

(2016) 01 P&H CK 0254

In the Punjab And Haryana At Chandigarh

Case No : ARB Case No. 222 of 2015 (O&M)

SEPCO Electric Power Construction Corporation

APPELLANT

Vs

Talwandi Sabo Power Limited and Others

RESPONDENT

Date of Decision : 20-01-2016

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 2(1)(e)(ii), Section 9

Citation : (2016) 01 P&H CK 0254

Hon'ble Judges : Amit Rawal, J.

Bench : Single Bench

Advocate : M.L. Sarin, Puneet Bali, Senior Advocates, Tushar Sharma, Ranjit Prakash, Arun Mani, Ritesh Aggarwal, Ankita Sambyal and Anshuman Pande, Advocates, for the Appellant; Ashwani Chopra, Senior Advocate, K.S. Nalwa, Rupa Pathania and Adhiraj Thind, Advocates,

Final Decision : Allowed

Judgement

Amit Rawal, J.—C.M. No. 25405-CII of 2015

1. Documents taken on record.

2. C.M. stands disposed of.

C.M. No. 26185-CII of 2015

3. Documents, Annexures P-17 and P-18 are taken on record.

4. C.M. stands disposed of.

C.M. No. 26769-CII of 2015

5. Reply to the application for vacation of stay, rejoinder to the written statement and documents are taken on record.

6. C.M. stands disposed of.

C.M. No. 26783-CII of 2015

7. Documents, Annexures R1/14 to R1/39 are taken on record.

8. C.M. stands disposed of.

C.M. No. 26773-CII of 2015

9. In view of the law laid down in *Balbir Dewan Cold Storage and General Mills Versus Naveen Chander*, AIR 1989 (Punjab) 257, the objections to the report of the Local Commissioner are not maintainable. Accordingly, the same are dismissed.

ARB No. 222 of 2015 (O & M)

10. The present petition has been filed, after the promulgation of Ordinance No. 9 of 2015 by invoking the provisions of Section 2(1)(e)(ii) of the Arbitration and Conciliation Act, 1996 as amended by Arbitration and Conciliation (Amendment) Ordinance, 2015 (for short "1996 Amended Act"), whereby it is provided that in case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction shall have jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject matter of a suit and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court, shall have the power to hear the petition filed under Section 9 of 1996 Amended Act.

11. The petitioner, who is a second party to the contracts dated 17.11.2009 having entered into for erecting 3 x 660 Mega Watt Thermal Power Project at Talwandi Sabo, has invoked the original jurisdiction of this Court. Prior to the aforementioned contracts, agreement dated 31.5.2008 was executed between the petitioner and respondent No. 2. Thereafter, respondent No. 2 set up respondent No. 1 as its wholly owned subsidiary for establishing and operating the Project and the aforementioned agreement was amended, whereby respondent No. 1 was to substitute respondent No. 2 as the owner of the Project. Accordingly, the petitioner, respondent No. 1 and respondent No. 2 executed the following five contracts for execution of the works, which together, constitute the EPC contracts for the entire Project:-

a) Novation Agreement relating to Offshore Supply Contract for the Talwandi-Sabo 3 x 660 MW Thermal Power Project dated 17.11.2009 and Amendment No. TSPL-SEPCO-01/R-01 dated 30.10.2010, Amendment No. TSPL-SEPCO-01/R-02 dated 25.03.2011, Amendment No. TSPL-SEPCO-01/R-03 dated 15.11.2012;

b) Novation Agreement relating to Offshore Engineering and Technical Services Contract for the Talwandi-Sabo 3 x 660 MW Thermal Power Project dated 17.11.2009 and Amendment No. TSPL-SEPCO-02/R-01 dated 30.10.2013, Amendment No. TSPL-SEPCO-02/R-02 dated 15.11.2012;

c) Novation Agreement relating to Onshore Supply Contract for the Talwandi-Sabo 3 x 660 MW Thermal Power Project dated 17.11.2009 and Amendment No. TSPL-SEPCO-03/R-01 dated 30.10.2010, Amendment No. TSPL-SEPCO-03/R-02

dated 15.11.2012;

d) Novation Agreement relating to Onshore Services & Construction Contract for the Talwandi-Sabo 3 x 660 MW Thermal Power Project dated 17.11.2009, Amendment No. TSPL-SEPCO-04/R-01 dated 30.10.2010 and Amendment No. TSPL-SEPCO-04/R-02 dated 15.11.2012; and

e) Novation Agreement relating to Umbrella Agreement for the Talwandi-Sabo 3 x 660 MW Thermal Power Project dated 17.11.2009 and Amendment No. TSPL-SEPCO-05/R-01 dated 30.10.2010, Amendment No. TSPL-SEPCO-05/R-02 dated 15.11.2012."

12. The aforementioned agreements hereinafter be called as the "contracts dated 17.11.2009". The amendments along with the contracts have been attached as Annexure P-2 (Colly) with the petition.

