
**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI
(APPELLATE JURISDICTION)**

**APPEAL NO.115 OF 2016
AND
I.A. NOs.265 & 266 OF 2016**

Dated: 3 rd FEBRUARY, 2017.

**Present: Hon'ble Smt. Justice Ranjana P. Desai, Chairperson
Hon'ble Shri B.N. Talukdar, Technical Member (P&NG)**

IN THE MATTER OF:

**M/s. SANWARIYA GAS LIMITED)
(Formerly Known as M/s Saumya DSM)
Infratech Limited), Through its Director,)
Having its registered Office at D-80,)
Sector-50, NOIDA -201310, UP.) ... **Appellant****

Versus

**PETROLEUM & NATURAL GAS)
REGULATORY BOARD,)
Through its Secretary, 1st Floor, World)
Trade Centre, Babar Road, New Delhi-1) ... **Respondents****

Counsel for the Appellant(s) : Mr. K.K. Rai, Sr. Adv.,
Mr. S.K. Pandey
Mr. Anshul Rai

Counsel for the Respondent(s) : Mr. Prashant Bezboruah
Mr. Sumit Kishore

J U D G M E N T

PER HON'BLE (SMT.) JUSTICE RANJANA P. DESAI – CHAIRPERSON

1. The Appellant is a company incorporated under the Companies Act 1956. The Appellant is an authorised entity to *inter*

alia implement the Piped Natural Gas (“**PNG**”) and Compressed Natural Gas (“**CNG**”) project for various applications in domestic, commercial, industrial and automobile sectors in Indian cities. The Appellant is selling CNG in Geographical Area (“**GA**”) of Mathura. The Respondent is the Petroleum and Natural Gas Regulatory Board (“**the Board**”) constituted under the Petroleum and Natural Gas Regulatory Board Act 2006 (“**the said Act**”) having both the administrative and quasi-judicial functions. In this appeal the Appellant has challenged order dated 22/05/2013 passed by the Board.

2. It is necessary to give the gist of facts of the case.

(a) On 12/06/2009 the Appellant was granted authorisation for laying, building, operating or expanding CGD network in GA of Mathura.

(b) On 13/09/2010 the Board issued a notice to the Appellant in respect of authorisation for CGD network granted for GA of Mathura. In the said notice it was stated that as per the requirement of

Regulation 11(1) of the Petroleum and Natural Gas Regulatory Board (Authorizing Entities to Lay, Build, Operate or Expand City of Local Natural Gas Distribution Networks) Regulations, 2008 (**“the said Regulations”**), the Appellant needs to have a firm Gas Tie Up in place within 90 days of the grant of authorisation. It was intimated to the Appellant that the Appellant’s time limit for a proper Gas Tie Up lapsed on 09/09/2009. However, no information/confirmation on a Gas Tie Up has been supplied to the Board by the Appellant and therefore, *prima facie* it appears that the Appellant has failed to meet the requirement under Regulation 11(1). It was further intimated to the Appellant that the Appellant’s performance on achievement of physical target for the first year has been reviewed and a shortfall has been observed in Inch-Kms to be laid and domestic connections to be achieved thereby showing non-compliance with Regulation 13 and Schedule D of the said Regulations. The Appellant was called upon to

appear before the Committee constituted by the Board and present its case on 21/09/2010 at 11.00 hrs at the address specified in the notice.

- (c) Admittedly, the Appellant's representative appeared before the Committee on 21/09/2010 and gave reasons for non-compliance of the relevant regulations. The Board found the said reasons to be not satisfactory. The Board therefore sent a notice on 03/11/2010 to the Appellant calling upon the Appellant to show cause as to why action under Regulation 11(5) of the said Regulations and under Section 23 of the said Act should not be initiated against the Appellant. The Appellant sent reply dated 15/11/2010 to the Board. The Board addressed another letter dated 14/01/2011 to the Appellant. In the said letter the Board requested the Appellant to attend a meeting in the Board's office on 07/02/2011 in connection with the show cause notice issued by the Board on 03/11/2010. The Appellant was intimated that

the Appellant will have to clarify its position on various issues such as (i) inability to achieve firm Gas Tie Up within the stipulated time, (ii) Non-achievement of physical parameters as per commitments in the bid and (ii) Restructuring of the project finances and revised financial closure.

