

(2010) 04 GUJ CK 0080

In the Gujarat High Court

Case No : Special Civil Application No. 3043 of 2010

Sal Steel Ltd. and Another

APPELLANT

Vs

State Load Dispatch Centre and Another

RESPONDENT

Date of Decision : 19-04-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11
Constitution of India, 1950 — Article 14, 226
Electricity Act, 2003 — Section 2(8), 25, 26, 27, 28

Citation : (2010) 04 GUJ CK 0080

Hon'ble Judges : K.A. Puj, J

Bench : Single Bench

Advocate : Mihir Joshi and Gaurav S. Mathur, for the Appellant; S.B. Vakil and Premal R. Joshi and N.K. Khare and Virendra M. Gohil, for the Respondent

Final Decision : Dismissed

Judgement

K.A. Puj, J.—The petitioners have filed this petition under Article 226 of the Constitution of India praying for quashing and setting aside the action of the respondent No. 1 unilaterally revising the accounting system of unscheduled interchange charges by retrospectively denying credit thereof to the petitioner No. 1 in contravention of Order No. 3 of 2006 passed by the Gujarat Electricity Regulatory Commission, communicated to the petitioners vide communications dated 11.01.2010, 22.01.2010 and 10.02.2010. The petitioners have also prayed for the declaration that the petitioner No. 1 Company is entitled to credit / payment of UI Charges for the period 30.03.2009 to 12.01.2010 and that the respondent No. 1 has no legal authority to revise the accounting treatment unilaterally so as to deny the said credit with retrospective effect and recover the same from the petitioner No. 1. The petitioners have also prayed for an order or direction in the nature of prohibition permanently restraining the respondent No. 1 from encashing the Bank Guarantee dated 04.03.2009, as extended, in order to recover the revised UI charges with retrospective effect.

2. This Court has issued notice on 09.03.2010 and by way of ad-interim relief, the respondents were directed not to encash the Bank Guarantee. On service of notice, affidavit-in-reply was filed on behalf of the respondent No. 1 on 11.03.2010, to which affidavit-in-rejoinder was filed on behalf of the petitioners on 15.03.2010. Further affidavit-in-reply was filed on behalf of the respondent No. 1 on 18.03.2010. Further affidavit-in-reply was filed on behalf of the respondent No. 1 on 21.03.2010, to which affidavit-in-rejoinder was filed on behalf of the petitioner No. 1 on 30.03.2010. On completion of the pleadings of the parties, the matter was heard at length. Mr. Mihir Joshi, learned Senior Advocate appears with Mr. Gaurav Mathur for the petitioners and Mr. S.B. Vakil, learned Senior Advocate appears with Mr. Premal Joshi for respondent No. 1 and Mr. N. K. Khare, learned advocate appears with Mr. V.M. Gohil for the respondent No. 2 Bank.

3. It is the case of the petitioners that the petitioner No. 1 is engaged in the business of manufacturing Sponge Iron and Ferry Alloys in the State of Gujarat. In order to meet its requirement of continuous and cost effective electricity, the petitioner No. 1 also set up a Captive Power Plant as defined in Section 2(8) read with Section 9 of the Act of 45 MW capacity. The said Captive Power Plant is situated at the manufacturing facility of the petitioner No. 1. At the time of commencement of business by the petitioner No. 1 in the year 2005, the petitioner No. 1 was availing benefit of exemption from payment of duties of excise granted vide Notification No. 39/2001-C.E. Dated 31.07.2001. However, severe economic recession that befell the industry in the year 2007 was particularly severe for the Steel industry. Coupled with economic meltdown, on account of which the petitioner No. 1 was facing resource crunch, the aforesaid exemption notification came to be amended in a manner that a substantial portion of the benefit was withdrawn. This led to reduction of demand of the products and the petitioner No. 1 was faced with idle capacity of its manufacturing facility and the Captive Power Plant. In this scenario, the petitioner No. 1 decided to avail of the Open Access mechanism provided under the Act and Gujarat Regulations by entering into bilateral transactions of sale of power. Initially, the petitioner No. 1 sold power to Gujarat Urja Vikas Nigam Limited (GUVNL) which is one of the recognized entities of the Gujarat Electricity Board and it is presently functioning as the nodal agency for electricity in the State of Gujarat. Thereafter, the petitioner No. 1 decided to sell power on the Indian Energy Exchange for which it has obtained necessary Standing Clearance / No Objection dated 08.12.2008 which was forwarded to the petitioner No. 1 vide letter dated 09.12.2008. the said clearance came to be amended from time to time vide No Objection Certificates dated 11.02.2009 and 05.03.2009.

4. In order to avail Open Access mechanism, every generating station is required to make payment of certain charges, as determined by Gujarat Regulations, the ABT Order and the Central Electricity Regulatory Commission (Open Access in Intra-State Transmission) Regulations, 2008 ("the Central Regulations"). One

such charge is an Unscheduled Interchange Charge that represents the variation from scheduled generation and/or drawl, as the case may be, by a generating licensee or a consumer, respectively. In letter dated 09.12.2008, the respondent No. 1 in paragraph No. (iii) has referred to UI Charges as under:

Since the Intra State UI accounting system is not in place, deviations will be charged @ 105% of regional periphery UI charges in case the generation is less than scheduled energy.

