
(2020) 06 DEL CK 0027

In the Delhi High Court

Case No : Original Miscellaneous Petition (I)(COMM) No. 340, 341, 342, 346, 347, 348 Of 2019

Suzlon Energy Ltd.

APPELLANT

Vs

Zemira Renewable Energy Ltd. & Anr.

RESPONDENT

Date of Decision : 04-06-2020

Acts Referred:

Constitution Of India, 1950 — Article 226
Arbitration and Conciliation Act, 1996 — Section 9

Citation : (2020) 06 DEL CK 0027

Hon'ble Judges : Jyoti Singh, J

Bench : Single Bench

Advocate : Sacchin Puri, Azmat H. Amanadullah, Dhananjay Grover, Deepali Dobhal, Divjyot Singh, Avsi M. Sharma, Apporva Pandey, Sunei Kapur,

Final Decision : Dismissed

Judgement

Jyoti Singh, J

1. Present petitions have been filed under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act") seeking restraint on invocation of Bank Guarantees (BGs) issued on behalf of Petitioner by Respondent No.2 (hereinafter referred to as "Banks") in favour of Respondent No.1.

2. Since a common question of law arises in all the seven petitions and the parties are the same/inter-related, they are being decided by a common judgment. The difference in the various petitions with regard to the dates of the Purchase Orders (hereinafter referred to as "Orders"), BGs and other factual details will be referred to in the later part of the judgment.

3. Petitioner (hereinafter referred to as "Suzlon") is one of the Renewable Energy Solutions Providers engaged in manufacture and supply of Wind Turbine Generators (WTGs) for generation, on a commercial scale, of renewable and

clean wind energy.

4. Respondent No.1 in respective petitions except in OMP (I) (COMM) 349/2019 is the subsidiary of "ReNew" Group of Companies and is a subsidiary Company of "ReNew Power Limited". In OMP (I) (COMM) 349/2019 Respondent no.1 is the lead Company of ReNew Group of Companies with host of other subsidiaries. For the sake of convenience all are being referred to as "Respondent" hereinafter.

CASE OF THE PETITIONER :-

5. Respondent issued Purchase Orders to the Petitioner for supply of Suzlon make S111_90 Type WTGs for its Wind Power Projects at different locations. In addition, parties also executed certain other Agreements for execution of works, ancillary to development of the Wind Power Projects, such as civil works, etc. The details of the Power Projects, their locations, and details of the BGs with respect to each of the Purchase Orders in the different petitions herein are given in a tabular form as under:-

Case No.

Purchase Order dated

Coordination Agreement dated

Power Project and its Location

Bank Guarantee No.

Amount of Bank Guarantee

OMP (I) (COMM) No. 340/2019

19.02.2018 (Amendment dated 14.03.2018)

14.03.2018

Borampalli, Andhra Pradesh

0094118BG0000528 dated 03.07.2018

Rs.20,11,80,000/-

OMP (I) (COMM) No. 341/2019

05.03.2016

05.03.2016 (Amendment dated 29.09.2016)

Ralla, Andhra Pradesh

170390IBGP01108 dated 27.12.2017 (renewed lastly on 04.09.2019)

Rs. 21,31,87,383/-

OMP (I) (COMM) No. 342/2019

05.03.2016

05.03.2016 (Amendment dated 29.09.2016)

Ralla, Andhra Pradesh

170390IBGP01107 dated 27.12.2017 (renewed lastly on 04.09.2019)

Rs 21,92,56,232/-

OMP (I) (COMM) No. 346/2019

30.01.2018

30.01.2018

Kustagi, Karnataka

10880014618 dated 01.08.2018

Rs. 14,02,50,000/-

OMP (I) (COMM) No. 347/2019

30.01.2018

30.01.2018

Kustagi, Karnataka

10880014718 dated 01.08.2018

Rs. 6,05,00,000/-

OMP (I) (COMM) No. 348/2019

06.01.2016

24.10.2016

Ellutala, Andhra Pradesh

Ellutala, Andhra Pradesh

10880002617 dated 10.02.2017 (renewed lastly on 22.05.2019) and

10880002717 dated 10.02.2017 (renewed lastly on 22.05.2019)

Rs. 3,32,84,335/-

Rs. 3,32,84,335/-

OMP (I) (COMM) No. 349/2019

28.07.2015

Nil

Limbwas, Madhya Pradesh

10880018817 dated 04.09.2017 (renewed lastly on 18.06.2019)

Rs. 32,00,00,000/-

6. In terms of the Orders, Petitioner furnished both Advance and Performance BGs. However, at present only the Performance Bank Guarantees under each of the Orders are valid and are subject matter of these petitions.

7. Petitioner supplied all the WTGs in accordance with its obligations under the Orders and their components, to Respondent and also erected and commissioned the entire Wind Power Project. Accordingly, Commissioning Certificates were also issued, with respect to each of the Orders.

8. On 18.03.2019, a meeting was held between the Petitioner and representatives of the Respondent to discuss the pending issues and concerns, raised by the Respondent qua various projects and the ancillary Agreements, but at no point was any claim / demand raised by the Respondent, under the Orders. On 31.07.2019, another meeting was held where again all the works executed by the Petitioner were discussed, but no claim or demand was raised. In fact, till date there is no demand by the Respondent against the Petitioner.

9. Respondent fraudulently and in a clandestine manner, issued letters (separately with respect to each of the Orders) to Respondent No.2 seeking invocation of the subsisting Bank Guarantees and demanded the sum involved under the different Bank Guarantees.

10. Respective dates of invocation of the different Performance Bank Guarantees involved in the present petitions are as under :-

Date of Invocation

Bank Guarantee No.