- (d) Instead of attending the said meeting the Appellant sent a letter dated 01/02/2011 requesting for adjournment. The Board accepted the request of the Appellant and communicated to the Appellant by its letter dated 04/02/2011 that future date will be communicated to the Appellant. By its e-mail dated 15/09/2011 the Board intimated to the Appellant that it has noticed that there were shortfalls in achievement of 2nd year targets for Mathura GA. The Appellant was asked to submit reasons for the said shortfalls as per the attached sheet latest by 20/09/2011. The Board addressed letter dated 16/03/2012 to the Appellant requesting the Appellant to depute its authorised

official to appear before the Committee constituted by the Board to look into the compliance issue on 28/03/2012 at 04.00 p.m. at the Board's office. Hearing was held on 28/03/2012. In the hearing the Appellant's representative requested for more time to present its case before the Committee. The Board granted the said request and by its e-mail dated 29/03/2012 directed the Appellant to appear before the Committee on 02/04/2012 at the Board's office.

- (e) The Board by its letter dated 10/12/2012 directed the Appellant to submit details of domestic PNG connections registered till 30/06/2012 in the attached format latest by 20/12/2012. By its letter dated 18/12/2012 the Appellant asked for further time of 20 days for submitting information on the ground that its office was shifted to some other premises. The Board by its letter dated 21/12/2012 and e-mail of the same date acceded to the request and extended the date to submit the

information latest by 31/12/2012. As no data was submitted though sufficient time was given to the Appellant the Board by its e-mail dated 01/01/2013 reminded the Appellant that the Board had not received any communication from the Appellant and therefore the Board will be constrained to consider the performance relating to the domestic connections only where the actual supply has started. By its letter dated 01/01/2013 the Appellant submitted information regarding registration of 9493 domestic PNG connections for Mathura GA in specified format. By its letter dated 10/01/2013 the Board asked for further details and information to enable verification of physical connections. The Appellant by its e-mail dated 14/01/2013 forwarded details about domestic connections. The Board by its letter dated 01/02/2013 asked for further details within two weeks stating that most of the information submitted by the Appellant was incomplete. Details of 28000 connections were

called for. By its letter dated 25/02/2013 the Appellant furnished details of 9493 domestic customers and map showing laying of pipeline. The Appellant stated that balance data will be provided shortly. On 21/05/2013 the Board addressed a letter to the Appellant stating that out of 28000 connections the Appellant has provided information in connection with only 9493 connections and that during verification it was found that the information submitted was factually incorrect and submission of incomplete and inaccurate data was a violation of Section 19 of the said Act. The Appellant was asked to appear before the Board on 31/05/2013 for a hearing in this regard.

- (f) On 22/05/2013 the Board addressed a letter to the Appellant regarding encashment of Performance Bank Guarantee. The Board asked the Appellant to replenish the encashed amount within two weeks as required under the said Act

and the said Regulations. The Appellant filed W.P. (C) No. 3914/2013 in the Delhi High Court challenging the said letter. The Delhi High Court by its order dated 05/06/2013 listed the petition for final hearing on 17/07/2013. The Delhi High Court stayed the Board's direction to the Appellant to make good the encashment of the performance bond till the next date of hearing.

