

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

IA NO.384 OF 2017 IN APPEAL NO.161 OF 2017
AND
IA NO.383 OF 2017 IN APPEAL NO.162 OF 2017

Dated : 29TH MAY, 2017.

**Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. I. J. Kapoor, Technical Member.**

IA NO.384 OF 2017 IN APPEAL NO.161 OF 2017

IN THE MATTER OF:-

**SHAPOORJI PALLONJI ENERGY)
(GUJARAT) PRIVATE LIMITED,)
SP Centre, 41/44, Minoo Desai Marg,)
Colaba, Mumbai – 400 005.) ... Applicants**

AND

- 1. GUJARAT ELECTRICITY)
REGULATORY COMMISSION,)
6th Floor, Gift One, Road 5C, Zone 5,)
Gift City, Gandhinagar - 382355.)**
- 2. GUJARAT URJA VIKAS NIGAM)
LIMITED,)
Sardar Patel Vidyut Bhavan, Race)
Course, Vadodara – 390 007.) ... Respondents**

Counsel for the Applicant(s)

Mr. Amit Kapur.
Mr. Malcom Desai

Counsel for Respondent(s) Mr. M.G. Ramachandran
Ms. Ranjitha Ramachandran
Mr. Shubham Arya
Ms. Poorva Saigal for R-2

ALONG WITH

IA NO.383 OF 2017 IN APPEAL NO.162 OF 2017

IN THE MATTER OF:-

ESSAR POWER GUJARAT LIMITED,)
EPGL House, 11, K.K. Marg, Mahalaxmi,)
Mumbai – 400 034.) **... Applicants**

AND

1. **GUJARAT ELECTRICITY)**
REGULATORY COMMISSION,)
6th Floor, Gift One, Road 5C, Zone 5,)
Gift City, Gandhinagar - 382355.)
2. **GUJARAT URJA VIKAS NIGAM)**
LIMITED,)
Sardar Patel Vidyut Bhavan, Race)
Course, Vadodara – 390 007.) **... Respondents**

Counsel for the Applicant(s) Mr. Sanjay Sen, Sr. Adv.
Mr. Nisarg Desai,
Mr. Munjaal Bhatt,
Mr. Mahesh Agarwal
Ms. Neeha Nagpal

Counsel for Respondent(s) Mr. M.G. Ramachandran
Ms. Ranjitha Ramachandran
Mr. Shubham Arya
Ms. Poorva Saigal for R-2

J U D G M E N T

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

1. Appeal No.161 of 2017 is filed by Shapoorji Pallonji Energy (Gujarat) Pvt. Ltd ("**Shapoorji**") being aggrieved by order dated 18/05/2017 passed by the Gujarat Electricity Regulatory Commission ("**the State Commission**") on IA No.3 of 2017 filed by Shapoorji in its Petition No.1511 of 2015. IA No.384 of 2017 is filed along with this Appeal by Shapoorji for interim reliefs.

2. Appeal No.162 of 2017 is filed by Essar Power Limited ("**Essar Power**") being aggrieved by order dated 18/05/2017 passed by the State Commission on IA No.4 of 2017 filed by Essar Power in its Petition No.1532 of 2015. IA No.383 of 2017 is filed along with this Appeal by Essar Power for interim reliefs. Respondent No.1 is the State Commission and Respondent No.2 is the Gujarat Urja Vikas Nigam Ltd. ("**GUVNL**").

3. Both these interim applications can be disposed of by a common order because they involve common question of law relating to invocation and encashment of Bank Guarantee. Facts are also similar.

4. Some background of both the applications needs to be given because the counsel appearing for the parties have insisted that these cases are clearly distinguishable from the facts of long line of judgments of the Supreme Court which lay down how limited is the interference of the courts with invocation and encashment of Bank Guarantee. Counsel stated that analysis of facts and careful perusal of the relevant documents is necessary because that would make it clearly evident that the Bank Guarantees of these cases are conditional.