04.10.2019

0094118BG0000528 dated 03.07.2018

04.10.2019

170390IBGP01108 dated 27.12.2017 (renewed lastly on 04.09.2019)

04.10.2019

170390IBGP01107 dated 27.12.2017 (renewed lastly on 04.09.2019)

09.10.2019

10880014618 dated 01.08.2018

09.10.2019

10880014718 dated 01.08.2018

09.10.2019

10880002617 dated 10.02.2017 (renewed lastly on 22.05.2019)

09.10.2019

10880002717 dated 10.02.2017 (renewed lastly on 22.05.2019)

09.10.2019

10880018817 dated 04.09.2017 (renewed lastly on 18.06.2019)

11. Vide an email dated 17.05.2019, Petitioner wrote to the Respondent, bringing to its notice a summary of the outstanding amounts, due and payable to the Petitioner, being a sum of Rs.63.48 Crores, cumulatively, under the different Orders. Respondent vide its email dated 21.06.2019, responded and gave its own calculation towards the amounts due. Even as per the calculations of the Respondent, a sum of Rs.9.67 Crores was payable to the Petitioner under all the Agreements and thus, vide email dated 08.08.2019, Petitioner reiterated its outstanding claims, as also objected to the calculations made by the Respondent. Post this email, there has been no response from the Respondent, despite reminders.

12. The WTGs have been commissioned and are generating electricity and revenue for the Respondent to its complete satisfaction and no objection or any dispute in this regard has been raised by the respondent. It is the fraudulent invocation of the Bank Guarantees which led the Petitioner to file the present petitions seeking interim injunctions restraining the respondent from invoking or encashing the Bank Guarantees issued by the Banks. Vide interim orders passed by this Court on various dates, Banks were restrained from encashing the Bank Guarantees in question and the interim order is continuing.

13. Learned Senior Counsel for the Petitioner argues that the Performance Bank Guarantees were furnished as a Security for the performance of Petitioner's obligation towards successful completion of warranty period and its other obligations, as agreed between the parties under clause 4.2 of the Agreements. As a matter of record, Petitioner has carried out the Work, as required under the Agreement and has achieved almost 100% of the overall progress towards commissioning of each WTG. He further argues that at no point in time, the Respondent raised any grievance with respect to non-fulfilment of any of the obligations by the Petitioner and till the filing of the petition, no claim / demand was raised by the Respondent on the Petitioner.

14. Learned Senior Counsel has drawn the attention of the Court to Clauses 4.2 (c) and 4.4 of General Clauses of Contract to argue that a bare perusal of the provisions of these clauses would show that for the Respondent to be entitled to invoke the Bank Guarantees, there had to be an amount due and payable by the Petitioner to the Respondent. However, the correspondence and the Minutes of Meeting appended to the petition disclose that no dues are outstanding towards the Respondent. Clauses 4.2(c) and 4.4 are as under :-

"4.2(c) The Supplier shall, as a pre-condition to the progress payment due upon successful Commissioning and operationalization of each WTG, provide unconditional and irrevocable bank guarantee(s) from a scheduled commercial bank with a value equivalent to Rs. 83, 82, 500/- (Rupees Eighty Three Lacs Eighty Two Thousand and Five Hundred only) for each WTG (each such bank guarantee is referred to as "Contract Performance Bank Guarantee-3" or "CPBG-3 ")

aggregating to a maximum amount of Rs. 20,11,80,000/-(Rupees Twenty Crore Eleven Lacs and Eighty Thousand only) as security for the performance of the Supplier's obligations towards successful completion of Warranty Period and its other obligation, as agreed between the Parties.

4.4 In the event of occurrence of any breach or failure or default by the supplier in fulfilling of its obligations under the Order, proceeds of APBG, CG AND CPBG provided by the Supplier pursuant to this Order may be appropriated by the Purchaser, as part compensation for any loss resulting from the Suppliers's failure to perform its respective obligations under this Order and without prejudice to any of the Purchaser's other rights or remedies under this Order towards such losses. "

15. Learned Senior Counsel next contends that it is evident from the recital of the BGs itself that the BGs were to cover the obligations of performance of the warranty period as stated in the various Contracts executed for the Project.

16. Learned Senior Counsel submits that it is the case of the Respondent in OMP (I) (COMM) 341 and 342/2019 (for the Ralla Project) that parties also executed Coordination Agreements qua the Projects, the clauses of which allow the Respondent to invoke the BGs issued under the respective Orders, for their alleged claims under other Agreements executed with other Companies mentioned in Schedule 1 of the Coordination Agreements. It is argued that this stand of the respondent is misconceived as the only other Company which was a party to the said Coordination Agreements, in addition to the Petitioner and the Respondent, was Suzlon Gujarat Wind Park Ltd. (SGWPL). It is also argued that Suzlon Global Services Ltd. (SGSL), is neither a party to the Coordination Agreement nor to the Operation and Maintenance (O&M) Agreements. None of the other five petitions herein contain similar Coordination Agreements, which entitle the Respondent to invoke the BGs for other Agreements.

17. Learned Senior Counsel submits that it came as a shock to the Petitioner when the Respondent invoked the BGs under the present petitions involving a sum of little over Rs.100 Crores. Perusal of the BGs in each case shows that they were issued under the respective Orders, for supply of WTGs and not under any other Agreements. Learned Senior Counsel also contends that this clearly is a fraudulent invocation of the BGs, which serves to vitiate the BGs and also causes irretrievable loss to the Petitioner. The Petitioner is undergoing a Corporate Debt Restructuring Process (CDRP) and despite having knowledge of the same,

Respondent chose to invoke the BGs. It is for this reason that the Court had, at the initial stage, stayed the invocation in all the petitions. Respondent took more than 2 and a half months to file the replies, as in the meantime, they were manufacturing claims to make out a case that money was due from the Petitioner. As an illustration, the first alleged claim in OMP (I)(COMM) 341/2019 is towards shortfall in resource availability. This is an amount sought by the Respondent from SGSL and not the Petitioner and that too, under a separate O&M Agreement executed between SGCL and the Respondent. Even the letters raising the claim were addressed to SGCL and not even copied to the Petitioner. This is a clear case of egregious fraud on the part of the Respondent to invoke the BGs and encash them.