13. It is pertinent to mention here that the Project constituted of three units of 660 MW each and the first unit, which was to be completed, was Unit # 2 followed by Unit # 3 and 1 as the second and the third units respectively. The first unit (Unit # 2) was contractually required to be completed by or within a period of 41 months from the date of commencement followed by the second unit (Unit # 3) to be completed by or within a period of 44 months from the date of commencement and the third unit (Unit # 1) to be completed by or within a period of 48 months from the date of commencement with a grace period of 4 months.

14. Respondent No. 3-AXIS Bank provided certain advance and performance bank guarantees, at the instance of the petitioner to respondent No. 1-Talwandi Sabo Power Limited (for short "TSPL"), which were back-to-back as against counter bank guarantees provided by the petitioner's bank in China for the purposes, the details of which are given hereinafter:-

Advance Bank Guarantees:

Performance Bank Guarantees:

15. Copies of few of the bank guarantees have been annexed with the petition as Annexure P-3 (Colly). Clause 30.2 of the GCC of Onshore Services Contract and the corresponding provisions of the other contracts, provide that the advance payment bank guarantee amounting to 10% of the contract price shall be submitted upon mobilization of men and materials and shall be progressively reduced on quarterly basis in proportion to the value of progress payments received. Clause 30.2 reads thus:-

"30.2 The Advance Payment Bank Guarantee amounting to 10% (ten percent) of the Contract Price shall be submitted upon mobilization of men and materials and within 14 days of signing of the Contract and it shall be valid up to the issuance of Provisional Acceptance Certificate of the last unit. The amount of the Advance Payment Bank Guarantee shall be progressively reduced on quarterly basis in

proportion to the value of the progress payments received.

(emphasis supplied)"

16. Mr. M.L. Sarin and Mr. Puneet Bali, learned Senior Counsel assisted by Mr. Tushar Sharma Advocate, appearing on behalf of the petitioner have submitted that on receipt of the RA Bills submitted by the petitioner, respondent No. 1 used to release the payments after debiting and adjusting pro rata amount against the advance payment. The Advance Bank Guarantee amounting to USD 62,801,349, out of which USD 31,284,000 bearing No. 1394FBG140008 and 1394FBG140009 were originally submitted for the 4th unit, which was subsequently cancelled by respondent No. 1. Respondent No. 1 insisted to continue with the same Advance Bank Guarantees, despite the specific legitimate demand from the petitioner to return the said Advance Bank Guarantees back to the petitioner, which has been alleged to be fraudulently withheld by respondent No. 1. It has been further submitted that as on date, USD 306,445 under the offshore contracts and USD 34,988 under the onshore contracts, out of the total advance money are required to be adjusted by respondent No. 1 and going by the strict terms of the contracts, the present value of USD 62.8 million of the Advance Bank Guarantee ought to have been progressively reduced to USD 306,445 under the offshore contracts and USD 34,988 under the onshore contracts. All the bank guarantees for the value of around 62.8 million have fraudulently been withheld by respondent No. 1. Various communications in this regard have been sent. The recent communication dated 14.11.2015 (Annexure P-4) has been referred to.

17. Vis-a-vis the Performance Bank Guarantees amounting to USD 143,376,996, it has been submitted that the same were provided to respondent No. 1. The petitioner has completed more than 98% works under the contracts, which is evident from the monthly progress report for the month of September, 2015 (Annexure P-8 Colly). It has been submitted that the discord relating to the filing of the petition has arisen for the reason that the project had substantially been delayed due to the acts, commission and omission of respondent Nos. 1 and 2 as the petitioner has been prevented from carrying out the reciprocal obligations under the contracts dated 17.11.2009, which led to the overrun of the time schedule, though had specifically been brought to the notice of respondent No. 1 and this fact is evident as the petitioner has been allowed to continue with the works beyond the stipulated time and in this regard have brought to the notice of this Court various provisions of the contract, namely 3.1, 3.2 and 3.3, thus, for all intents and purposes, the commencement date was 9.9.2009, vide which the petitioner was required to commence all works of the contracts. The obligations of the purchaser have been pointed out by referring to the terms and conditions of the contracts, namely, 9.1, 9.2 and 9.3 and the obligations of the owner as 1.3.1, 1.3.2, 1.3.3, 1.3.4 and 1.3.5. The clauses, which provide for extension of completion time, variation issued, events or circumstances of Force Majeure have been referred to, which have been also extracted in the petition. The same read thus:-

"24. Extension of Completion Time

24.1 Grounds for Extension of Completion Time.

The Contractor shall be entitled to an extension of completion time if by reason of:

24.1.1 Any variation issued in accordance with Clause 22.1 hereof;

24.1.2 events or circumstances of Force Majeure as defined in Clause 37 hereof;

24.1.3 any act of prevention on the part of the owner or other failure of the owner to fulfill any of its obligations under this Contract;

24.1.4 an instruction of the owner to suspend the whole or any part of the works, for reasons not attributable to the Contractor;

24.2 Grant of Extension of Time.

As soon as reasonably practicable following the occurrence of any of the circumstances described in Clause 24.1 hereof, but subject to the provision thereto, the Owner shall grant the Contractor from time to time in writing either prospectively or retrospectively such extension to the relevant Completion Schedule as shall be fair and reasonable."