- (g) On 28/05/2013 the Appellant sent a letter to the Board seeking postponement of hearing which was to take place on 31/05/2013 to 03/07/2013. On 29/05/2013, the Board sent e-mail to the Appellant regarding rescheduling of the hearing of 31/05/2013 to 03/07/2013. On 25/06/2013 the Appellant sent a letter to the Board seeking postponement of hearing scheduled on 03/07/2013 till disposal of W.P. (C) No.3914 of 2013 by the Delhi High Court. The Board sent letter dated 26/06/2013 to the Appellant asking the Appellant to remain present for the hearing on

03/07/2013 with material facts of the case in its defence. The Board stated that the hearing of 03/07/2013 was scheduled in terms of the Board's letter dated 21/05/2013 which related to submission of incomplete and inaccurate data regarding fulfilment of obligations to meet targets/project milestones whereas the Delhi High Court's order dated 05/06/2013 related to the letter dated 22/05/2013 regarding directions to make good the Performance Bank Guarantee and therefore the Appellant was asked to remain present for the hearing on 03/07/2013.

- (h) It appears that on 03/07/2013 the Appellant's representative visited the Board and handed over yet another representation reiterating its request for postponement of hearing. The representative of the Appellant conveyed to the Board that he would not be attending the hearing. The Board however decided to meet at 14.30 hrs in case the Appellant chooses to appear. However, no representative of

the Appellant remained present. According to the Board the Delhi High Court writ petition pertained to a separate issue. The Board had asked the Appellant to remain present in connection with submission of incorrect data. According to the Board, the Board therefore took a serious view of the matter and by its order dated 03/07/2013 imposed a penalty of Rs.25 lakhs on the Appellant.

- (i) It may be stated here that on 17/07/2013 the Delhi High Court passed an order in the pending petition being WP(C) No.3914/2013 directing the Appellant to provide security in the form of FDR. Accordingly, the Appellant deposited an FDR drawn in the name of the Appellant in the sum of Rs.25 lakhs with the Registrar General of the Delhi High Court qua penalty of Rs.25 lakhs imposed on the Appellant. On 08/04/2015 the Delhi High Court disposed of the writ petition giving liberty to the Appellant to prefer an appeal. The Delhi High Court continued its order dated 05/06/2013

granting stay to the replenishment of the Performance Bank Guarantee pending institution of the appeal and observed that thereafter this Tribunal will take an independent view as to the interim order. So far as FDR is concerned the Delhi High Court directed that it shall not be dissolved without the Delhi High Court's permission and it shall be kept alive pending disposal of the appeal. The Delhi High Court ordered that the FDR should remain with its Registry and this Tribunal would be free to pass appropriate orders with respect to the FDR at the time of disposal of the appeal. To complete the facts it needs to be noted that this Tribunal has continued the interim order passed by the Delhi High Court till disposal of this appeal.

3. We have narrated all the facts in detail with a purpose. The Appellant has challenged order/letter dated 22/05/2013 in this appeal. The Appellant has also filed another appeal challenging order dated 03/07/2013. That appeal will be dealt with by us on its own facts on merits. The Appellant however is trying to contend

that both these appeals are connected. The Board's contention is that they are separate appeals as they relate to independent issues. We shall deal with these contentions shortly against the backdrop of the above facts.

4. As already noted by the impugned letter/order dated 22/05/2013 the Board has encashed an amount of Rs.1,10,84,250.00 from the Performance Bank Guarantee furnished by the Appellant on the ground that in accordance with the terms and conditions of authorisation and provisions under Regulation 16(1)(c) of the said Regulations the Board had come to the conclusion that breach of authorization had occurred with respect to timely commissioning of the CGD Network and Gas Tie Up. It is necessary to now refer to the rival submissions.

5. Mr. Rai learned senior counsel appearing for the Appellant has assailed the impugned order on several counts. Gist of his submissions is as under:

- (a) The impugned order is in violation of Section 13 of the said Act and Regulation 16 of the said Regulations.