18. Learned Senior Counsel relies on a judgment of a Coordinate Bench of this Court in *Larsen & Toubro Limited v. Experion Developers Pvt. Ltd.* in OMP (I)(COMM) 200/2019 decided by judgment dated 3.07.2019 where the Court has held that once a contract between the parties circumscribes the power of a party to invoke a BG in a particular manner, a Court under Section 9 of the Act must ensure that the BG is invoked in accordance with the contractual provisions and the invoking party cannot rely on the general law applicable to BG invocation. It is pointed out that though the judgment is under challenge before the Division Bench but there is no stay. Learned Senior Counsel also argues that in a subsequent petition under Section 9 of the Act between the same parties, another Bench of this Court has distinguished the earlier judgment and declined to grant an injunction, vide judgment dated 3.12.2019 in OMP (I)(COMM) 234/2019, however, the said judgment is also pending before a Division Bench and the Respondent therein has been restrained from invoking the BG.

19. Learned Senior Counsel points out that there being an Arbitration Agreement between the parties, Petitioner vide Notice dated 05.02.2020 has invoked the Arbitration Agreement. The Arbitration Clause reads as under :-

42.2 Arbitration

In the event the Parties are unable to resolve any Dispute in accordance with Clause 42.1, such Dispute shall be resolved by arbitration in accordance with the following:

(a) Submissions of Disputes

Any Dispute shall be settled exclusively and finally by arbitration. In any such arbitration, either Party shall be entitled to present positions and rely upon information supplemental to or different from those relied upon for purposes of any attempted amicable dispute resolution pursuant to Clause 42.1.

(b) Arbitration Act

The conduct of any arbitration proceedings and any award rendered hereunder and the validity, effect and interpretation of this Clause 42 shall be governed by the laws of India and the enforcement of this Clause 42 and any award rendered

hereunder shall be governed by the Arbitration and Conciliation Act, 1996 (the " Arbitration Act"). Such arbitration shall be held in accordance with the Rules of Arbitration of the International Centre for Alternative Dispute Resolution, New Delhi, or such other rules as may be mutually agreed by the Parties.

(c) Number of Arbitrators and appointment of Arbitrators

The arbitral tribunal shall consist of three arbitrators, with each Party appointing one arbitrator and the third arbitrator shall be appointed by such two Party appointed arbitrators.

(d) Seat of Arbitration

The seat of arbitration shall be New Delhi, India.

20. Per contra, learned counsel for the Respondent submits that Framework Agreements and Amendment Agreements were executed between M/s ReNew Power Ventures Private Limited and Suzlon for Turn Key development of 518.70 MW capacity Wind Power Projects, across the States of Andhra Pradesh, Gujarat and any other State as mutually decided between the parties. Subsequently, separate Agreements were signed between Suzlon/its Group Companies and M/s ReNew Power Ventures Private Limited/ its Group Companies.

21. Share Purchase Agreement dated 13.03.2018 was entered inter se the Respondent and thereafter Co-ordination Agreements were entered into with Suzlon, SGWPL and Suzlon Power Infrastructure Limited for setting up the Projects at various locations. Separate Construction Contracts were also executed between the parties including the Land Agreement.

22. Learned counsel for Respondent submits that several claims of Respondent are pending against Suzlon some of which have been detailed in the reply reserving the rights of Respondent to raise further claims. It is submitted that some of these claims mentioned elaborately in the replies are : on account of failure to provide and install wind mast; failure to pay vendors; bay maintenance charges levied by APTRANSCO; PSS panel failure; pending works; under achievement of Machine Availability Warranting etc. Respondent, therefore, has claims in excess of Rs. 77,45,49,238/- against Suzlon and is entitled to invoke the BGs. Suzlon has failed to complete the work with respect to various projects awarded to it and is in breach of Contractual obligations. It is submitted that there is no admission that Respondent owes any amount to Suzlon and on the contrary there are outstanding dues towards the Respondent, details of which have been mentioned in the replies to the petitions. Suzlon has made false and incorrect statements and has filed selective documents to suit its case.

23. Learned counsel argues that the BGs in question are unconditional and irrevocable and Respondent No. 2 is obliged under the BGs to pay the amounts to Respondent without demur and protest and without any further proof or documents and notwithstanding any contest or dispute by Suzlon with respect to the alleged outstanding dues.

24. I have heard the learned counsels for the parties and examined their submissions.

25. Before examining the rival issues involved in the present petitions, it is important to refer to certain clauses of the Purchase Orders, the Co-ordination Agreements and the BGs in question. Since the documents are more or less the same in all the petitions except for the differences as brought out above, the Clauses incorporated in the Purchase Order in O.M.P. (I) (COMM) 340/2019 is being referred to. The Purchase Order in the said case is dated 19.02.2018 and was amended on 14.03.2018. Relevant portions of the Purchase Order are as under :-

"...This has reference to our discussions on the cited subject for Supply (as defined hereinafter) of 24 (twenty four) number of WTGs (defined below), of Suzlon make S-111_90 type 2.10 MW capacity wind turbine generators; as described separately in the Technical Specifications, for our proposed wind power project of 50.40 MW capacity at Borampalli Site, district Anantpur, in the State of Andhra Pradesh.

Pursuant to our discussions, we are pleased to issue this Order for the Supply of 24 (twenty four) sets of WTG(s) on the terms and conditions contained hereinafter."

x x x

"The Order Value shall be firm and fixed and shall not be subject to escalation under any circumstances, except in accordance with the express provisions of this Order. It is clarified that the Order Value includes but is not limited to :

(i). WTG Supply, design, engineering and manufacturing in accordance with the Specifications as agreed between the parties;

(ii). WTG delivery and transportation upto Project Site;

(iii). Cost of procuring the applicable Approvals, licences, permits, clearances and consents;

(iv). Includes all duties, Taxes, cess and other levies as of the date of this Order, including but not limited to statutory payments, and any other costs required for transfer of the Project to the Purchaser or its Affiliates / nominees;

(v). Defects Liability, Serial Defect Liability and Warranty;

(vi). All costs, unless otherwise specified, incurred by Supplier to obtain and maintain the Insurance Policies in accordance with the terms of this Order."

x x x

"6. GENERAL TERMS AND CONDITIONS

6.1 The supply shall be executed in accordance with the provisions of this Order

and GCC which shall be separately agreed between the Parties. The GCC and scope of Supply once agreed between the Parties shall form an integral part of this Order and shall be in full force and effect as though they were expressly set out in the body of this order.