18. The learned Senior Counsel, for the petitioner, have also submitted that the process of the final tests prior to the completion of the Units as envisaged in the contracts dated 17.11.2009 has been completed, which means "provisional completion" and the same eventually would occur when the Reliability Run Tests (RRTs) have successfully been completed. The RRTs are the tests, which are to be carried out by the petitioner immediately prior to the handing over of the Units, which can be conducted when the completed plant is connected to the grid of the Punjab State Transmission Corporation Ltd., which has to run for 72 hours continuously and on completion of RRTs, respondent No. 1, as per Clause 27 of the General Conditions of the Onshore Services Agreement, was required to issue a Provisional Acceptance Certificate (PAC) They have further submitted that respondent No. 1 failed to adhere to the terms and conditions of the reciprocal contractual obligations by wrongfully withholding the undisputed contract milestones payments, in essence, failed to give various consents for the Project, i.e., fuel (oil & coal) for carrying out the testing for the first and second units (i.e. Unit # 2 & Unit # 3) and the details of which have been referred to in paragraph 13 of the petition. In support of the aforementioned submissions, reference has been made to Provisional Acceptance Certificate of the first unit, i.e., Unit # 2 dated 6.12.2014, Annexure P-8 (Colly).

19. For the purpose of payments of the outstanding amounts, a meeting, on 9.9.2015, was held in China between the petitioner and respondent Nos. 1 and 2 through the Senior Management Official of respondent No. 2, whereby consensus was reached between the parties that the petitioner will give the detailed plan for the 141 Nos. opening points, out of which 7 major points would be completed by

approximately end of December, 2015 and for Unit No. 2 (Unit # 3), the time taken may be longer. The first batch of hot air gates will be installed by (approximately) end of December, 2015 and the remaining will be sent to site by (approximately) end of December, 2015 and the installation of the same will depend on the shutdowns of units. The said 7 major points have been defined in the said Minutes of Meeting. It was further agreed that the petitioner would expedite the completion of the next two units" RRT expeditiously, aiming to achieve the Unit # 3 start up for RRT purpose on best efforts by the end of October, 2015 and Vedanta-respondent No. 1 will support in the milestone payments, which shall not be held due to open points and both the parties shall prepare agreed list of open/defects points with completion dates. Out of the total outstanding payment of USD 92 million + INR 67 crores and Vedanta had confirmed the payment of USD 65 Million between 1st Oct. 15 to 15th Oct. 15, which has admittedly been paid. USD 27 million will be paid by approximately mid-January, 2016 and vis-a-vis payment of Rs. 30 crores already advised to be released on 9.9.2015 and Rs. 37 crores to be released between 1st October 15 to 15th Oct. 15. Vedanta had to clear the dispatch of Mill hot air gates and will issue the MDCC for 44C tomorrow. The amount of Advance Bank Guarantees to be deducted will be reconciled by both Vedanta and SEPCO. Vedanta had agreed to appoint dedicated task fore and give names of the team member within 15 days to discuss claims of either side. Similarly, SEPCO shall also do the same.

20. It has been further submitted that subsequent to 9.9.2015, a meeting was held on 17.11.2015 and the minutes were also recorded, which have been attached at Pages 830 and 831 of the paper book, whereby both the parties agreed for expediting the RRT and handing over Unit # 3, with available resources, the petitioner shall light up Unit # 3 on 18.11.2015 and the Unit will achieve full load and Unit shall complete 3 days full load continuous operation till 26.11.2015 and thereafter TSPL shall issue RRT certificate and Performance Acceptance Certificate (PAC) immediately after achievement of point 1. Purpose of this MOM was to consider the RRT and handing over Unit # 3 and SEPCO had undertaken to rectify the equipment/system defects within jointly agreed timeline, such schedule shall be finalised within 30 days of unit hand over.

21. However, the petitioner was astonished/astounded to receive a communication/letter dated 18.11.2015, whereby respondent No. 1, by referring to letters dated 3.11.2015, 4.11.2015 and 18.11.2015 that it had served notices calling upon the petitioner to demonstrate the capability of Unit # 3 in passing reliability test, shown its discontentment that the petitioner did not intend to start Unit # 3 rather threatened that they will be compelled to take over Unit # 3 and take action in accordance with law and it is under these circumstances, the present petition has been filed.