- (b) The impugned order was passed without prescribing any remedial measures contemplated under Regulation 16 of the said Regulations. Forfeiture of Performance Guarantee can take place only upon failure to comply with remedial measures suggested under Regulation 16(1)(c).
- (c) The Board has erred in issuing the impugned order dated 22/05/2013 when the hearing with regard to the deficient domestic PNG connections was yet to commence.
- (d) Regulation 7 of the said Regulations provided for Bidding Criteria. Clause (d) thereof required the entity to bid for the number of domestic customers to be connected by PNG for each of the year of exclusivity period and that was to have weightage of thirty percent. The said Regulations were amended on 07/04/2014. Clause (d) of Regulation 7 was dropped. The amended regulations with

effect from 07/04/2014 insist on creation of infrastructure and not on number of connections. This was done because the Board realised the difficulties faced by entities in achieving the target of domestic PNG connections. The insistence of the Board on the Appellant to give details of the actual PNG domestic consumers is arbitrary.

- (e) Though Performance Bank Guarantee is encashed the Appellant is not remediless. The Appellant can sue for damages in case Performance Bank Guarantee is wrongly encashed (See: **UP Cooperative Federation Ltd. v. Singh Consultants and Engineers (P) Ltd.**¹⁾)
- (f) The impugned action of the Board is arbitrary and illegal. The impugned order therefore deserves to be set aside.

6. We have also heard Mr. Prashant Bezboruah learned counsel appearing for the Board. Counsel submitted that the Appellant is

¹(1933) 1 SCC 174

purposely trying to link the impugned order with order dated 03/07/2013 whereby the Board has imposed penalty of Rs.25 lakhs for furnishing incorrect data. By Show Cause Notice dated 21/05/2013 the Appellant was called for a personal hearing in respect of submission of factually incorrect data regarding fulfilment of the Appellant's obligations. Counsel pointed out that the decision regarding encashment of Performance Bank Guarantee was already taken in Board meeting on 09/05/2013 for non-achievement of targets. Counsel submitted that the Appellant is guilty of serious non-compliance and violations of the terms and conditions of the authorisation granted to it. Numerous letters were sent to the Appellant. Counsel submitted that enough opportunity was given to the Appellant to comply with the conditions of the authorization, but the Appellant went on asking for time and hence Performance Bank Guarantee was encashed as per the provisions of the said Regulations. Counsel submitted the encashment having been done, this Tribunal should not interfere with it. In this connection counsel relied on the Delhi High Court's judgment in ***Siti Energy Limited & Anr. v. PNGRB*** dated 02/02/2016 in W.P.(C) 125/2016. Counsel submitted that in the circumstances the appeal deserves to be dismissed.

7. We must quote the relevant regulations so that controversy involved in this matter can be examined in light of those regulations. Regulation 13 of the said Regulations reads as under:

“13. Post-authorisation monitoring of activities (pre-commissioning).

(1) An authorised entity shall provide, on a quarterly basis, a progress report detailing the clearances obtained, targets achieved, expenditure incurred, works-in-progress and other relevant information in the form at Schedule E.

(2) The Board shall seek compliance by the entity to the relevant regulations for technical standards and specifications, including safety standards through conduct of technical and safety audits during the commissioning phase as well as on-going basis thereafter for ensuring safe commissioning and operation of the CGD network.

(3) The Board shall monitor the progress of the entity in achieving various targets with respect to the CGD network project, and in case of any deviations or shortfall, advise remedial action to the entity.”

Thus under sub-section (3) post authorisation, the Board has to monitor the progress of the entity in achieving targets with respect to the CGD network project, and advise remedial action to the entity in case any shortfall is noticed.

8. Regulation 16 relates *inter alia* to consequences of default. It reads thus:

“16. Consequences of default and termination of authorization procedure.

(1) An authorized entity shall abide by all the terms and conditions specified in these regulations and any failure in doing so, except for force majeure, shall be dealt with as per the following procedure, namely:-

(a) the Board shall issue a notice to the defaulting entity allowing it a reasonable time to fulfil its obligations under the regulations;

(b) no further action shall be taken in case remedial action is taken by the entity within the specified period to the satisfaction of the Board.