5. We shall first turn to Shapoorji's case. On 15/5/2010 Shapoorji entered into a PPA with GUVNL for supply of 800 MW Power on the terms and conditions stated in the PPA. The

terms include the fulfilment of Conditions Subsequent by Shapoorji as provided in Article 3.1. Shapoorji could not fulfil the Conditions Subsequent. According to Shapoorji its inability to fulfil the Conditions Subsequent is solely due to circumstances beyond its control as it was impacted by Force Majeure Events. Shapoorji sought extension of time to fulfil the conditions subsequent vide letters dated 02/07/2012, 30/01/2013, 10/05/2013, 29/07/2013, 10/02/2015, 21/04/2015 and 27/07/2015. Extension was granted by GUVNL till 14/02/2013 on 09/10/2012. On 19/03/2013 again extension was granted upto 14/05/2013. Because of the request of Shapoorji again on 29/06/2013 extension of time was granted until 14/11/2013 subject to Shapoorji depositing an additional Performance Bank Guarantee of Rs.80 crores. On 03/08/2013 GUVNL again informed Shapoorji that time would be extended subject to Shapoorji depositing additional Performance Bank Guarantee of Rs.80 crores. On 07/01//2014, 13/03/2014, 07/05/2014, 30/06/2014, 21/08/2014 and 28/11/2014 GUVNL requested Shapoorji to submit additional Contract Performance

Guarantee of Rs.80 crores. However it was not furnished. On 29/12/2014, 07/02/2015, 15/04/2015, 06/08/2015 and 20/08/2015 GUVNL sent letters to Shapoorji stating that the existing Contract Performance Guarantee of Rs.240 cores will be encashed unless additional Contract Performance Guarantee of Rs.80 crores is furnished. It was not furnished. Shapoorji's request was that additional Contract Performance Guarantee may not be insisted upon and extension of time be granted.

6. On 26/05/2015 Shapoorji filed Petition No.1511 of 2015 against GUVNL, *inter alia* praying (i) for evolving a mechanism for determination of tariff for supply of electricity under the PPA or otherwise so as to ensure that the adverse impact of the Change in Law Events and/or unforeseen/uncontrollable events which are listed in paragraph 17 thereof is adjusted/absorbed/offset into the tariff by revising the tariff to the extent of such impact so as to make the Project economically viable and (ii) to direct the Respondent to extend the time period for achieving the Conditions Subsequent in

terms of Article 3.1.1. of the PPA by a suitable further period of at least 6 months from the date of final decision of the State Commission in respect of the present petition and to correspondingly extend the Scheduled Delivery Date, without insisting for any additional Contract Performance Guarantee. Shapoorji stated in this petition, *inter alia*, that promulgation of Indonesian Regulation No.17 of 2010 by Indonesian Government, subsequent to the PPA, is a Change in Law and/or Force Majeure Event which has increased the price of imported coal and has impacted viability of the PPA. In this petition, IA No.7 of 2015 was filed by Shapoorji for interim relief. It must be stated here that GUVNL also filed Petition No.1526 of 2015 before the State Commission seeking submission of an additional Contract Performance Guarantee of Rs.80 crores by Shapoorji.

7. On 07/02/2017 both the petitions i.e. Petition No.1511 of 2015 and Petition No.1526 of 2015 were listed before the State Commission. It is the case of Shapoorji that statement was made by officers of GUVNL that Contract Performance

Guarantee will not be encashed and therefore the State Commission adjourned the matters. GUVNL has filed an affidavit on 13/02/2017 before the Gujarat High Court that no such statement was made.

8. On 08/02/2017 a Termination Notice was issued by GUVNL to Shapoorji invoking Article 3.4.2 of the PPA that the Contract Performance Guarantee of Rs. 240 crores furnished by ICICI Bank would be encashed and GUVNL would be entitled to recover an additional amount of Rs.80 crores. On 09/02/2017 Shapoorji filed IA No.3 of 2017 praying that pending hearing and final disposal of Petition No.1511 of 2015, GUVNL be restrained from encashing the Contract Performance Guarantee or on insisting on any additional Contract Performance Guarantee. Since the State Commission did not take up the matter, Shapoorji filed Special Civil Application No.2360 of 2017 before the Gujarat High Court. On 28/03/2017 the Gujarat High Court disposed of the said application directing the State Commission to dispose of the cases on the date fixed by it. Without going into the

merits of the case, the High Court passed an order of status quo till the hearing is over and order is passed by the State Commission. The High Court however observed that it will be open to the State Commission to pass appropriate order on interim applications.