5. In the subsequent No Objection Certificate dated 11.02.2009, the respondent No. 1 referred to scheduling and accounting arrangement. The respondent No. 1 has subsequently also provided for the accounting treatment in respect of the Open Access Transaction applicable to the petitioner No. 1. The respondent No. 1 had been following the same norms as laid down in the ABT Order, Gujarat Regulations and Central Regulations and charging UL in case of under generation and giving credit in case of controlled over generation.

6. As a condition being granted No Objection for bilateral transaction, using the state grid, the petitioner No. 1 was required to furnish a Bank Guarantee for securing the respondent No. 1 in respect of UI Charges. The petitioner No. 1 accordingly submitted Bank Guarantee for Rs. 1.27 Crores dated 04.03.2009 issued by the respondent No. 2 Bank. The said Bank Guarantee came to be extended upto 31.12.2010 vide letter of extension of validity dated 23.06.2009 issued by the respondent No. 2 Bank.

7. It is also the case of the petitioners that the concept of Open Access mechanism has opened doors for transactions in power as a commodity. Pursuant to the enactment of Electricity Act, 2003, Open Access Regulations framed by CERC and GERC govern the mode, methodology and other aspects of sale / purchase of power within the State of Gujarat as well as for inter state transactions. Moving forward from GERC Open Access Regulations, vide ABT order, GERC introduced Inter State Availability Based Tariff (ABT System) in the State of Gujarat. The ABT order provides for, inter alia, the charges leviable for Open Access Transactions in ABT regime, namely, Capacity Charges, Energy Charges and Unscheduled Interchange (UI) Charges. So far as UI Charges are concerned, UI charges, the same are explained to mean, "Variation between actual generation or actual drawl and scheduled generation or scheduled drawl which is to be accounted through UI Charges. For a generating station, like the petitioner's CPP, UI would be equal to its actual generation minus its scheduled generation. The rates thereof fixed by CERC for UI have been incorporated in the said order. Paragraph No. 12 of the ABT Order provides that excess generation upto 105% by a generating company having a capacity of above 15 MW would entitle the generating Company to UI charges. Similar provision of crediting a generating station for controlled excess generation, upto 105% of scheduled generation, by which the frequency of the grid moves towards an optimum level, are also found in Gujarat Regulations and Central Regulations. If these Regulations are to be read in conjunction with the No Objection Certificate dated

11.02.2009, it clearly demonstrates that where the petitioner would generate and inject more power to the grid, curing its imbalance, the petitioner No. 1 would be entitled to UI Charges. However, if the petitioner resorted to under generation and added to the imbalance the petitioner would be required to pay UI Charges. In accordance with the aforesaid Regulations and permission, the respondent No. 1 had consistently been granting credit of UI Charges to which the petitioner No. 1 was entitled and the petitioner No. 1 was required to make payment of UI Charges after adjusting the said credit.

8. It is also the case of the petitioners that all of a sudden, vide letter dated 11.01.2010, the respondent No. 1 without any prior indication forwarded a revised statement of UI Charges for the period 30.03.2009 to 21.12.2009. In the said letter, the respondent No. 1 has stated that though the accounting of UI Charges is being done in accordance with the Regulations framed by CERC and GERC, on a representation made by GUVNL in a final procedure of accounting prepared, it has been decided not to apportion the UI Charges in respect of Inter State Western Region Transaction to which the petitioner No. 1 is entitled and has received credit thereof. The respondent No. 1 has accordingly revised the account of the petitioner No. 1 with retrospective effect as if no adjustment was admissible. Thereafter, the respondent No. 1 has issued a further letter dated 22.01.2010 whereby the statement of revision of UI Charges for the week of 21.12.2009 to 27.12.2009 was sent to the petitioner No. 1. All letters dated 11.01.2010 for previous 38 weeks are identical, except the statement of revised accounts.

9. On receiving the aforesaid communications, the petitioner No. 1 deputed one of its Officers to enquire personally from the respondent No. 1 as to how and why the change in accounting system is made. However, the respondent No. 1 was not forthcoming with any explanation and instead sent communication dated 10.02.2010, calling upon the petitioner No. 1 to make payment of the revised UI Charges within 7 days failing which the respondent No. 1 would resort to encashing the Bank Guarantee dated 04.03.2009 as extended. The petitioner No. 1 replied to the aforesaid letter vide letter dated 24.02.2010 seeking information as to the mechanism for arriving at the figure of Rs. 1,10,09,715/- and also indicating that the action of proposing to invoke Bank Guarantee is completely unwarranted. The respondent No. 1 replied to its letter dated 24.02.2010 vide letter dated 28.02.2010 indicating therein that the respondent has revised the energy account of the previous weeks due to the change in energy accounting procedure purportedly on the basis that queries / comments have been raised by certain stakeholder upon verification of the accounts maintained by the respondent No. 1. The respondent No. 1 has also telephonically informed the petitioner No. 1 that it would be initiating action of invoking the Bank Guarantee dated 04.03.2009 as extended. The petitioner No. 1 has, therefore, written to the respondent No. 1 vide letter dated 06.03.2010 that its proposed action of invoking Bank Guarantee is ex-facie unwarranted and illegal. It was made clear therein that the petitioner has never denied its liability to pay UI Charges but has

only sought to understand the rational and basis of the new accounting system and it was also made clear that the proposed action of the respondent No. 1 is contrary to law and fraudulent.