(c) in case of failure to take remedial action, the Board may encash the performance bond of the entity equal to percentage shortfall in meeting targets of inch-kms and/or domestic connections. Provided that, the value so encashed would be refunded, if the entity achieves the cumulative targets at the end of exclusivity period for exemption from the purview of common carrier or contract carrier. In case of failure to abide by other terms and conditions specified in these regulations, performance bond shall be encashed as under:

(i) 25% of the amount of the performance bond for the first default; and

(ii) 25% of the amount of the performance bond for the second default:

Provided that the entity shall make good the encashed performance bond in each of the above cases within two weeks of encashment failing which the remaining

amount of the performance bond shall also be encashed and authorization of the entity terminated.

(iii) 100% of the amount of performance bond for the third default and simultaneous termination of authorization of the entity.

(d) the procedure for implementing the termination of an authorization shall be as provided in Schedule G;

(e) without prejudice to as provided in clauses (a) to (d), the Board may also levy civil penalty as per Section 28 of the Act in addition to taking action as prescribed for offences and punishment under Chapter IX of the Act.”

Clause (c) of Regulation 16 is material because encashment of Performance Bank Guarantee is done under this provision.

9. Before we proceed further we must remove the confusion created by the Appellant by linking Show Cause Notice dated 21/05/2013 with encashment of Performance Bank Guarantee. Relevant portion of Show Cause Notice dated 21/05/2013 reads thus:

“With reference to the above quoted letters it may be observed that Saumya DSM Infratech Ltd. was asked to provide details of all the 28000 PNG domestic connections that were claimed to have been made. However, in its latest letter dated 25/02/2013, SDSM had submitted data of only 9493 domestic customers out of 28000 domestic customers. The remaining data was to be provided to PNGRB subsequently, but no further information had been received till date.

2. *In the interim, PNGRB has ascertained/verified the correctness of SDSM's submissions in respect of PNG domestic connections. During the verification exercise undertaken, it has been noticed that information submitted by SDSM is factually incorrect. Summary of findings of the verification exercise undertaken by PNGRB is at Annexe I.*

3. *Submission of incomplete and inaccurate data regarding fulfilment of SDSM's obligation to meet targets as per authorisation issued by PNGRB amounts to violation of the terms and conditions of authorisation granted under Section 19 of the Act and would attract further action as per provisions of the Act.*

4. *In this regard SDSM is advised to be present before the Board with any material facts of the case in their defence on 31/05/2013 at 1115 Hrs. for hearing before the Board at PNGRB office, 1st Floor, World Trade Centre, Babar Road, New Delhi 110001.*

It is clear from the above extract that the Appellant had submitted data of only 9493 domestic customers out of 28000 domestic customers. On verification of the said data the Board found the data to be factually incorrect. Since furnishing of incomplete and inaccurate data regarding fulfilment of obligation to meet targets as per authorization attracts further action, the Appellant was advised to remain present in the Board's office with material facts. Penalty was imposed on the ground that the Appellant furnished incorrect data. Encashment of Performance

Bank Guarantee vide the impugned order dated 22/05/2013 was done because as per Regulation 16(1)(c) of the said Regulations, the Board had come to a conclusion that breach of authorisation had occurred with respect to timely commissioning of the CGD Network and Gas Tie Up. The two issues are different.

10. At this stage it is necessary to quote following table relating to the Appellant's performance.

Geographical Area	Mathura
Inch-Km Target for 2 nd Year	310
Targets Achieved till 3 rd Yr.	397
2 nd Year Target (PNG domestic Connection Numbers)	28000
Achieved till 3 rd Yr.	620
Full Target of 5 Yrs (till June 2014) of Inch-Kms.	347
Achievement till date of Inch-Kms	397
Full Target of 5 Yrs(till June 2014)- PNG Connections	65000
Achievement till date	3481