22. The learned Senior Counsel for the petitioner have further submitted, that for the purpose of granting interim relief as per Section 9 of 1996 Amended Act, particularly the prayer vis-a-vis encashment of the Advance Bank Guarantees

and Performance Bank Guarantees, the Court has to see the following factors:-

- i) Fraud;
- ii) Special equities/Irretrievable injury.

23. The petitioner by knocking the door of the Court, as an interim measure, is able to make out a case of special equities, failing which the Court shall not interfere, much less, refuse to grant interim measures. It has also been submitted that once respondent No. 1 completely volte-faced from the minutes of the meeting held on 17.11.2015 by writing the impugned letter dated 18.11.2015, therefore, a dispute as per Clause 10 of the contracts had arisen, which necessitated to invoke the arbitration in terms of contracts dated 17.11.2009, whereby it has nominated Hon"ble Justice (Retd.) Bisheshwar Prasad Singh (former Judge, Supreme Court of India) as its nominee arbitrator and vide notice dated 26.11.2015 called upon Vedanta to communicate the name of their joint nominee Arbitrator by and within 30 days of the receipt of the notice, i.e., by or before December 25, 2015 in order to enable him to constitute the Arbitral Tribunal with the appointment of the Presiding Arbitrator by the nominee Arbitrators so appointed by the parties and proceed with the arbitration proceedings expeditiously, failing which the petitioner shall be constrained to take such steps under legal procedure, whereas after filing of the present petition, respondents have also appointed/nominated their arbitrator, who is a retired Judge of Hon"ble Supreme Court of India. Both the Arbitrators have given their consent and the arbitral proceedings shall commence in the first week of January, 2016, however the seat of the arbitration as per the contracts is at Singapore, but it can be changed with the consent of the parties. It is under these circumstances, the interim protection has been sought, that till the aforementioned arbitrators appoint the third arbitrator, the bank guarantees, referred to in the interim order dated 1.12.2015 be not encashed.

24. It has further been submitted that vide interim order dated 1.12.2015, this Court had appointed Local Commissioner, who has also submitted his report. The attention of this Court has been drawn to the report, which reveals that the SEPCO-petitioner, its sub-contractors, staff and security guards had been banned from entering into the project site from 18.11.2015 and the photographs in this regard have also been annexed as Annexure R-1 (with the report) and as per the information provided to the Local Commissioner by the representatives of TSPL, the project has been delayed by SEPCO and Unit # 2 (No. 1) had been running by TSPL for about one year, whereas Unit # 3 (No. 2) had been running by TSPL for 19 days and the TSPL has also invited for testing and trials of Unit No. 1 vide, written communication dated 3.12.2015, for steam blowing and subsequent synchronization and reliability run test. The Commercial Operation Date (COD) for Unit # 3 has been passed on 24.11.2015, which is running continuously at full load for 72 hours since its taking over from SEPCO on 18.11.2015. Learned Senior Counsel, during the course of the arguments, have also relied upon the data downloaded from the Internet on 22.12.2012, which ex-facie, proved that

the Independent Power Plants (IPPs), Talwandi Sabo are running to full capacity, vis-a-vis Unit # 2 and Unit # 3 and, thus, prays that the interim protection granted by this Court vide order dated 1.12.2015, corrected on 8.12.2015 vis-a-vis encashment of the bank guarantees be continued till the arbitrator enters into the reference and decides the controversy between the parties. In support of their contentions, have relied upon the following judgments:-

"1. Hindustan Construction Co. Ltd. Versus State of Bihar and others, , (1999) 8 Supreme Court Cases 436;

2. Continental Construction Ltd. and Anr. Versus Satluj Jal Vidyut Nigam Ltd., , (2006) 1 Arb LR 321 (Delhi);

3. CREF Finance Limited Versus Puri Construction Ltd. & Ors., , 2000 (55) DRJ;

4. Embassy Property Developments Limited (Formerly known as M/s. Dynasty Developers Private Limited) Versus Jumbo World Holdings Limited, , 2013 (4) CTC 154;

5. Goyal MG Gases Pvt. Ltd. Versus Air Liquide Deutschland GmbH and Ors., rendered by Delhi High Court in OMP 361 of 2004, decided on 31.01.2005; and

6. M/s. Best on Health Ltd. and others Versus M/s. Bestech India Pvt. Ltd., rendered by this Court in F.A.O. No. 1620 of 2014, decided on 30.6.2014 to contend that the bank guarantee should be in unequivocal terms, unconditional and recite that the amount would be paid without demur or objection irrespective of any dispute that might have cropped up or might have been pending between the beneficiary under the bank guarantee or the person on whose behalf the guarantee was furnished. The terms of the bank guarantee are extremely material.