6.2 This Order shall be subject to governing laws and dispute resolution mechanism as may be mutually agreed between the parties and provided in the GCC."

x x x

"ANNEX -1

GENERAL CONDITIONS OF CONTRACT - SUPPLY OF WTG(S)."

x x x

"Contract Performance Bank Guarantee (CPBG)" shall have the meaning ascribed to it in Clause 4.2(a) of the GCC."

x x x

"Supplier" means Suzlon Energy Limited, a company incorporated under the Companies Act, 1956, having its registered office at 5, Shrimali Society, Near Shri Krishna Complex, Navrangpura, Ahmedabad - 380 009 which expression shall unless repugnant to the context and meaning thereof be deemed to mean and include its successors and permitted assigns."

x x x

"4. Bank Guarantees"

x x x

"4.2 Contract Performance Bank Guarantee

(a). The Supplier shall, as a pre-condition to the progress payment due upon successful Commissioning and operationalization of each WTG, provide unconditional and irrevocable bank guarantee(s) from a scheduled commercial bank with a value equivalent Rs.41,91,250/- (Forty One Lacs Ninety One Thousand Two Hundred and Fifty only) for each WTG (each such bank guarantee is referred to as "Contract Performance Bank Guarantee-I" or "CPBG-1") aggregating to a maximum amount of Rs.10,05,90,000/-(Rupees Ten Crore Five Lacs and Ninety Thousand only), as security for the performance of the Supplier's obligations towards successful performance of Warranty obligations and its other obligations. The Parties agree that CPBG-1 shall be released upon the expiry of a period of one year from the successful Commissioning of a WTG. The Contract Performance Bank Guarantee shall be in the format mutually agreed between the Parties.

(b). The Supplier shall, as a pre-condition to the progress payment due upon

successful Commissioning and operationalization of each WTG, provide unconditional and irrevocable bank guarantee(s) from a scheduled commercial bank with a value equivalent Rs.41,91,250/- (Forty One Lacs Ninety One Thousand Two Hundred and fifty only) for each WTG (each such bank guarantee is referred to as "Contract Performance Bank Guarantee-2" or "CPBG-2") aggregating to a maximum amount of Rs.10,05,90,000/-(Rupees Ten Crore Five Lacs and Ninety Thousand only), as security for the performance of the Supplier's obligations towards successful completion of Warranty Period and its other obligations. The Parties agree that CPBG-2 shall be released upon the later of the successful completion of Power Curve Guarantee Test and the expiry of a period of one year from the successful Commissioning of a WTG.

(c). The Supplier shall, as a pre-condition to the progress payment due upon successful Commissioning and operationalization of each WTG, provide unconditional and irrevocable bank guarantee (s) from a scheduled commercial bank with a value equivalent to Rs.83,82,500/-(Rupees Eighty Three Lacs Eighty Two Thousand and Five Hundred only) for each WTG (each such bank guarantee is referred to as "Contract Performance Bank Guarantee-3" or "CPBG-3") aggregating to a maximum amount of Rs.20,11,80,000/- (Rupees Twenty Crore Eleven Lacs and Eighty Thousand only), as security for the performance of the Supplier's obligations towards successful completion of Warranty Period and its other obligations, as agreed between the Parties."

26. Performance Bank Guarantee dated 03.07.2018 furnished by the Bank on behalf of the Petitioner in OMP (I) (COMM) 340/2019, as an illustration, reads as under:-

"A. Zemira Renewable Energy Limited, having its registered office at 101-104, GCP Business Centre, Opposite Memnagar Fire Station, Vijay Char Rasta, Memnagar, Ahmedabad - 380014 and a corporate office at Commercial Block-1, Zone 6, Main Sector Road, Phase-V, Commercial Complex, Golf Course Road, Gurugram - 122009, Haryana, India (hereinafter referred to as the "Owner", which expression shall unless repugnant to the context or meaning thereof, include its successors, administrators and permitted assigns) has entered into a Contract for Supply bearing No.Zemira/17-18/AP-Borampalli / WTG/001 dated February 19, 2018 and further amended on March 14, 2018 (hereinafter referred to as the "Contract") with Suzlon Energy Limited, having its registered office at "Suzlon", 5, Shrimali Society, Near Shri Krishna Complex, Navrangpura, Ahmedabad-380009 and a corporate office at One Earth, Hadapsar, Pune-411028 (hereinafter referred to as the "Supplier", which expression shall unless repugnant to the context or meaning thereof, include its successors, administrators, executors and permitted assigns) to cover the obligation of performance of the warranty period as stated in various Contracts executed for the Project (hereinafter referred to as the "Obligation") consisting of 24 (twenty four) numbers of Suzlon make S111_90 type wind turbine generators (hereinafter referred to as "WTGs") of 2.10 MW capacity aggregating to 50.40

MW wind power project at Mudigallu village, Kalyanadurg Taluk, District Anantpur, in the State of Andhra Pradesh (hereinafter referred to as the "Project").

B. In accordance with the terms of the Contract, the Supplier has agreed to furnish the Owner an irrevocable and unconditional performance bank guarantee in a form and from a bank acceptable to the Owner, as security for the performance of the Obligation, for an amount of INR 20,11,80,000/- (Rupees Twenty Crores Eleven Lacs and Eighty Thousand Only) hereinafter referred to as the ("Guaranteed Amount") as per the Contract from Bank of Maharashtra, a company under the Banking Regulation Act, 1949, having its registered office at Lokmangal, 1501, Shivaji Nagar, Pune and amongst other places a branch office at Corporate Finance Branch, Yashomangal, 1183/A, F.C. Road, Pune-411005 (hereinafter referred to as the "Bank", which expression shall unless repugnant to the context or meaning thereof, include its successors, administrators, executors and permitted assigns).