Admittedly, the Appellant was granted authorization in 2009. The Central Government authorised the Appellant on 26/06/2010

since Section 16 of the said Act had not been notified and was only notified on 15/07/2010. The above table shows the dismal performance of the Appellant as regards domestic connection numbers. Admittedly, as per Regulation 10(2) of the said Regulations the grant of authorization is subject to the entity achieving a firm natural Gas Tie Up. Under Regulation 11(1) the authorised entity has to enter into a firm natural gas supply agreement with gas producer/maker. Under Regulation 11(5) in case of failure to have a Gas Tie Up the authorization can be cancelled and performance bond can be encashed. Admittedly the Appellant did not have Gas Tie Up at the relevant time. Performance review of the Appellant confirmed the Appellant's failure to achieve targets.

11. It is necessary to refer to the following minutes of the Board meeting held on 09/05/2013 to which our attention is drawn by the counsel for the Board.

**Relevant extract of the item pertaining to
Monitoring Group from the minutes of the Board
meeting held on 09/05/2013**

**“(1) Performance review of CGD entities
authorised during first round of bidding for the
6 GAs of Dewas, Kota, Meerut, Sonapat, Mathura
and Kakinada]Proposed by Member (I)]**

After deliberations, the Board approved encashment of Performance Bonds as per Option 2 of the agenda note's proposals, towards default in achieving the targets of PNG domestic connections and/or Inch-KM. The Board also approved encashment of additional 25% of the Performance Bonds submitted by M/s Bhagyanagar Gas Limited and M/s Saumya DSM Limited on account of no gas tie-up and delay in gas tie-up respectively. As regards to the proposal of imposing additional penalty on M/s Saumya DSM Limited for submission of incomplete and inaccurate data, the Board decided that this issue should be referred to the Legal Division for examining applicability of penalty under Section 28 of the PNGRB Act, 2006."

The above minutes clearly show that the Appellant did not have Gas Tie Up which could have led to cancellation of its authorisation also. The above minutes also make it clear that what led to encashment of part of the Performance Bank Guarantee is the failure to commission the CGD Network in time and the failure to have Gas Tie Up in place. In Inch-KM target having been achieved that issue appears to have been given up. Pertinently the issue regarding submission of incomplete and inaccurate data was referred to the Legal Department for examining the applicability of penalty under Section 28 of the said Act. This clearly substantiates the Board's stand that encashment of part of the Performance Bank Guarantee was based on failure in timely commissioning of CGD

Network and absence Gas Tie Up. The issue regarding submission of accurate data was a separate matter. It was referred to the Legal Department and subsequently in that connection Show Cause Notice was issued to the Appellant on 21/05/2013. Show Cause dated 21/05/2013 and hearing in connection with that issue has nothing to do with the encashment of Performance Bank Guarantee reflected in the impugned order. This submission of the Appellant must therefore fail.

12. It was urged that the said Regulations were amended and with effect from 07/04/2014 Bid Criteria is changed. After the amendment insistence is on creation of infrastructure and not on number of connections and therefore Board's insistence on giving details of the actual PNG Domestic connections is arbitrary. There is no merit in this submission. The amendment is admittedly prospective and will not cover the Appellant's case.

13. It was urged that the forfeiture of Performance Bank Guarantee can only take place in case the entity fails to comply with remedial measures suggested under Regulation 16(1)(c). It is submitted that in this case there was no opportunity given to the

Appellant to take remedial measures.