9. On 28/04/2017 Shapoorji filed an application before the Gujarat High Court seeking a direction that the State Commission should hear the main petition being Petition No.1511 of 2015 along with all the interim applications. This request was not acceded to by the High Court, hence on 03/05/2017 Shapoorji withdrew the application. On 18/05/2017 after hearing the parties the State Commission dismissed IA No.3 of 2017. As already stated, order dated 18/05/2017 is challenged in Shapoorji's appeal and instant IA No.384 of 2017 is filed in the said appeal praying that pending disposal of this appeal the impugned order be stayed and GUVNL be restrained from invoking/encashing the existing Contract Performance Guarantee provided by ICICI Bank to GUVNL.

10. We shall now turn to Essar Power's case. Essar Power entered into PPA dated 15/05/2010 with GUVNL whereunder Essar Power agreed to establish the generating station and generate and supply electricity for a contracted capacity of 800 MW on the terms and conditions stated in the PPA. The terms include the fulfilment by Essar Power of the Conditions Subsequent as provided in Article 3.1 of the PPA. Essar Power could not fulfil the Conditions Subsequent. According to Essar Power, the said inability was due to circumstances beyond its control as it was impacted by Force Majeure Events. On 04/06/2011, GUVNL issued a letter to Essar Power stating that it had not submitted sufficient data in support of fulfilment of Conditions Subsequent though 12 months from the effective date had elapsed. On 12/08/2011, GUVNL sent a letter to Essar Power stating that its request for extension of time till 15/03/2012 could not be granted and requested Essar Power to furnish an additional Contract Performance Guarantee for Rs.12 crores per week for the delay period. On 18/08/2011, Essar Power issued Termination

Notice seeking to terminate the PPA under Article 3.4.5. On 20/08/2011, GUVNL called upon Essar Power to withdraw the Termination Notice. Thereafter, there was a meeting between the parties. On 10/10/2011, GUVNL issued a letter to Essar Power stating that it had agreed to grant extension of time till 14/08/2012 without seeking additional Contract Performance Guarantee subject to the condition that such extension shall not entitle Essar Power for extension in Scheduled Delivery Date. On 12/10/2011, Essar Power withdrew the Termination Notice dated 18/08/2011 and further stated that it was committed to the Project and was keen to develop it and deliver power as per its commitments. Essar Power was not able to fulfil Conditions Subsequent even in the extended time. On 04/10/2012, GUVNL agreed to grant Essar Power extension of time limit upto 14/02/2013 without seeking additional Contract Performance Guarantee. Again on 19/03/2013, GUVNL granted extension in time limit upto 14/05/2013 without seeking additional Contract Performance Guarantee. On 27/05/2013, Essar Power sought further extension of time. On 29/06/2013, GUVNL issued a letter to

Essar Power stating that extension upto 14/11/2013 would be granted subject to Essar Power depositing an additional Contract Performance Guarantee of Rs.80 crores in favour of GUVNL within 10 days. Essar Power again sought time vide letter dated 08/07/2013. GUVNL reiterated its stand vide letter dated 10/07/2013 that extension of time would be granted subject to Essar Power depositing an additional Contract Performance Guarantee of Rs.80 crores within 10 days.

11. Thereafter, by letters dated 01/10/2013, 28/11/2013, 13/03/2014 and 07/05/2014, GUVNL requested Essar Power to furnish additional Contract Performance Guarantee of Rs.80 crores. Essar Power cited difficulties faced by it and did not furnish additional Contract Performance Guarantee. In spite of this, on 30/06/2014, GUVNL issued a letter to Essar Power stating that it had granted extension in time limit upto 31/12/2014. By letters dated 21/08/2014 and 29/12/2014, GUVNL requested Essar Power to submit additional Contract Performance Guarantee of Rs.80 crores.

12. On 15/04/2015, GUVNL issued letter to Essar Power asking it to submit the additional Contract Performance Guarantee of Rs.80 crores before 21/04/2015 and informing that in case additional Contract Performance Guarantee is not furnished, Essar Power will encash the existing Performance Bank Guarantee.