NOW THEREFORE, the Bank hereby, unconditionally and irrevocably, guarantees and affirms as follows:-

1. This Bank Guarantee is issued for and shall be effective from the date of its issuance (hereinafter referred to as the "Effective Date") and shall be and remain valid till 30th June, 2020 (hereinafter referred to as the Validity Period) subject to further claim period of 1 month i.e. upto 31st July, 2020 ("Claim Period").

2. The Bank hereby unconditionally and irrevocably guarantees and undertakes to pay to the Owner forthwith, upon the first written demand made by the Owner and received at Bank counter on or before 31st July 2020, without any demur, reservation, recourse, contest or protest, and without any reference to the Supplier, and without the Owner being required to prove or show grounds or reasons for its demand and / or for the sum specified therein. A written demand from the Owner to the Bank shall be conclusive and binding on, and shall not be questioned by, the Bank as to the correctness of the contents thereof and the Owner's right to demand payment from the Bank under the Bank Guarantee.

3. The Owner shall have the right to file / make a claim on the Bank under this Bank Guarantee on or before the expiry of the Claim Period."

27. Law relating to unconditional and irrevocable BGs is no longer res integra. Supreme Court and this Court in several judgments have from time to time emphasized and re-emphasized the restraints on the power of a Court to interfere in invocation of these BGs, when invoked by the beneficiaries. Instead of referring to each one of these judgments, in my opinion, reference to a recent judgment of a Co-ordinate Bench of this Court would succinctly bring out the law on the subject. In the case of Classic-KSM Bashir JV v. Rites Limited 2018 SCC OnLine Del 8888, the Court held as under:-

"33. The law of injunction in the case of bank guarantee is no longer res integra.

In *Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineering Works (P) Ltd.* (1997) 6 SCC 450, Supreme Court reiterated this law as under:

"21. Numerous decisions of this Court rendered over a span of nearly two decades have laid down and reiterated the principles which the courts must apply while considering the question whether to grant an injunction which has the effect of restraining the encashment of a bank guarantee. We do not think it necessary to burden this judgment by referring to all of them. Some of the more recent pronouncements on this point where the earlier decisions have been considered and reiterated are *Svenska Handelsbanken v. Indian Charge Chrome* [(1994) 1 SCC 502] , *Larsen & Toubro Ltd. v. Maharashtra SEB* [(1995) 6 SCC 68] , *Hindustan Steel Workers Construction Ltd. v. G.S. Atwal & Co. (Engineers) (P) Ltd.* [(1995) 6 SCC 76] and *U.P. State Sugar Corpn. v. Sumac International Ltd.* [(1997) 1 SCC 568] The general principle which has been laid down by this Court has been summarised in the case of *U.P. State Sugar Corpn.* [(1997) 1 SCC 568] as follows: (SCC p. 574, para 12) "The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize 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 realization of such a bank guarantee. The 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 the 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. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country."

Dealing with the question of fraud it has been held that fraud has to be an established fraud. The following observations of Sir John Donaldson, M.R. in *Bolivinter Oil SA v. Chase Manhattan Bank* [(1984) 1 All ER 351, CA] are apposite:

"The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear, both as to the fact of fraud and as to the bank's knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated

statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it discharged."

34. In *Vinitec Electronics Private Ltd. v. HCL Infosystems Ltd.* (2008) 1 SCC 544, the Supreme Court after relying upon various earlier judgments of the Court reiterated that the allegation with regard to the alleged breach of a contract by the respondent is not a plea of fraud of an egregious nature so as to vitiate the entire transaction. Paragraphs 24 to 28 of the Judgment are quoted herein below:

"24. The next question that falls for our consideration is as to whether the present case falls under any of or both the exceptions, namely, whether there is a clear fraud of which the Bank has notice and a fraud of the beneficiary from which it seeks to benefit and another exception whether there are any "special equities" in favour of granting injunction.

25. This Court in more than one decision took the view that fraud, if any, must be of an egregious nature as to vitiate the underlying transaction. We have meticulously examined the pleadings in the present case in which no factual foundation is laid in support of the allegation of fraud. There is not even a proper allegation of any fraud as such and in fact the whole case of the appellant centres around the allegation with regard to the alleged breach of contract by the respondent. The plea of fraud in the appellant's own words is to the following effect:

"That despite the respondent HCL being in default of not making payment as stipulated in the bank guarantee, in perpetration of abject dishonesty and fraud, the respondent HCL fraudulently invoked the bank guarantee furnished by the applicant and sought remittance of the sums under the conditional bank guarantee from Oriental Bank of Commerce vide letter of invocation dated 16-12-2003."

26. In our considered opinion such vague and indefinite allegations made do not satisfy the requirement in law constituting any fraud much less the fraud of an egregious nature as to vitiate the entire transaction. The case, therefore does not fall within the first exception.

27. Whether encashment of the bank guarantee would cause any "irretrievable injury" or "irretrievable injustice". There is no plea of any "special equities" by the appellant in its favour. So far as the plea of "irretrievable injustice" is concerned the appellant in its petition merely stated:

"That should the respondent be successful in implementing its evil design, the same would not only amount to fraud, cause irretrievable injustice to the applicant, and render the arbitration nugatory and infructuous but would permit the respondent to take an unfair advantage of their own wrong at the cost and extreme prejudice of the applicant."

28. The plea taken as regards "irretrievable injustice" is again vague and not

supported by any evidence."