10. Mr. Mihir Joshi, learned Senior Advocate appearing for the petitioners has submitted that the action of the respondent No. 1 in unilaterally changing the method of accounting, which change is also contrary to the stipulations made in the ABT Order and contrary to the Gujarat Regulation is ex-facie illegal, unwarranted, unjustified and liable to be quashed and set aside. The action of the respondent No. 1 in treating the non-payment of the revised UI Charges by the petitioner No. 1 as a default and the proposal to encash the bank guarantee dated 04.03.2009 as extended, is ex-facie illegal, contrary to record and hence, amounts to a fraudulent action. The same is liable to be quashed and set aside. He has further submitted that the respondent No. 1 has acted contrary to the ABT Order passed by the CERC and contrary to the Gujarat Regulation by revising / modifying the accounting treatment so as to deny credit of UI Charges that are legal and statutorily admissible to the petitioner No. 1 when the petitioner No. 1 generates more power and thereby improves the imbalance in the grid. The respondent No. 1 has no legal authority to unilaterally revise such accounting treatment, contrary to the order and regulation of GERC, without seeking concurrence of GERC. The said action is ex-facie illegal and in excess of jurisdiction and the proposed encashment of bank guarantee dated 04.03.2009, as extended, is fought with malafide and fraudulent intention. The action of the respondent No. 1 in changing the accounting treatment solely on the basis of an alleged representation made by GUVNL without seeking appropriate direction from GERC and thereupon to seek coercive recovery of the revised charges by a proposed action of encashment of Bank Guarantee is ex-facie illegal, unwarranted and unjustified, in excess of jurisdiction and amounts to fraud on the respondent No. 2 as well as the petitioner No. 1. The same is, therefore, liable to be quashed and set aside.

11. Mr. Joshi has further submitted that the respondent No. 1 is seeking to recover revised UI Charges by encashing the bank guarantee dated 04.03.2009 as extended in contravention of the provisions of the Bank Guarantee. The Bank Guarantee in question clearly records that the secured amount is equivalent to a some receivable / payable determined based on quantum of sale / trade @ 105% of maximum unscheduled interchange rate. The bank guarantee is an unequivocal and unconditional agreement by the respondent No. 2 to make payment of amount receivable by the respondent No. 1 on being demanded on the basis of the quantum of sale at the prescribed rate. He has further submitted that the said Bank Guarantee is circumscribed by the condition that the respondent No. 1 must fail to pay any charges towards its obligation laid down in the ABT Order. Under the said ABT Order, the petitioner is clearly entitled to credit or receipt of UI Charges where the grid is benefit by extra generation. He has, therefore, submitted that the action of the respondent No. 1 in seeking to invoke the Bank Guarantee is ex-facie illegal and an act of fraud upon the

respondent No. 2 who may honour the Bank Guarantee without realising that the demand is contrary to the terms of the Bank Guarantee and based on extraneous reasons. He has, therefore, submitted that the petitioner No. 1 is entitled to a declaration that the respondent No. 1 has no legal authority to encash the Bank Guarantee dated 04.03.2009 as extended and the said action deserves to be permanently stayed.

12. Mr. Joshi has further submitted that the action of the respondent No. 1 in treating the transaction of power to western region as not eligible for credit of UI Charges is ex-facie illegal and discriminatory. Under the Central Regulations, the Gujarat Regulations and the ABT Order, all transactions that may be undertaken outside the Gujarat of periphery are required to be treated and accounted for at the Gujarat periphery in so far as UI Charges are concerned. That being so, there was no reason or rational in treating transaction to Western Region separately and creating a different system of accounting system of UI Charges for such transaction at the Gujarat periphery. The said action of the respondent is clearly discriminatory, treats equal as unequal, is arbitrary and is liable to be quashed and set aside.

13. In such a situation, the encashment of Bank Guarantee is not permissible. In support of this submission, Mr. Joshi relied on the decision of the Delhi High Court in the case of Bottle Glass Pvt. Ltd. Vs. Union of India and Others, wherein it is held that when the Government obtains a Bank Guarantee when it is entering into commercial transaction with another party, then the Court would be hesitant in staying the operation of the bank guarantee. However, the Bank Guarantee was demanded by the respondents not as a part of a commercial transaction but in exercise of its statutory or executive power as a Government. If bank guarantee has been furnished by a party on its being required to do so by the Government, by exercising its statutory or executive power, then the Courts can examine the action of the Government when it seeks to invoke the bank guarantee. A Government is required to act fairly and judiciously. Any action of the Government which is regarded as arbitrary is per se violative of Article 14 of the Constitution. If it can be shown, therefore, that the decision of the Government to invoke the bank guarantee is arbitrary or mala fide then that decision can be challenged. The Court in that case took the view that the default of the petitioner stood completely waived and the respondents must be regarded as having abandoned their right to demand the payment of rupees two lacs on the basis of bank guarantee.

14. Mr. Joshi, therefore, submitted that the petition deserves to be admitted and during the pendency of this petition, the respondent No. 1 must be restrained from encashing the Bank Guarantee.

15. Mr. S. B. Vakil, learned Senior Advocate appearing for the respondent No. 1 has submitted that the petition is in two parts (1) for quashing and setting aside the action of the respondent No. 1 i.e. State Load Dispatch Centre ("SLDC" for short) revising the account of Unscheduled Interchange (UI) Charges and

rectifying excess credit given to the petitioner No. 1 in UI accounting system under the Open Access Mechanism provided under the Electricity Act, 2003 and Gujarat Electricity Regulatory Commission (Open Access Intra-State Transmission and Distribution) Regulation, 2005 and (2) encashment of bank guarantee dated 04.03.2009. Both the parts of the petition require separate consideration.