25. The learned Senior Counsel for the petitioner have further submitted that no doubt the guarantor has no right to know the reasons of or to investigate the merits of the demand, but the terms and conditions of the bank guarantee are especially to be seen whether the case of the petitioner falls in the expression "Special Equities/Irretrievable Injury" or not and in this regard, drawn the attention of this Court to the terms and conditions of the bank guarantees to contend that similar are the conditions with regard to the performance bank guarantees too. They further contended that the amount of guarantee shall be on receipt of the approval of the TSPL on contractor's application, progressively reduced on quarterly basis in proportion to the value of progress payment received by the contractor, in essence until and unless, the contractor's application is not made, the TSPL would not be able to determine the actual amount by raising the demand to the bank for encashment of the bank guarantees and since respondent No. 1 had withheld the bank guarantees, despite the fact that 98% of the works has been done, it will be within the realm/domain of the arbitrator to determine the extent of the work done or not and till the same is adjudicated, the bank guarantees may not be encashed. Clause 4 of

guarantees reads thus:

"The amount of the guarantee shall be, upon the receipt of your approval on the contractor's application, progressively reduced on quarterly basis in proportion to the value of progress payment received by the contractor."

26. Mr. Sarin and Mr. Bali have further submitted that TSPL has also entered into the Power Purchase Agreement dated 1.9.2008 and a dispute has arisen between the parties and the matter has been referred to the Punjab State Electricity Regulatory Commission as the Punjab State Power Corporation Ltd. was in the process of encashing the bank guarantees executed by TSPL and the Regulatory Commission vide order dated 18.11.2014 has stayed the encashment of the bank guarantees till further orders. Copy of the same has been attached as Annexure P-11 with the petition.

27. It has been further submitted that the motive of unjust enrichment is on account of the fact that respondent No. 2 has reported a 40% fall in its consolidated net profit to INR 974 crores in the recent quarter of FY 16, compared with INR 1,640 crores in the previous year. Thus, there is a drop of revenue to the extent of 16%.

28. Mr. Sarin and Mr. Bali have also drawn the attention of this Court to the Final Energy Account for the months of September, 2015 and October, 2015 to show that the second unit (Unit # 3) has started w.e.f. 00:00 hr on 25.11.2015 and the letter dated 27.11.2015 (Annexure P-25) prima-facie proves that the respondents have taken a contradictory stand in the written statement that they have no intention to encash the performance bank guarantees and advance bank guarantees, whereas the contents of the letter (Annexure P-25) would reveal that respondent No. 1 had partially taken over Unit # 3 and there is no reference to the contents of the letter dated 17.11.2015. They have further drawn the attention of this Court to Para 7 of the letter dated 12.12.2015 (Annexure P-19), written by respondent No. 1 to the petitioner, after passing of the interim order, whereby it reveals that in case the bank guarantees are not extended till the making good of the defects and warranty period of the entire plant is over, the TSPL will be constrained to encash the bank guarantees. They have also drawn the attention of this Court to the letter dated 27.10.2015 (Annexure P-20), which shows that TSPL Unit-I has achieved 86% availability, whereas Unit-II commissioning activities commenced, to be synchronized in Q3.

29. Mr. Ashwani Chopra, learned Senior Counsel assisted by Mr. K.S. Nalwa, Advocate, appearing on behalf of respondent Nos. 1 and 2 has assiduously rebutted the aforementioned arguments, by pointing out that it has been a categoric stand/reply of TSPL-respondent No. 1 that the petitioner has not come to the Court with clean hands and has made an attempt to withhold certain material facts and the petition is liable to be dismissed in view of the law laid down by the Hon'ble Supreme Court in S.P. Chengalvaraya Naidu (dead) by LRs Versus Jagannath (Dead) by LRs and others, , (1994) 1 SCC 1 inasmuch as it has

been wrongly pleaded that the petitioner has completed 98% of the works, whereas as per own admission in rejoinder, payments aggregated to 83% of Offshore contract and 87% of Onshore contract have been received.

30. A false claim regarding pendency of payments has been made, whereas respondent No. 1 has been releasing payments strictly as per the terms of the contracts and in consonance with the Minutes of the Meeting (MOM) dated 9.9.2015 (Annexure P-9). The petitioner has not disclosed that it failed to complete its part of commitments even after receiving complete payment as per MOM, *ibid*. It has also not disclosed that, it was decided in the meeting that 65 million USD would be released on or before 15.10.2015, though no work (based on milestones) had been completed satisfactorily, yet the payment of USD 903 Million and INR 1937 crores has been made. Except few, all 141 defects/punch points, referred to in the MOM dated 9.9.2015, are still open for correction, but the petitioner failed to perform the RRT for second unit (Unit # 3) till date. The petitioner even instructed its subcontractors not to continue with any work in the Project and threatened that in case they are found working for respondent No. 1, then huge penalty will be levied and in this regard, has drawn the attention of this Court, to the letter dated 17.11.2015 (Annexure R1/10), which shows that the intention of the petitioner is to obstruct the Project work and hold the project at ransom for its bogus claims. The allegation of not adhering to the terms and conditions of the MOM is falsified from the fact that even no cause of action accrued in favour of the petitioner as certain payments were to be made in January, 2016 and also demonstrated some defaults on behalf of the petitioner, which read thus:-