35. In *Gujarat Maritime Board v. Larsen and Toubro Infrastructure Development Projects Limited and Anr.* (2016) 10 SCC 46, the Supreme Court once again cautioned that bank guarantee is a separate contract and is not qualified by the contract under which it is given. Whether the cancellation was just and proper is a question to be decided by the Arbitrator and not by this Court under Section 9 of the Act. I would only quote the relevant paragraphs of the said Judgment:

"9. Unfortunately, the High Court went wrong both in its analysis of facts and approach on law. A cursory reading of LoI would clearly show that it is not a case of forfeiture of security deposit "... if the contract had frustrated on account of impossibility..." but invocation of the performance bank guarantee. On law, the High Court ought to have noticed that the bank guarantee is an independent contract between the guarantor Bank and the guarantee appellant. The guarantee is unconditional, no doubt, the performance guarantee is against the breach by the lead promoter viz. the first respondent. But between the bank and the appellant, the specific condition incorporated in the bank guarantee is that the decision of the appellant as to the breach is binding on the Bank. The justifiability of the decision is a different matter between the appellant and the first respondent and it is not for the High Court in a proceeding under Article 226 of the Constitution of India to go into that question since several disputed questions of fact are involved.

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11. It is contended on behalf of the first respondent that the invocation of bank guarantee depends on the cancellation of the contract and once the cancellation of the contract is not justified, the invocation of bank guarantee also is not justified. We are afraid that the contention cannot be appreciated. The bank guarantee is a separate contract and is not qualified by the contract on performance of the obligations. No doubt, in terms of the bank guarantee also, the invocation is only against a breach of the conditions in the LoI. But between the appellant and the Bank, it has been stipulated that the decision of the appellant as to the breach shall be absolute and binding on the Bank.

12. An injunction against the invocation of an absolute and an unconditional bank guarantee cannot be granted except in situations of egregious fraud or irretrievable injury to one of the parties concerned. This position also is no more *res integra*. In *Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co.* [Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co., (2007) 8 SCC 110], at para 14: (SCC pp. 117-18) "14. From the discussions made hereinabove relating to the principles for grant or refusal to grant of injunction to restrain enforcement of a bank guarantee or a letter of credit, we find that the following principles should be noted in the matter of injunction to restrain the encashment of a bank guarantee or a letter of credit:

(i) While dealing with an application for injunction in the course of commercial

dealings, and when an unconditional bank guarantee or letter of credit is given or accepted, the beneficiary is entitled to realise such a bank guarantee or a letter of credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.

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

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

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

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

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

13. The guarantee given by the Bank to the appellant contains only the condition that in case of breach by the lead promoter viz. the first respondent of the conditions of LoI, the appellant is free to invoke the bank guarantee and the Bank should honour it "... without any demur, merely on a demand from GMB (appellant) stating that the said lead promoter failed to perform the covenants...". It has also been undertaken by the Bank that such written demand from the appellant on the Bank shall be "... conclusive, absolute and unequivocal as regards the amount due and payable by the Bank under this guarantee". Between the appellant and the first respondent, in the event of failure to perform the obligations under the LoI dated 6-2-2008, the appellant was entitled to cancel the LoI and invoke the bank guarantee. On being satisfied that the first respondent has failed to perform its obligations as covenanted, the appellant cancelled the LoI and resultantly invoked the bank guarantee. Whether the cancellation is legal and proper, and whether on such cancellation, the bank guarantee could have been invoked on the extreme situation of the first respondent justifying its inability to perform its obligations under the LoI, etc. are not within the purview of an inquiry under Article 226 of the Constitution of India. Between the Bank and the appellant, the moment there is a written demand for invoking the bank guarantee pursuant to breach of the covenants between the appellant and the first respondent, as satisfied by the appellant, the Bank is bound to honour the payment under the guarantee."

28. Having the benefit of the various judgments referred to above, this Court can only observe that when a BG is unconditional and irrevocable, the Rule is that the Courts should refrain from injuncting their invocation or encashment by the

beneficiary. This Rule is subject to only two exceptions and which are : (a). egregious fraud which vitiates the entire underlying transactions and of which the Bank has notice; or (b). irretrievable injury of an exceptional circumstance, where it is impossible for the Guarantor to reimburse itself, if it ultimately succeeds in final adjudication of the disputes. The Courts in exceptional circumstances would invoke the doctrine of Special Equities to restrain the injunction but other than these exceptions there cannot be any interference in the invocation of an Unconditional BG.

29. The question therefore that this Court needs to consider in all the seven petitions is whether the BGs in question are Unconditional and Irrevocable and if so, whether any of the exceptions to the Rule exists and has been established by the Petitioner, so as to be entitled to an injunction against the encashment of the BGs.

30. A perusal of the BGs in question, one of which has been extracted above, makes it abundantly clear that the BGs are Unconditional and Irrevocable and the Banks have undertaken to honour the claim of the beneficiary, without any demur or protest and de hors and irrespective of any disputes between the beneficiary and the Guarantor. Petitioner has not been able to set up any case of egregious fraud with respect to the invocation of the BGs in question. There is only a vague pleading to this effect which is not enough for this Court to pass a restraint Order.

31. Both the Petitioner and the Respondent have raised disputes regarding the completion of the work under the Agreements as well as the amounts outstanding against each other. Alleged deficiencies in the work carried out by the Petitioner, have been brought out by the Respondent, which has been vehemently denied by the Petitioner. However, the serious disputes on the merits of the respective claims raised by the parties herein cannot be a ground to interfere and restrain the invocation/encashment of the BGs in question. It is a settled law that BG is an independent contract between the bank and the beneficiary. Once the beneficiary invokes the BG, the Bank is obliged to honour the Guarantee without any demur or protest and irrespective of any dispute between the beneficiary and the Guarantor. In *Ansal Engineering Projects Ltd. v. Tehri Hydro Development Corporation Ltd. & Anr.* 1996 5 SCC 450, the Supreme Court held as under:-