16. As regards the petitioner's claim for restraining the encashment of the bank guarantee dated 04.03.2009 as extended, Mr. Vakil submitted that according to the terms of the Bank Guarantee, its encashment does not depend upon whether SLDC's demand against the petitioner No. 1 is correct. The liability of the respondent No. 2 Bank under the bank guarantee is absolute and the respondent No. 2 is obliged to honour the bank guarantee on demand of SLDC irrespective of any controversy between the parties to the contract as to performance of the contract. This Court should not grant any injunction restraining SLDC from enforcing the liability of the petitioner No. 1 and the respondent No. 2 under the Bank Guarantee. The petition does not contain any allegation of fraud in entering into any transaction in the sense understood in law governing enforcement of bank guarantee. Notwithstanding the encashment of bank guarantee, it would be open to the petitioners to approach the Regional or the Gujarat State Regulatory Commission to challenge the validity of the UI Charges demanded by SLDC.

17. Mr. Vakil has further submitted that the system of transmission and distribution of power generated by generating stations in Gujarat i.e. petitioner No. 1 and transmitting power through the transmission system of Gujarat Energy Transmission Corporation Limited (GETCO) is required to be understood. Power cannot be stored and is required to be transmitted immediately on generation. The generating stations like the petitioner No. 1 entered into agreements with consumers or traders in Gujarat or outside for purchase of power. These agreements are known as Power Purchase Agreements (PPA). The generating station injects power generated by it in the State Grid for transmission to the purchaser and the purchaser draws the power committed to it by the generating station from the grid. The power injected by the generating station in the Grid is metered at the point of injection and the power drawn by the purchaser from the grid is metered at the point of drawl by the purchaser. The purchaser makes payment directly to the generating station for the power withdrawn from the grid, regardless of whether the generating station had injected the said quantum of power or more or less power in the grid. Since transmission of power involves transmission and other losses, the generating station is required to inject in the grid not only the quantum of committed power, but more to cover losses so as to transmit to the purchaser the committed quantum of power. As long as the generating station injects the requisite quantum of power in the grid to reach the committed quantum to the purchaser, the accounting may involve only charges for the use of the transmission facility by the generating station. However, the generating station very often injects more or less than the requisite quantum of power i.e. over-injects or under-injects power in the grid. This is called Unscheduled Interchange, for which charges are required to be paid by / to the

generating station by the SLDC. For both the injection of power by the generating station in the grid and drawl of power by the purchaser accounting is done in 15 minutes blocks and accounts are required to be settled by the generating station at the interval of seven days each. Gujarat is a part of the Western Region, which includes Goa, Madhya Pradesh, Maharashtra, Chhatisgadh, Diu & Daman. A generating station in Gujarat can enter into Power Purchase Agreement with the purchaser outside Gujarat in the Western Region. The Gujarat grid is also linked to the Western grid and such Inter-State purchaser would draw power committed by a generating station in Gujarat from the Western Grid. The accounting system follows mechanical reading but is highly elaborate and complicated. Though GERC decides the quantum of transmission and other losses to be taken into account in injecting power by the generating station in the grid the actual losses could be more or less. If the specified losses are less than the actual losses, more power to that extent is available in the grid and is drawn by some consumer or purchaser and payment is received by the grid which creates the imbalance in UI accounting. If the specified losses are more than the actual losses, the quality of power received by a consumer may change and the load of some consumers may be required to be adjusted. Similarly, if some Intra-State Grid users are significantly generating less power or drawing more power than their schedule, some other consumer's load is required to be adjusted / curtailed. As a result, such consumer may be deprived from electricity. Instability of power supply in such cases can even lead to cascading effect and black out. In such eventualities, adjustments in credits and debits for UI Charges becomes necessary. Mr. Vakil, therefore, submitted that the first part of prayer involves disputed questions of fact and requires expertise. SLDC is the apex body to ensure integrated operation of the power system in a State.

18. It is responsible for optimum scheduling and dispatch of electricity within a State in accordance with the contracts entered into with the licensees or the generating companies operating in the state, monitor grid operations, keep accounts of the quantity of electricity transmitted through the State Grid and exercise supervision and control over the Intra-State Transmission System. Section 33(1) of the Act empowers SLDC to give such directions and exercise such supervision and control as may be required for ensuring the integrated grid operations and for achieving the maximum economy and efficiency in the operation of power system in the State. Section 33(2) provides that every generating company, generating station, sub-station are concerned with the operation of the power system shall comply with the directions issued by the SLDC, that SLDC shall comply with the directions of the Regional Load Dispatch Centre and if any dispute arises with reference inter alia to integrated operation of the State Grid or in relation to any direction given u/s 33(1), it shall be referred to the State Commission for decision. Mr. Vakil has, therefore, submitted that the remedy of the petitioners is to approach GERC. He has, therefore, submitted that none of the prayers made by the petitioners in the present

petition is required to be granted and the petition deserves to be dismissed.