31. He, thus, urged that the present case does not fall within the special equities/ realm and in this regard has drawn the attention of this Court to the judgments of Hon'ble Supreme Court rendered in *BSES Ltd. (Now Reliance Energy Ltd.) Versus M/s. Fenner India Limited & another*, 2006 (2) SCC 728 and as well as *Dwarikesh Sugar Industries Limited Versus Prem Heavy Engineering Works (P) Limited*, (1997) 6 SCC 450. Mr. Chopra has submitted that second unit (Unit # 3) had started around 28.12.2014, but was stopped subsequent to fire in Air Pre-Heater (APH) on 5.1.2015 and the said fire occurred owing to the fault in the design. Though the said repair could have been done within a period of 20 days, but the same was repaired over an extended period of five months and thereafter the petitioner flatly refused to start up the second unit (Unit # 3) and rather had raised the bills of RRT. He has drawn the attention of this Court to the letter (Annexure R1/1) to demonstrate that the petitioner has been intentionally raising the demand, whereas the contents of the letter would show that the second unit (Unit # 3) had not completed. In essence, RRT has not been done. Copy of one of the letters dated 30.10.2015 has been annexed as Annexure R-1/7. Rather, the petitioner has been raising unauthorised demand of USD 300 Million, alleged to have been incurred at their hands, which had been varying in various letters, in essence, demand of USD 300 Million has come down to USD 200 Million, which is evident from the contents of letter dated 5.11.2015.

Basically, all the payments have been made, but the petitioner failed to rectify the defects and for that defects, the respondent has to reimburse heavy amount from the petitioner and, therefore, the interim order granted by this Court should be vacated.

32. Mr. Chopra, has further submitted, that the respondents have also appointed their arbitrator, namely, Justice V.N. Khare (former Judge of the Hon'ble Supreme Court of India), who has also given the consent. After the arbitration reference findings, in case the claim of the petitioner finds favour with the Tribunal, they shall be entitled to damages and interest visa-vis encashment of the bank guarantees. Rather, the petitioner has wrongly alleged that the respondents have threatened to encash the bank guarantees, which is factually incorrect and misconceived. No occasion had arisen for the respondents to either extend threat for encashment of the bank guarantees, which are unconditional and irrevocable and are part of an independent contract between respondent No. 1 and respondent No. 3. The continuation of the interim order/stay order on the encashment of the bank guarantees would prejudice the interest of the project, for, Clause 30.3 of the Onshore Service and Construction Contract, Performance Bank Guarantees have been identified as a mechanism to ensure completion of the project and correction of the defects by the contractor by ensuring the successful performance of all three units till the warranty period of one year after the handing over of the respective unit is over. Even though the bank guarantees are valid upto February, 2016, the interim protection, will leave no contractual recourse being available to respondent No. 1 for ensuring completion and successful operations of the plant during the warranty period. The petitioner is required to correct/complete the following punch points, referred to in paragraph 21 of the reply, which read thus:-

33. In support of his contention, relied upon paras 9, 14, 26 and 30 of the judgment in BSES Ltd.'s case (supra) and paragraphs 20, 21, 28, 29 and 32 of Dwarikesh Sugar Industries Ltd.'s case (supra). He has also cited the judgments rendered in Ansal Engineering Projects Ltd. Versus Tehri Hydro Development Corporation Ltd. and another, , (1996) 5 SCC 450 and Himadri Chemicals Industries Ltd. Versus Coal Tar Refining Co. , (2007) 8 Supreme Court Cases 110, wherein it has consistently been held that until and unless special equities, irretrievable injury is not made out, there should be no interference in petition under Section 9 of 1996 Act, much less, no interim measure should be granted, thus, prays for dismissal of the petition.

34. Mr. Sarin and Mr. Bali, in rebuttal, have submitted that respondent No. 1 while replying to the specific averments made in Para 21 of the petition, said that the pleadings in the written statement are vague and evasive, in essence specific pleadings in the corresponding paragraphs of the petition have not been denied, whereas on going through the specific pleadings, not only a prima-facie case but balance of convenience, much less irreparable loss and injury has been made out.

35. I have heard the learned counsel for the parties, appraised the paper book

and am of the view that the present petition deserves to be allowed.

36. The scope of testing the petition filed under Section 9 of 1996 Amended Act is limited to the extent as to whether the interim measures/directions sought for are required to be passed or not. As per the amended provisions, any of the party who has invoked the jurisdiction under Section 9 of the 1996 Amended Act has to seek appointment of the Arbitrator. It is a matter of record that the petitioner, vide notice dated 26.11.2015, has appointed/nominated Justice Bisheshwar Prasad Singh (Former Judge of the Supreme Court) as their arbitrator. During the course of arguments, Mr. Chopra acknowledged the fact, that respondent No. 1 has also appointed Justice V.N. Khare (former Judge of the Hon"ble Supreme Court) as their Arbitrator and both the Arbitrators have given their consent. This Court, vide an ex-parte order dated 1.12.2015, corrected vide order dated 8.12.2015 enjoined the respondents from encashing the bank guarantees. Now, it is to be seen whether as per the pleadings/arguments and as well as the case law cited, the case of the petitioner for irretrievable injury or special equities is made out or not.