13. On 19/05/2015, Essar Power issued a Termination Notice to GUVNL. GUVNL sent reply dated 16/06/2015 calling upon Essar Power to withdraw the Termination Notice by 23/06/2015 failing which GUVNL shall terminate the PPA and invoke the existing Bank Guarantee. Essar Power filed Special Civil Application No.10061 of 2015 before the Gujarat High Court challenging GUVNL's letter dated 16/06/2015. The High Court granted ad-interim protection to Essar Power qua encashment of the Bank Guarantee. On 10/09/2015, GUVNL filed Petition No.1527 of 2015 in the State Commission seeking additional Performance Contract Guarantee of Rs.80

crores from Essar Power. On 21/09/2015, GUVNL issued letter threatening to invoke Bank Guarantee.

14. On 22/09/2015, Essar Power filed Petition No.1532 of 2015 inter alia for a declaration that the Termination Notice dated 19/05/2015 has been validly issued and for a direction to GUVNL to forthwith return the Contract Performance Guarantee.

15. It is the case of Essar Power that on 07/02/2017, both the petitions were listed before the State Commission when officers of GUVNL stated that GUVNL shall not invoke the Bank Guarantee. The State Commission, therefore, adjourned the petitions. GUVNL has denied that any such statement was made.

16. On 08/02/2017, GUVNL issued Termination Notice to Essar Power as per Article 3.4.2 of the PPA, terminating the PPA dated 10/05/2010 and informing Essar Power that GUVNL shall proceed to encash the Contract Performance

Guarantee of Rs.240 crores. Hence, Essar Power filed I.A. No.4 of 2017 inter alia seeking stay of Termination Notice dated 08/02/2017. Since urgent listing was declined, Essar Power filed S.C.A. No.2363 of 2017 before the Gujarat High Court. The High Court by order dated 28/03/2017 directed status quo qua termination of PPA and encashment of Bank Guarantee pending decision and directed the State Commission to decide the interim application within six weeks. On 18/05/2017, the State Commission by the impugned order rejected I.A. No.4 of 2017. As already stated, Order dated 18/05/2017 is challenged in Essar Power's appeal and instant I.A. No.383 of 2017 is filed in the said appeal praying that pending hearing of the instant appeal, Termination Notice dated 08/02/2017 and invocation and encashment of Contract Performance Guarantee provided by Essar Power be stayed.

17. By the impugned order, the State Commission has after discussing the law on the invocation and encashment of Bank Guarantees held that the Contract Performance Guarantees in

these cases are unconditional; there is no evidence of fraud and encashment of the Contract Performance Guarantees will not result into irretrievable prejudice, injury or injustice to Shapoorji or Essar Power. The State Commission has in the circumstances, dismissed the interim applications.

18. We have heard Mr. Amit Kapur, learned counsel appearing for Shapoorji and Mr. Sen, learned senior counsel appearing for Essar Power. Counsel have also filed written submissions which we have perused. Some of their submissions are common. While reproducing them, we shall avoid repetition. We have also heard Mr. Ramachandran, learned counsel appearing for GUVNL and perused the written submissions filed by him.

19. Gist of submissions of Mr. Kapur learned counsel appearing for Shapoorji is as under.

(a) The Termination Notice dated 08/02/2017 issued by GUVNL terminating the PPA dated 15/05/2010 is

unlawful and malafide having been issued during pendency of Petition No.1511 of 2015 as also IA No.7 of 2015.

- (b) The Contract Performance Guarantee was issued in terms and pursuant to Clause 2.13 of the RFP document and inspite of using the words “unequivocally, irrevocably and unconditionally to pay” the invocation and encashment was qualified by use of “as per terms of PPA”. This incorporated the relevant provisions of the PPA.
- (c) The invocation was not in terms of the PPA since “Force Majeure” is an explicit carve out in which circumstances, no right accrues to terminate the PPA for non-fulfilment of any conditions subsequent by the Procurer.
- (d) The Contract Performance Guarantee is invocable to realise liquidated damages which can accrue only when there is any proven loss/damage suffered by GUVNL as held by the Supreme Court in **Kailash Nath v. DDA**¹.

¹(2015) 4 SCC 136

GUVNL has neither claimed nor quantified any loss or damage suffered.