19. Mr. Vakil has further submitted that statement produced before this Court by SLDC clearly indicates that the other Intra-state Companies had paid the amounts demanded by SLDC. If an intra-State or inter-State Company injects more power in the grid then it is required to meet its commitment to its customer / consumer who draws only the committed power, the surplus remains in the grid but in accounting, the inter-State Company does not get any credit for the differential amount. Moreover, credit in accounting is given on the basis of meter reading, which may at times be erroneous. For such reasons, injection of power in the grid differs from the quantum of power for which the intra-State or inter-State Company would be entitled to or gets credit in accounting. However, the revenues of GUVNL which is a residual entity of intra-State level may suffer deficit or excess for such imbalances. SLDC does the accounting in respect of intra-State transactions, whereas for inter-State transactions the accounting is done by the respective Regional Load Dispatch Centre. The respective Regional Load Dispatch Centre in its accounting recognizes only GUVNL as representing Gujarat and not any intra-State Company. Prior to the adjustment in accounting concerned in the petition, adjustment portion of inter-State transactions was apportioned and billing was done on that basis. As a result of the same, the petitioner and other intra-State Companies had received higher credit, which was not due to them, if adjustment portion of inter-State transactions was not apportioned as aforesaid. Therefore, SLDC was required to rectify the accounting of intra-State Companies by not apportioning any benefit to them in respect of inter-State transactions. In rectification of accounting, no change has been made in respect of UI charges billed earlier.

20. Mr. Vakil in support of his submission that so far as the first two prayers in the petition are concerned, GERC is the only forum which can decide such disputes between the parties and this Court should not exercise its discretion, has relied on the decision of the Apex Court in the case of Central Power Distribution Co. and Others Vs. Central Electricity Regulatory Commission and Another, In this case, the application of Availability Based Tariff (ABT) in relation to Unscheduled Interchange (UI) charges to Simadhri generating station supplying power within State of Andhra Pradesh was held to be within the jurisdiction of CERC, particularly when the said generating station was owned and controlled by NTPC, a Govt. of India undertaking indicating that CERC had plenary power to regulate the grid, particularly in the context of the grid being integrated and connected across the region comprising of more than one State. It was further held that CERC had jurisdiction to deal with great discipline in regard to single State beneficiary station.

21. Mr. Vakil in support of his submission that the issues involved in the present petition are not only disputed questions of law but they are also the issues of complicated nature and to resolve such issues, an expertise knowledge is required and hence, this Court should not exercise its jurisdiction, has relied on

the decision of the Apex Court in the case of West Bengal Electricity Regulatory Commission Vs. C.E.S.C. Ltd. etc. etc., wherein it is held that the Commission constituted u/s 17 of the 1998 Act is an expert body and the determination of tariff which has to be made by the Commission involves a very highly technical procedure, requiring working knowledge of law, engineering, finance, commerce, economics and management. It would be more appropriate and effective if a statutory appeal is provided to a similar expert body, so that various questions which are factual and technical that arise in such an appeal, get appropriate consideration in the first appellate stage also. The Central Electricity Regulatory Commission which has a judicial member as also a number of other members having varied qualifications, is better equipped to appreciate the technical and factual questions involved in the appeals arising from the orders of the Commission. Neither the High Court nor the Supreme Court would in reality be appropriate appellate forums in dealing with this type of factual and technical matters. Therefore, it is recommended that the appellate power against an order of the State Commission under the 1998 Act should be conferred either on the Central Electricity Regulatory Commission or on a similar body.

22. Mr. Vakil in support of his submission that if an alternative effective remedy is provided under the Statute, the Court should not exercise its discretion and entertain the writ petition, has relied on the decision of the Apex Court in the case of Sri Ramdas Motor Transport Ltd. and Others Vs. Tadi Adhinarayana Reddy and Others, wherein it is held that a shareholder has very effective remedies under the Companies Act for prevention of operation and mismanagement. When such remedies are available, the High Court should not rightly entertain a petition under Article 226.

23. Mr. Vakil further relied on the decision of the Apex Court in the case of Shivanand Gaurishankar Baswanti v. Laxmi Vishnu Textile Mills and Anr. (2008) 13 SCC 323 wherein, while confirming the decision of the High Court in dismissing the writ petition, the Apex Court observed that the appellant did not approach either of the said forums, High Court was justified in dismissing the subsequent writ petition in limine by passing the impugned order. In that case, the appellant, worker of the Company, submitted a representation to the Chief Justice of High Court which was registered as Public Interest Litigation alleging illegality in the sale effected by the Company. The High Court directed the appellant to seek remedy before the appropriate Forum. However, the appellant again filed a writ petition before the High Court. It was held that if the appellant was aggrieved by the orders passed by DRT, he ought to have approached the Debts Recovery Tribunal against those orders. Further, if he had grievance against the Company, or inaction on the part of the authorities under the Labour Laws on the ground that they had not protected the interest of workers of the Company, he ought to have approached the Labour Court / Industrial Tribunal. Neither of these things was done by the appellant. Hence, the High Court has rightly dismissed the subsequent writ petition.

24. Mr. Vakil in support of his submission that this Court should not entertain this petition by granting stay against encashment of Bank Guarantee, has relied on the following judgments:

1. In *United Commercial Bank Vs. Bank of India and Others*, the Apex Court held that the Courts usually refrain from granting injunction to restrain the performance of the contractual obligations arising out of a letter of credit or a bank guarantee between one bank and another. If such temporary injunction were to be granted in a transaction between a banker and a banker, restraining a bank from recalling the amount due, when payment is made under reserve to another bank or in terms of the letter of guarantee or credit executed by it, the whole banking system in the country would fail.

2. In *Centax (India) Ltd. Vs. Vinmar Impex Inc. and Others*, it is held that the obligation of the Allahabad Bank under the letters of indemnity countersigned by the appellant was absolute and upon a demand being made by the shipping company i.e. the beneficiary, the Bank was liable to honour the same regardless of any controversy between the parties i.e. the appellant - buyer and respondent - sellers, as to whether the contract of sale had been performed. The appellant took the risk of unconditional wording of the letters of indemnity executed by its bankers, the Allahabad Bank. There is really no equity in favour of the appellant.