"5. It is equally settled law that in terms of the bank guarantee the beneficiary is entitled to invoke the bank guarantee and seek encashment of the amount specified in the bank guarantee. It does not depend upon the result of the decision in the dispute between the parties, in case of the breach. The underlying object is that an irrevocable commitment either in the form of bank guarantee or letters of credit solemnly given by the bank must be honoured. The court exercising its power cannot interfere with enforcement of bank guarantee/letters of credit except only in cases where fraud or special equity is *prima facie* made out in the case as triable issue by strong evidence so as to prevent irretrievable

injustice to the parties. The trading operation would not be jettisoned and faith of the people in the efficacy of banking transactions would not be eroded or brought to disbelief. The question, therefore, is whether the petitioner had made out any case of irreparable injury by proof of special equity or fraud so as to invoke the jurisdiction of the Court by way of injunction to restrain the first respondent from encashing the bank guarantee. The High Court held that the petitioner has not made out either. We have carefully scanned the reasons given by the High Court as well as the contentions raised by the parties. On the facts, we do not find that any case of fraud has been made out. The contention is that after promise to extend time for constructing the buildings and allotment of extra houses and the term of bank guarantees was extended, the contract was terminated. It is not a case of fraud but one of acting in terms of contract. It is next contended by Shri G. Nageshwara Rao, the learned counsel for the petitioner, that unless the amount due and payable is determined by a competent court or tribunal by mere invocation of bank guarantee or letter of credit pleading that the amount is due and payable by the petitioner, which was disputed, cannot be held to be due and payable in a case. The Court has yet to go into the question and until a finding after trial, or decision is given by a court or tribunal that amount is due and payable by the petitioner, it cannot be held to be due and payable. Therefore, the High Court committed manifest error of law in refusing to grant injunction as the petitioner has made out a prima facie strong case. We find no force in the contention. All the clauses of the contract of the bank guarantee are to be read together. Bank guarantee/letters of credit is an independent contract between the bank and the beneficiary. It does not depend on the result of the dispute between the person on whose behalf the bank guarantee was given by the bank and the beneficiary. Though the question was not elaborately discussed, it was in sum answered by this Court in *Hindustan Steel Workers Construction Ltd. v. G.S. Atwal & Co. (Engineers) (P) Ltd.* [(1995) 6 SCC 76] (SCC at p. 79). This Court had held in para 6 that the entire dispute was pending before the arbitrator. Whether, and if so, what is the amount due to the appellant was to be adjudicated in the arbitration proceedings. The order of the learned Single Judge proceeds on the basis that the amounts claimed were not and cannot be said to be due and the bank has violated the understanding between the respondent and the bank in giving unconditional guarantee to the appellant. The learned Judge held that the bank had issued a guarantee in a standard form, covering a wider spectrum than agreed to between the respondent and the bank and it cannot be a reason to hold that the appellant is in any way fettered in invoking the conditional bank guarantee. Similarly, the reasoning of the learned Single Judge that before invoking the performance guarantee the appellant should assess the quantum of loss and damages and mention the ascertained figure, cannot be put forward to restrain the appellant from invoking the unconditional guarantee. This reasoning would clearly indicate that the final adjudication is not a precondition to invoke the bank guarantee and that is not a ground to issue injunction restraining the beneficiary to enforce the bank guarantee. In *Hindustan Steelworks Construction Ltd. v. Tarapore & Co.* [(1996) 5 SCC 34 : JT

(1996) 6 SC 295] , it was contended that a contractor had a counter-claim against the appellant; that disputes had been referred to the arbitrator and no amount was said to be due and payable by the contractor to the appellant till the arbitrator declared the award. It was contended therein that those were exceptional circumstances justifying interference by restraining the appellant from enforcing the bank guarantee. The High Court had issued interim injunction from enforcing the bank guarantee. Interfering with and reversing the order of the High Court, this Court has held in para 23 that a bank must honour its commitment free from interference by the courts. The special circumstances or special equity pleaded in the case that there was a serious dispute on the question as to who has committed the breach of the contract and that whether the amount is due and payable by the contractor to the appellant till the arbitrator declares the award, was not sufficient to make the case an exceptional one justifying interference by restraining the appellant from enforcing the bank guarantee. The order of injunction, therefore, was reserved with certain directions with which we are not concerned in this case.

6. A conjoint reading of the bank guarantee and the letter of invocation demanding payment of amount due and payable by the petitioner would show that the first respondent had specified and quantified in terms of the bank guarantee a total sum with interest due thereon in a sum of Rs 57,57,970 as on 5-4-1995. A demand in terms of clause (i) of the bank guarantee was made. The bank had irrevocably promised and undertaken to pay to the Corporation without any demur or damage an amount not exceeding Rs 57,57,970 plus interest as per terms and conditions contained in the bank guarantee untrammelled by the bilateral agreement between the petitioner and the first respondent-Corporation stating the amount claimed was due and payable on account of loss or damage caused to or likely to be caused to or by the Corporation by reason of any breach by the said contract or any of the terms and conditions contained in the said agreement notwithstanding any dispute or disputes raised under the contract in any suit or proceedings pending before any court or tribunal relating thereto. The liability of the bank is absolute and unequivocal; it would thereby be clear that the bank is not concerned with the ultimate decision of a court and a tribunal in its finding after adjudication as to the amount due and payable by the petitioner to the first respondent. What would be material is the quantification of the liability in the letter of revocation. The bank should verify whether the amount claimed is within the terms of the bank guarantee or letter of credit. It is axiomatic that any payment by the bank, obviously be subject to the final decision of the court or the tribunal. At the stage of invocation of bank guarantee, the need for final adjudication and decision on the amount due and payable by the petitioner, would run contrary to the terms of the special contract in which the bank had undertaken to pay the amount due and payable by the contractor. Thus we hold that there is no question of making out any prima facie case much less strong evidence or special equity or exceptional circumstances for interference by way of injunction."