- (e) The invocation and encashment shall cause irreparable harm to Shapoorji, while withholding such action till final adjudication on merits will not cause any harm to GUVNL since the guarantee is valid and invocable till August, 2020.
- (f) Encashment of the Contract Performance Guarantee affects all the companies of the Shapoorji Group. It will affect several projects present and future across the country and would cause irreparable/irretrievable harm, loss or injury to the entire group. Balance of convenience is in Shapoorji's favour.
- (g) It is settled law that a document including a performance guarantee must be construed as per its express terms in context of the contemporaneous/subsequent conduct of the parties (**Bank of India & Anr. v. K.Mohandas & Ors²**). Substance and intent behind the words make a

² (2009) 5 SCC 313

Contract Performance Guarantee unconditional. In this case Contract Performance Guarantee should be read and interpreted in light of its own terms which refer to the terms of the PPA. Doctrine of incorporation by reference is material in this connection.

- (h) Contract Performance Guarantee could be validly invoked by GUVNL, if it was concluded that the PPA has been rightly terminated and Essar Power's claim that it was unable to fulfil the Conditions subsequent was duly adjudicated. This could have been done by considering Article 3.4.2, 3.4.3, 3.1.1(f), Article 3.8.1 and other relevant Articles in their proper perspective. The State Commission should have disposed of the main petition and all applications.
- (i) Article 3.4.2. of the PPA is subject to Article 3.4.3 of PPA. Article 3.4.3 of the PPA provides that in the event, Shapoorji is unable to fulfil any of the Conditions Subsequent due to any Force Majeure Event, the time period for the fulfilment of the Conditions Subsequent as

mentioned in Article 3.1 shall be extended for a maximum period of 10 months from 14/05/2011. Thereafter the PPA may be terminated either by Shapoorji or GUVNL without payment of any liquidated damages. Article 3.8.1 of the PPA further provides that GUVNL shall release the Contract Performance Guarantee on termination of the PPA by any party under Article 3.4.3.

- (j) Contract Performance Guarantee is a standard document. In case there is any ambiguity in the interpretation thereof rule of *Contra Proferentem* will apply. The Court will prefer that interpretation which is more favourable to the party who has not drafted the standard agreement. Form of PPA was provided with the RFP (See: **K. Mohandas**). Judgments on which the State Commission has relied upon are not applicable to this case. They can be distinguished on facts. The Bank Guarantee in those cases was unconditional.
- (k) Judgments on Bank Guarantees cited by GUVNL do not apply to the facts of this case. They are distinguishable

on facts, as in this case the Contract Performance Guarantee is clearly conditional.

20. Gist of submissions of Mr. Sen, learned counsel appearing for Essar Power is as under:

- (a) An interim injunction restraining invocation of an absolute and unconditional Bank Guarantee can be issued when the invocation is fraudulent or irretrievable hardship/injury will happen, should the invocation be permitted.
- (b) While invoking the Bank Guarantee, GUVNL has fraudulently ignored the fact that in terms of Article 3.4.3 and Article 11.5.1 of the PPA dated 15/05/2010, the Procurer has an obligation to release / return the Bank Guarantee to the Seller if the Seller is able to establish that the termination is on account of Force Majeure Events. In **Gujarat Maritime Board v. Larsen & Toubro Infrastructure Development Projects Limited**

& Anr.³, there was no provision in the contract that allowed return / release of Bank Guarantee on account of termination for Force Majeure Events. That judgment is, therefore, not applicable to this case.

- (c) When the issue of Force Majeure is pending adjudication, there cannot be invocation of Bank Guarantee on the principle that the guarantee is absolute and unconditional. The guarantee in the present case is conditional to the extent of happening of Force Majeure Events. If Force Majeure Events take place, it is a condition of the guarantee that it would be returned.
- (d) The proposition of a Bank Guarantee being an independent contract does not apply to a situation where a party to the contract is restrained from taking any steps in relation to enforcing the security given under the contract pending adjudication of a dispute. The State Commission is fully vested with powers to issue interim relief. Section 94 of the Electricity Act, 2003 (“**the said Act**”) is material in this respect. The jurisdiction to