3. In *General Electric Technical Services Company Inc. Vs. M/s. Punj Sons (P) Ltd. and another*, the Apex Court held that the High Court misconstrued the terms of the bank guarantee and the nature of the inter-se rights of the parties under the contract. The appellant having made a demand for encashment under the bank guarantee and in terms thereof, the Bank has to pay and the Bank was willing to pay as per the undertaking. The Bank cannot be interdicted by the Court at the instance of respondent No. 1 in the absence of fraud or special equities in the form of preventing irretrievable injustice between the parties. The High Court in the absence of prima facie case on such matters committed error in restraining the Bank from honouring its commitment under the bank guarantee. The Bank is not concerned with the outstanding amount payable by the appellant under the running bills. The right to recover the amount under the running bills has no relevance to the liability of the Bank under the guarantee. The liability of the Bank remained intact irrespective of the recovery of mobilisation advance or the non-payment under the running bills. The failure on the part of the appellant to specify the remaining mobilisation advance in the letter for encashment of bank guarantee is of little consequence to the liability of the Bank under the guarantee.

4. In *AIR 1997 1644 (SC)* the Apex Court held that when in the course of commercial dealings an unconditional bank guarantee is accepted, the beneficiary is entitled to realise such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated.

The Courts should, therefore, be slow in granting an injunction to restrain the realisation of such a bank guarantee. The existence of any dispute between the parties to the contract is not a ground for issuing an injunction to restrain the enforcement of bank guarantees. Courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. 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.

5. In *Oil and Natural Gas Corporation Ltd. Vs. State Bank of India, Overseas Branch, Bombay*, the Apex Court held that encashment of an unconditional bank guarantee does not depend upon the adjudication of disputes. Also no distinction can be made between a Bank guarantee for due performance of a work contract and a guarantee given towards security deposit for a contract or any other kind of guarantee. Where the beneficiary shall be the sole judge on the question of breach of the primary contract the bank shall pay the amount covered by the guarantee on demand without a demur. In the absence of a plea of fraud, guarantee has to be given effect to.

6. In *Daewoo Motors India Ltd. Vs. Union of India (UOI) and Others*, the Apex Court held that the words "by reason of non-fulfilment of the export obligation under the above said Notification" cannot be read in isolation by dissociating them from the context in which they have been used. A reading of the bank guarantee as a whole show that those words only qualify the preceding words, "loss or damage caused or suffered by the President of India", and do not constitute a condition precedent for the respondent Govt. of India to invoke the bank guarantee, much less they give any cause of action to the bank to contest the encashment of the bank guarantee on the ground of there being no non-fulfillment of the export obligation. Further the bank guarantee furnished by the bank being unconditional and absolute bank guarantee, the bank has rendered itself liable to pay the cash on demand by the President of India "notwithstanding any dispute raised by the company in any proceeding before any Court or Tribunal". The clause in the bank guarantee specifically provides that the demand made by the President of India shall be conclusive as regards amount due and payable by the bank under this guarantee and the liability under the guarantee is absolute and unequivocal. Therefore, the bank has no case to resist the encashment of the bank guarantee.

25. As far as the question of fraud is concerned, Mr. Vakil relied on the decision of the Apex Court in the case of *I.T.C. Limited Vs. Debts Recovery Appellate Tribunal and Others*, wherein it is held that the Bank has to honour the bank guarantee or Letter of Credit subject of course to the cases of two exceptions viz. Where there was fraud or irretrievable injury. If the documents presented by the seller before the Bank were forged or were fraudulent to the knowledge of the

seller, surely the Bank would have an independent cause of action against the seller for it was an act of the seller which was responsible for inducing the Bank to release the funds. But the Bank could not, by merely stating that there was non-supply of goods by the appellant-seller, use the words "fraud or misrepresentation" for purposes of coming under the exception. The dispute as to non-supply of goods was a matter between the seller and buyer and did not provide any cause of action for the Bank against the seller. What was necessary for the Bank to refuse payment was a case of clear "fraud" and the Bank's knowledge as to such fraud. The Bank cannot refuse payment merely because according to it the claim was "dishonest" or "suspicious" or it appeared to be a sharp practice but it must be established as "fraud". Mere allegations and counter allegations between the parties as to breach of contract, non-payment of advances or non-supply of machinery did not amount to fraud. Therefore, an allegation of non-supply of goods by the sellers to the buyers did not by itself amount, in law, to a plea of "fraud" as understood in this branch of the law and hence by merely characterising alleged non-movement of goods as "fraud", the Bank cannot claim that there was a cause of action based on fraud or misrepresentation. Nor was the case one where there was an allegation of presentation of forged or fraudulent documents. Non-movement of goods by the seller could be due to a variety of tenable or untenable reasons, the seller may be in breach of the contract but that by itself does not permit a plaintiff to use the word "fraud" in the plaint and get over any objections that may be raised by way of filing an application under Order 7 Rule 11 CPC.

26. Mr. Vakil, while meeting with the argument of the petitioner that no opportunity was given by SLDC in raising the demand on the basis of revised accounting system, has relied on the decision of the Apex Court in the case of State of Punjab and Others Vs. Ajudhia Nath and Another, wherein it is held that although an opportunity of being heard has to be given to a liquor vendor when his licence is sought to be cancelled, the same principle of natural justice does not come into play when the demand is merely for payment of a sum becoming due under the conditions subject to which the licence was granted. Where therefore the demands were for payment of the amount of still head duty which had become due under the contracts accepted by the licensee himself and had resulted from the terms of those contracts, no question of affording to the licensee any opportunity of being heard arose.