37. The parameters for considering the special equities have been laid down by the Hon"ble Supreme Court in the judgments cited (supra) and time and again it has been held that for the purpose of adjudicating such lis, the terms and conditions of the bank guarantees have to be seen, in essence the plain and simple bank guarantee being irrevocable and unconditional on demand, the Bank has no right to hold it back to honour the request. From the terms and conditions of the bank guarantees in the present case, it is evident that the bank guarantee had to be reduced, keeping in view the contract or extent of work done from time to time and that too on receipt of the letter from a contractor. Both the sides have tried to project their case that they have adhered to the terms and conditions of the agreement, but in view of the allegations and cross-allegations vis-a-vis the faults/completion of work, the matter has to be adjudicated by the Arbitrators and not by this Court, while entertaining the petition under Section 9 of 1996 Amended Act. Long drawn arguments have been addressed on behalf of the parties to the lis touching the merits of the matter, which would not be within the domain/realm of this Court to ponder upon, for the reason that it would seriously prejudice the rights of the parties in the arbitration proceedings. Moreover, as already observed, the scope of Section 9 of 1996 Amended Act is limited. No doubt, it has consistently been held that fraud or special equity pleaded and prima facie is to be established that too 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 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. Equally, this Court cannot remain oblivious of the fact, that whether irretrievable injury would be caused to the

petitioner in case the injunction granted vide order dated 1.12.2015 and corrected on 8.12.2015 is vacated. While granting injunction, resulting of irretrievable injury, has to be such a circumstance which would make it impossible for the guarantor to reimburse himself, if he ultimately succeeds. This has to be established and proved to the satisfaction of the Court that there is no possibility whatsoever of the recovery of the amount from the beneficiary, by way of "restitution". The terms and conditions of the bank guarantee (extracted supra) leave no manner of doubt that it is not a fixed advance bank guarantee and performance bank guarantee keeps on varying subject to the terms and conditions of correspondence/letters of the contractor and the beneficiary. In the instant case, MOM dated 9.9.2015 and 17.11.2015 leave no manner of doubt that the parties with regard to the commencement of the unit were alive to the situation. However, for the sake of brevity, the contents of MOM dated 9.9.2015 and 17.11.2015 are desirable to be extracted herein below:

"MOM of Summit Meeting Between Vedanta and SEPCO

DATE: 09.09.2015

Place: SEPCO1 Head Office, Jinan, China

Participants:

Vedanta:

On 09.09.2015, the top management from Vedanta and SEPCO held a meeting where the following arguments are reached between two sides:

1. a) SEPCO will give detailed plan for the 141 Nos. opening points.
- b) Out of these 7 major points will be completed by approximately end of December, 2015. For Unit 2 the time taken may be longer.

However, the first batch of hot air gates will be installed by approximately end of December 2015 and remaining hot air gates will be sent to site by approximately end of December 2015 and the installation of the same will depend on the shutdowns of units.

The said 7 major points are: a. Hot Air Gates for mills; b. Coal mills liner & balls; c. Dome valves of ESP/FF; d. Seal air fans; e. analyzers + AAQ; f. valves + DE compressors; g. CW motor.

2. SEPCO1 will expedite the completion of the next 2 units" RRT expeditiously, aiming to achieve the unit # 3 startup for RRT purpose on best efforts by the end of October 2015. Vedanta will support in the milestone payments. These milestone payments will not be held due to open points but both Vedanta and SEPCO will prepare agreed list of open/defects/points with completion dates.

3. Out of total outstanding payment of USD 92 Million + INR 67 crores, the following is confirmed by Vedanta:

a. Dollar Payment

USD 65 Million will be paid between 1st Oct. 15 to 15th Oct. 15. USD 27 Million will be paid by approximately mid-January 2016.

b. Rupee Payment

Rs. 30 crores already advised to be released today.

Rs. 37 crores to be released between 1st Oct. 15 to 15th Oct. 15.

Both Vedanta and SEPCO1 commit to complete expeditiously and make TSPL project a proud showcase site.

4. Vedanta will clear the dispatch of Mill hot air gates.

5. Vedanta will issue the MDCC for 44C tomorrow.

6. The amount of ABG to be deducted will be reconciled by both Vedanta and SEPCO.

7. Vedanta will appoint dedicated task force and give names of the team member within 15 days to discuss claims of either side. SEPCO will also give names of the task force. SEPCO claims on BALCO will be discussed by a separate team from Vedanta.