32. The argument of the learned Senior Counsel for the Petitioner that the Petitioner is undergoing the Corporate Debt Restructuring Process and encashment of the BGs worth over Rs. 100 crores would cause irretrievable injury, cannot be a ground to injunct the invocation of the BGs. In the case of Zillion Infra Projects (P) Ltd. v. Fab-Tech Works & Constructions Pvt. Ltd., (2015) 224 DLT 371 the Court while dealing with "irretrievable injury" held as under:-

"13. On the question of irretrievable injury, the Supreme Court in U.P. State Sugar Corpn. (Supra), held that to avail of this exception, the party seeking an injunction would have to show that exceptional circumstances exist which make it impossible for the guarantor to reimburse himself if he ultimately succeeds and this will have to be decisively established. Clearly, a mere apprehension that the other party will not be able to pay, is not enough. 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. There must be a fraud in connection with the Bank Guarantee".

In the case of U.P. State Sugar Corporation vs. Sumac International Ltd. AIR 1997 SC 1644, Supreme Court held as under:-

".....The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would over ride the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country. The two grounds are not necessarily connected, though both may coexist in some cases....."

Supreme Court also laid down the high threshold of irretrievable injury that must be met for seeking injunction against invocation and held as under:-

"14. On the question of irretrievable injury which is the second exception to the rule against granting of injunctions when unconditional bank guarantees are sought to be realised the court said in the above case that the irretrievable injury must be of the kind which was the subject-matter of the decision in the Itek Corporation case (supra). In that case an exporter in the U.S.A. entered into an agreement with the Imperial Government of Iran and sought an order terminating its liability on stand by letters of credit issued by an American bank in favour of an Iranian Bank as part of the contract. The relief was sought on account of the situation created after the Iranian revolution when the American Government cancelled the export licences in relation to Iran and the Iranian Government had forcibly taken 52 American citizens as hostages. The U.S. Government had blocked all Iranian assets under the jurisdiction of United States and had cancelled the export contract. The court upheld the contention of the exporter that any claim for damages against the purchaser if decreed by the

American Courts would not be executable in Iran under these circumstances and realisation of the bank guarantee/Letters of credit would cause irreparable harm to the plaintiff. This contention was upheld. To avail of this exception, therefore, exceptional circumstances which make it impossible for the guarantor to reimburse himself if the ultimately succeeds, will have to be decisively established. Clearly, a mere apprehension that the other party will not be able to pay, is not enough. In the Itek case (supra) there was a certainty on this issue. Secondly, there was good reason, in that case for the court to be prima facie satisfied that the guarantors i.e. the bank and its customer would be found entitled to receive the amount paid under the guarantee."

In the said case the Company before the Supreme Court was a Sick Industrial Company and Reference was pending before BIFR, yet, Supreme Court declined to injunct invocation of the BG. Supreme Court relied on an earlier judgment of the Court in U.P. Cooperative Federation Ltd. v. Singh Consultants & Engineers (P) Ltd., (1988) 1 SCR 1124 where the Court has held that Bank is not in the least concerned with the relations between the supplier and the customer and nor with the performance of the contractual obligations.

33. Recently, a Co-ordinate Bench of this Court in Umaxe Projects Private Limited v. Air Force Naval Housing Board and Another, in O.M.P. (I) (COMM.) 206/2019 declined to restrain the invocation of an unconditional BG and observed that merely because invocation of the BG would cause financial distress to the Petitioner, cannot be a ground to invoke the exception or irreparable injury. Thus the argument of financial distress cannot be of any help to the Petitioner herein.

34. Learned Senior Counsel relying on the judgment of the Co-ordinate Bench in Larsen & Toubro (supra) had contended that the BG can only be invoked in the manner provided in the terms of the Contract and in the present case the invocation is not in accordance with clauses 4.2 (c) and 4.4 of General Clauses of the Contract. Suffice would it be to observe that this Court in a subsequent judgment between the same parties has distinguished the said judgment based on the law laid down by the Supreme Court and has rejected the prayer for grant of restraint against invocation of unconditional and irrevocable BGs. The obligations of the parties under Clauses 4.2 (c) and 4.4 and their interpretations will be in the domain of the Arbitral Tribunal and cannot be adjudicated in the present petitions.

35. Learned Senior Counsel for the Petitioner had argued that in two out of the seven petitions i.e. for the Ralla Project, the parties had executed Co-ordination Agreement, the clauses of which allowed the Respondent to invoke the BGs under the said Orders and the only other Company which was a party to the said Agreements apart from the Petitioner and Respondent was SGWPL. SGSL was not a party to the said Agreements and therefore, in the five out of seven petitions, there being no Co-ordination Agreements, the BGs cannot be invoked by the Respondent. In my view, this contention merits rejection. It is true that in OMP (I)(COMM) 349/2019, there is no Co-ordination Agreement but it is equally

true that the Petitioner is a party to all the said Co-ordination Agreements and the Purchase Orders alongwith the Respondent. What is of significance is that the BGs have been issued by the Banks on behalf of the Petitioner and under the respective Orders and not on behalf of SGSL. The Clause which allows Respondent to invoke the BGs, other than in default of Purchase Orders, is relevant to O.M.P. (I) (COMM) Nos.341/2019 and 342/2019 only. The BGs have been invoked under the Orders and not under the Co-ordination Agreement. The relevant portions of the Purchase Orders have been extracted in the earlier part of the judgment and a bare reading indicates that the PBG was given under the Purchase Orders and have thus been rightly invoked by the Respondent. In any event, the dispute with respect to the Co-ordination Agreements and the other Agreements regarding the reciprocal obligations of the parties would be in the domain of the Arbitrator and cannot be adjudicated in this petition.

36. Petitioner has been unable to make out a prima facie case for grant of injunction against the invocation/encashment of the BGs and has failed to establish that its case falls under any of two exceptions aforesaid i.e egregious fraud and irretrievable injury. This Court thus finds no merit in the Petitions.

37. Petitions are accordingly dismissed. All pending applications are disposed of.

38. The Interim Orders dated 11.10.2019 in OMP (I) (COMM) Nos.340/2019; 341/2019 and 342/2019 as well as Interim Orders dated 14. 10.2019 in O.M.P. (I) (COMM) Nos.346/2019; 347/2019; 348/2019 and 349/2019 are hereby vacated.