27. If the above principles of law propounded by the Courts from time to time are applied to the facts of the present case, the bank guarantee clearly indicates that the guarantee shall be a primary obligation of the guarantor of bank and accordingly, procurer shall not be obliged before enforcing the bank guarantee to take any action in any Court or arbitral proceedings against the intra-State Company, to make any claim against or any demand on the intra-State Company or to give notice to the intra-State Company to enforce any security held by procurer or to exercise, levy or enforce any distress, diligence or other process against the intra-State Company. It further makes clear that in case of violation

of the terms of the bank guarantee, penalty would be levied on the claimed amount as per the Bank's penalty rates. It will not be open to intra-State Company to challenge the said clause on any ground whatsoever including formation of opinion about the default as to the amount of guarantee or part thereof remaining payable under the Contract and such opinion of SLDC of GETCO shall be final and binding thereof for the purpose of invocation of this bank guarantee. Thus, the respondent No. 2's liability under the guarantee is absolute and the respondent No. 2 is obliged to honour the guarantee on payment of SLDC irrespective of any controversy between the parties to the contract as to the performance of the contract.

28. Mr. Vakil has, therefore, submitted that the petitioner has no legal or valid right to claim any injunction against encashment of bank guarantee and if he has any grievance against the action of SLDC against revision of the accounts, it is open for the petitioner to approach GERC for redressal of its grievance. He has, therefore, submitted that the petition deserves to be dismissed on either of these two grounds.

29. Having heard learned advocates appearing for the parties and having considered their rival submissions in light of the statutory provisions and decided case law on the subject and also having gone through various documents produced along with the petition as well as during the course of hearing of this petition, the Court is of the view that the petitioners have basically raised two issues in this petition. The first issue is in relation to the decision of the respondent No. 1 revising the account of Unscheduled Interchange (UI) charges and rectifying excess credit given to the petitioner No. 1 in UI Accounting System under the Open Access mechanism and the second issue is in relation to encashment of Bank Guarantee dated 04.03.2009. Detailed submissions were made by the learned Counsels on both the issues and various provisions were brought to the notice of the Court. There is no dispute about the fact that the first issue is highly technical in nature and it requires very special and expertise knowledge on the subject. A very strenuous effort was made on behalf of the petitioners to convince this Court that the respondent No. 1 i.e. SLDC has no legal authority to revise the accounting treatment unilaterally so as to deny the credit / payment of UI Charges for the period from 30.03.2009 to 12.01.2010 with retrospective effect and recover the same by encashment of bank guarantee. As against this, various submissions were made on behalf of the respondent No. 1 that it is merely a rectification of the accounting system and SLDC is well within its jurisdiction to make such adjustment of debit and credit of UI Charges. Initially, adjustment portion of the intra-state transactions was apportioned and billing was done on that basis. Resultantly, the petitioner No. 1 Company and other intra-State Companies had received higher credit, which was not due to them. By rectification of the accounting system, the adjustment portion of the intra-State transactions was taken away and as a result thereof, the petitioner No. 1 Company and other generating Companies were made liable to give such amount to GUVNL as per the direction of the respondent No. 1. It is

on record that not only the petitioner No. 1 but other Companies were also issued similar communications and all of them except the petitioner have complied with the directions issued by the respondent No. 1.

30. The moot question, therefore, arose before the Court as to whether the challenge raised by the petitioners in this petition has any substance or merits. It also leads to the Court to decide as to whether the Court should entertain such challenge and give its finding on this issue. For this purpose, a close look is required to the relevant provisions contained in Section 33 of the Electricity Act, 2003. Part V of the Act deals with transmission of electricity. It divides into two parts. Sections 25 - 29 deals with Inter-State transmission whereas Sections 30 - 33 deals with Intra-State transmission. Section 31 deals with constitution of SLDC and Section 32 discusses about functions of SLDC. As per Sub-section (1) Section 32, SLDC was considered to be the apex body to ensure integrated operation of the power system in a State and as per Sub-section (2), it is responsible for optimum scheduling and dispatch of electricity within a State, in accordance with the contracts entered into with the licensees or the generating Companies operating in the State. It monitors grid operations, keeps accounts of the quantity of electricity transmitted through the State grid and exercises supervision and control over the Intra-State transmission system. Section 33 deals with compliance of directions issued by SLDC. Sub-section (1) of Section 33 empowers the SLDC to give such directions and exercise such supervision and control as may be required for ensuring the integrated grid operations and for achieving the mechanism economy and efficiency in the operation of power system in the State. Sub-section (2) of Section 33 is very important for our purpose. It says that every licensee, generating company, generating station, sub-station and any other person connected with the operation of the power system shall comply with the directions issued by the State Load Dispatch Centre under Sub-section (1). Here in the present case, initially statement of imbalances energy accounting among Open Access users in Intra-State network for about 32 weeks was prepared in accordance with Open Access Regulations, 2005 of GERC and Open Access Regulation, 2008 of GERC. Subsequently, on representation from GUVNL and after discussion, final procedure for accounting and settlement of payment was prepared. As per this procedure, adjustment portion of Intra-State transaction is not apportioned. GUVNL as residual entity shall bear all the adjustment portion of the Intra-State transaction. The adjustment portion of Intra-State transaction which was considered in earlier bills was to be revised to the unadjusted portion. Accordingly, SLDC Gujarat has revised the imbalance energy account of 32 weeks due to submission of GUVNL executing adjustment portion of Intra-State WR transactions and all pool members were requested to settle the differential amount within 7 days. This is in exercise of powers conferred on SLDC u/s 32 of the Act and directions were issued u/s 33(1) of the Act and the petitioner No. 1 Company and all other Companies are bound to comply with these directions. It is, of course, open for the petitioners to raise any dispute under Sub-section (4) of Section 33 which says that if any dispute