14. We are unable to agree with this submission. We have given the details of the correspondence between the Appellant and the Board. We notice that by its letter dated 14/01/2011, the Board had requested the Appellant to attend a meeting in the Board's office on 07/02/2011 to discuss issues such as (i) inability to achieve firm Gas Tie Up, (ii) Non-achievement of physical parameters as per commitments in the bid and (iii) Restructuring of the project finances and revised financial closure. This shows that the Board had shown its desire to discuss the matter. Remedial measures could have been discussed in this meeting. Instead of attending this meeting the Appellant asked for time. The correspondence, to which we have referred, shows that the Appellant simply went on asking for time. In fact, in this case the Board has shown enough patience. After the Appellant's failure to achieve targets in the first year the Board did not take any action. It went on requesting the Appellant to furnish details and attend Committee meetings. But the Appellant consistently asked for time on grounds such as shifting of the premises. Had the Appellant cooperated with the Board, the Board as a regulator could have

suggested remedial measures. But the Appellant showed complete non-cooperation and evasive approach. The fact that the Board gave so much time to the Appellant indicates that the Board wanted the Appellant to improve its performance and achieve targets. The Appellant did not avail of the opportunities given by the Board to have a dialogue with the Board. In such a situation after giving enough latitude to the Appellant if the Board takes strict action, it cannot be faulted for it. This submission of the Appellant must therefore fail.

15. Lastly, we must advert to the law relating to encashment of Bank Guarantee which is settled by the Supreme Court in a number of judgments. We may, in this regard, refer to the Delhi High Court's judgment in **Siti Energy Limited** where the Delhi High Court has after referring to several judgments summarised the law as under:

“25. The law relating invocation of bank guarantees is no longer res integra. The law is well settled that the interference by the Courts is permissible only where the invocation of the bank guarantee is against the terms of the guarantee or if there is any fraud. In the absence of the same, the bank is liable to pay the guaranteed amount without any demur whatsoever and the bank is bound to honour the guarantee irrespective of any dispute raised by its customer since a bank guarantee is an independent and

*a separate contract. It is also a well settled principle that fraud, if any, must be of an egregious nature, which would vitiate the very foundation of such a bank guarantee and the beneficiary seeks to take advantage of the situation. Allowing encashment of bank guarantee would result in irretrievable harm or injustice to one of the parties concerned has also been recognized by the Courts as a justifiable ground for interference, however, the harm or injustice contemplated must be of such an exceptional and irretrievable nature as would override the terms of the guarantee [vide **U.P. Cooperative Federation Ltd. vs. Singh Consultants and Engineers (P) Ltd. (1988) 1 SCC 174; Vintec Electronics Private Ltd. vs. HCL Infosystems Ltd. (2008) 1 SCC 544; Himadri Chemicals Industries Ltd. vs. Coal Tar Refining Company (2007) 8 SCC 110; Mahatma Gandhi Sahakra Sakkare Karkhane vs. National Heavy Engg. Coop. Ltd. (2007) 6 SCC 470.**] In a recent decision **M/s. Adani Agri Fresh Ltd. vs. Mahboob Sharif & Ors. (2015) SCC OnLine SC 1302**, the Supreme Court while reiterating the principles of law laid down in the above decisions further explained that the fraud, if any, must be of an egregious nature as to vitiate the underline transaction.”*

16. In this case part of the Performance Bank Guarantee is already encashed. The invocation of Performance Bank Guarantee is not against the terms thereof. There is no fraud. It cannot be said in the circumstances of the case, that any irretrievable injustice is caused to the Appellant. None of the circumstances justifying interference with the invocation of Bank Guarantee are present here. Counsel for the Appellant submitted that a wronged person can always sue for damages. In this behalf counsel relied on the

judgment of the Supreme Court in **U.P. Cooperative Federation Ltd.** Since we find that the Board was justified in invoking the Bank Guarantee this judgment would not be applicable to this case.

17. In view of the above we find no substance in this appeal. The appeal is dismissed. Needless to say that the interim relief qua replenishment of encashed Performance Bank Guarantee which is in operation stands vacated. The Appellant shall make good the encashed performance bond within three weeks from today. Consequently, the IA Nos.265 and 266 of 2016 do not survive and are disposed of, as such.

18. Pronounced in the Open Court on this **3rd day of February, 2017.**

B.N. Talukdar
[Technical Member (P&NG)]

Justice Ranjana P. Desai
[Chairperson]

√ **REPORTABLE/NON-REPORTABLE**