Signature Vedanta:

Signature

SEPCO:"

"Minutes of Meeting

Date: 17-Nov-15

Following is jointly agreed for expediting the RRT and handover the unit # 3, with available resources, SEPCO shall light up unit # 3 on 18th Nov. 15 and unit shall achieve full load and unit shall complete 3 days full load continuous operation till 26th Nov. 16.

1. RR test for unit # 3 shall be conducted by SEPCO by running the unit on full load continuously for 72 hrs with reliable plant performance and ramp up/down (500 MW to 660 MW and vice versa) demonstration, such that the parameters remain within the acceptance range during ramp up/down test, else the ramp up/down test shall be repeated.

2. TSPL shall issue RRT certificate and PAC immediately after achievement of point 1, on immediate unit handover.

3. Pending demonstration tests shall be completed by SEPCO within 2 months of unit handover. Detailed schedule for the demonstration tests shall be finalised jointly within 4 days of handover and both parties shall put best efforts to adhere

to it.

4. The purpose of this MOM is limited to considering RRT and plant handover for unit # 3 and SEPCO shall rectify the equipment/system defects within jointly agreed timeline, such schedule shall be finalized within 30 days of unit handover. SEPCO TSPL"

38. Coupled with the contents of the letter dated 12.12.2015 (Annexure P-19), it is irresistibly concluded that TSPL has shown its intention to encash the bank guarantee. Said pleading is contrary to the pleadings taken in the written statement, where respondent No. 1 has explicitly averred that it has no intention encash the bank guarantee. For the sake of brevity, paragraph 7 of the letter (Annexure P-19) and para 18 of the preliminary objection taken in the written statement read thus:-

"7. SEPCO should also note the coal handling plant was handed over in miserable state to TSPL only on June 30, 2015 with only two tipplers. Further it has been proven that the ash handling plant, isolation dampers, mill liners and balls (including others as provided earlier) are design defects and are yet to be rectified by SEPCO to get relieved from its obligations under the contract. As per Onshore Service Contract-Clause 31.5 the warranty period of the units is to be extended till the Defects as per Clause 31.3 are made good. Under Clause 30.5 the bank guarantees are required to be extended at the instance of TSPL, therefore, SEPCO is directed to extend the bank guarantees will it has completed making good all defects and warranty period for entire plant is over. Else TSPL will be constrained to encash the bank guarantee."

"18. That the petitioner has wrongly alleged in para 19, that the answering respondent has threatened to encash the Bank Guarantees, which is factually incorrect and misconceived. There was/is no need for the answering Respondent to either threaten or intimate the Petitioner for encashment of the bank guarantees which are unconditional and irrevocable and are part of an independent contract between answering Respondent and Respondent No. 3. Further in light of payments of USD 65 Million and Rs. 67 crores having been made by the answering Respondent to the Petitioner in terms of the minutes of meeting dated 09.9.2015 only proves that the intentions of the answering Respondent were clear and fair to ensure that the payments are released as promised and the work is completed by the Petitioner to ensure that all the defects to be removed as agreed by the Petitioner and further work is carried out within the time frame agreed even in the minutes of meeting of 09.09.2015."

39. It is yet to be adjudicated which of the parties has sustained the loss or to recover the amount, as to whether the petitioner has not been paid his balance payments or has incurred major amount or TSPL though has partially taken over the unit, but the defects, as alleged, have not been rectified and as to whether suffered any loss or not. All these disputes would be within the domain of the Arbitration.

40. The cumulative reading of the aforementioned MOM and as well as the threat extended vide letter dated 12.12.2015 after passing of the interim order, I am of the view that irretrievable injury would be caused to the petitioner in case the bank guarantees, referred to in the interim order, are encashed, particularly the performance bank guarantees and advance bank guarantees are not of ordinary bank guarantees, as it involves the reciprocal act by the parties to the lis as the work progresses, thus, in essence these are not ordinary and simple bank guarantees and, therefore, the interim order dated 1.12.2015 and corrected vide order dated 8.12.2015 requires to be maintained for a period of three weeks from the date of constitution of Arbitration Tribunal with liberty to the petitioner to seek interim relief by invoking the provisions of Section 17 of 1996 (Amended Act) by moving a separate application before the Arbitral Tribunal to be constituted. The Arbitral Tribunal shall be at liberty to pass the independent order uninfluenced with the findings rendered by this Court if any application seeking interim direction is filed.

41. The factors whether the Unit has actually started production or not, whether Unit # 2 and Unit # 3 have commenced production or not or whether it has achieved the complete capacity or not are not to be considered by this Court while entertaining the application, but shall be a matter of consideration by the Arbitral Tribunal.

42. In view of what has been observed above, the petition is allowed.

43. Nothing stated in the said order would affect the merits and demerits of the claim/counter claim purported to have been filed by the parties to the lis before the Arbitral Tribunal.