arises with reference to the quality of electricity or safe, secure and integrated operation of the State grid or in relation to any direction given under Sub-section (1), it shall be referred to the State Commission for decision. The petitioner is, therefore, having an efficacious alternative remedy to raise this dispute before the Gujarat Electricity Regulatory Commission ? GERC u/s 33(4) of the Act. Proviso to this Sub-section is equally important which says that pending the decision of the State Commission, the directions of the SLDC shall be complied with by the licensee or generating Company. It is, therefore, obligatory on the part of the petitioner before raising any dispute either before the State Commission or before this Court to comply with the directions issued by the respondent No. 1. The direction is to settle the differential amount within 7 days. Since this has not been done, the question of encashment of bank guarantee arises.

31. The above discussion leads this Court to take the decision that the petitioners are not justified to raise the first issue before this Court. The reasons for taking this decision are very obvious. The petitioners are having an equally efficacious alternative remedy u/s 33(4) of the Electricity Act, 2003. The disputes between the parties are highly complicated in nature and it requires very special and expertise knowledge. As held by the Apex Court in the case of West Bengal Electricity Regulatory Commission (Supra), that the commission was constituted u/s 17 of the 1998 Act is an expert body and the determination of tariff which has to be made by the commission involves a very highly technical procedure, requiring working knowledge of law, engineering, finance, commerce, economics and management. The Apex Court has gone one step further in that case and recommended to confer the Appellate Power against an order of the State Commission, on the Central Electricity Regulatory Commission or on a similar body.

32. In the above view of the matter, when the provision is made under the Act and Sub-section (4) of Section 33 of the Electricity Act, 2003 specifically states that any dispute with regard to any direction of the SLDC shall be referred to the State Commission for decision, this Court does not think it fit and proper to exercise its power under Article 226 of the Constitution of India and to give any finding on the controversy raised between the parties. It is, therefore, just and proper for the petitioner to raise this dispute before the Commission and the Commission shall decide the said issue in accordance with law and on the basis of the evidence that may be produced before the Commission, and without being influenced by any observations made by this Court in this judgment.

33. This leads to the second issue with regard to encashment of bank guarantee. The law is well settled on this point. It is an accepted position that during the course of any commercial transaction, if an unconditional bank guarantee is accepted, the beneficiaries entitled to release such Bank Guarantee in terms thereof irrespective of any pending disputes. The Bank giving such bank guarantee is duty bound to honour it as per its terms irrespective of any dispute

between the parties. It is also an acceptable proposition in law that encashment of an unconditional bank guarantee does not depend upon the adjudication of disputes. The beneficiary of the bank guarantee is the sole judge on the question of breach of the primary contract and the Bank has no other alternative but to give the amount covered by the guarantee on demand without a demur. The Courts have carved out two exceptions to the general proposition and those exceptions are fraud and irretrievable injury. In the present case, there is no question of any fraud and mere allegation in the petition about the fraud is not sufficient for restraining the Bank from giving payment to the beneficiary. What was necessary for the Bank to refuse payment was a case of clear fraud and the Bank's knowledge as to such fraud. The Bank cannot refuse payment merely because according to the Bank, the claim was dishonest or suspicious. Mere allegations and counter allegations between the parties as to the breach of contract, non-payment of advances or non-supply of materials did not amount to fraud. Likewise, the revision of accounting system by the respondent No. 1 and thereby issuance of directions to the pool members to settle the differential amount cannot be termed as fraud and on that basis, the Bank cannot be restrained from making payment to the respondent No. 1 on making such demand to the respondent No. 2 Bank. Mr. Vakil is, therefore, right in his submission based on the terms of the bank guarantee that the respondent No. 1 is not under any obligation before enforcing the Bank Guarantee to take any action in any Court or Arbitral proceedings against the petitioner No. 1 Company, to make any claim against or any demand or to give any notice for the purpose of enforcement of any security held by the SLDC or to exercise, levy or enforce any distress, diligence or other process against the respondent No. 1. The Bank Guarantee in question further makes it clear that it would not be open for the petitioner No. 1 Company to challenge any clause in the Bank Guarantee on any ground whatsoever including formation of an opinion about the default as to the amount of guarantee or part thereof remaining payable under the contract and such opinion of SLDC shall be final and binding thereof for the purpose of invocation of the bank guarantee. The Court is, therefore, of the view that the liability under the Bank Guarantee is absolute. The liability of the respondent No. 2 under the Bank Guarantee is absolute and the Bank is, therefore, bound to honour the said guarantee by making payment to the respondent No. 1 irrespective of any controversy between the parties.

34. In the result and subject to the petitioner's right to challenge the issue No. 1 before the Gujarat Electricity Regulatory Commission keeping open, this petition is dismissed. Interim relief granted earlier stands vacated. There shall be no order as to costs. Request for continuation of interim relief till the petitioners approach higher forum is rejected.