³ (2016) 10 SCC 46

adjudicate disputes between generating company and licensee falls under the powers vested in the State Commission under Section 86(1)(f) of the said Act. Therefore, the State Commission can in exercise of statutory powers restrain GUVNL from invoking the Bank Guarantee when the matter is sub-judice. (See: **GUVNL v. Essar Power Ltd.**⁴)

- (e) GUVNL has committed fraud because its representative during the hearing before the State Commission on 07/02/2017 stated that the Bank Guarantee will not be invoked. GUVNL is fraudulently denying this fact.
- (f) Order of invocation would cause irreversible damage to Essar Power. It will not have the requisite working capital for generating and supplying power. The Force Majeure Events that affected Essar Power's project should have been adjudicated upon. Since the Bank Guarantee is being maintained, any deferment of the decision to invoke cannot cause any prejudice to GUVNL.

⁴ (2008) 4 SCC 755

There is no reason given by the State Commission as to why it did not dispose of the entire matter.

- (g) Bank Guarantee involved in the present case is conditional. Settled principles of law have been applied without recognising the peculiar facts of the case, particularly Article 3.4.3 , 3.8 and 11.5.1 of the PPA and body of the Bank Guarantee. Reliance is placed on **Hindustan Construction Co. Ltd. v. State of Bihar & Ors.**⁵.
- (h) Prayer for stay of operation of the Termination Notice dated 08/02/2017 was not considered.
- (i) The Bank Guarantee is a term of the contract and is issued and regulated in terms of the contract. It is not an independent contract as alleged. There is a prima facie case in favour of Essar Power. The State Commission has not taken any prima facie view on the clauses of the PPA and the terms of Bank Guarantee.

⁵ (1999) 8 SCC 436

(j) Judgment of the Supreme Court in **Gangotri Enterprises Limited v. Union of India & Ors**⁶. is relevant and covers this case. It supports the contention that the sum claimed by GUVNL is pending adjudication and hence is not at present due. Hence, the Bank Guarantee cannot be invoked.

21. Gist of submissions of Mr. Ramachandran learned counsel appearing for GUVNL is as under:

(a) IA No.3 of 2017 filed by Shapoorji was considered alongwith IA No.4 of 2017. The Record and Proceedings of the matters show that the State Commission was required to consider these applications and not the main matter. The High Court rejected Shapoorji's application that main petition should be heard on merits before deciding IA No.4 of 2017. On 04/05/2017 that application was withdrawn.

⁶ (2016) 11 SCC 720

- (b) In the interim applications only two issues were raised. One was regarding the Full Bench judgment of this Tribunal in **Adani Power Ltd., etc. v. CERC & Ors.**⁷, where promulgation of Indonesian Regulation was held to be a Force Majeure Event and the second issue was regarding GUVNL having agreed in the court that the Contract Performance Guarantee will not be enforced. No other issues were raised. The basis of the first submission got negated with the judgment of the Supreme Court dated 11/04/2007 in Appeal Nos.5399-5400 of 2016.
- (c) There are only three exceptions to the encashment of Bank Guarantee. It can be invoked if it is conditional or if there is a fraud of egregious nature or if the enforcement would lead to irretrievable injustice. These principles are settled by a catena of judgments of the Supreme Court, extracts of which are contained in the Appendix. The decision of the Supreme Court in **UP State Sugar Corporation v.**

⁷ Judgment dated 07/04/2016 in Appeal No.100 of 2013, etc.

Sumac International Limited⁸ has been consistently followed by the Supreme Court, latest being **Gujarat Maritime Board**.

- (d) The Bank Guarantees in this case are unconditional. The expression “as per the terms of the PPA” cannot be read out of context. The real intent of the document has to be seen (See: **K. Mohandas**). The said expression cannot override the impact of all other terms of the PPA. There is no incorporation of the terms of the PPA in the Bank Guarantee.
- (e) The allegation that an officer of GUVNL had agreed to the non-encashment of the Bank Guarantee on 07/02/2017 is without any basis. The affidavit filed by GUVNL on 13/02/2017 before the High Court clarifies this position.

22. At the outset, it is necessary to have a look at the Termination Notice issued by GUVNL so that we get clear idea

⁸ (1997) 1 SCC 568

about GUVNL's case. Since the Termination Notices issued to Essar Power and Shapoorji are similar, we will reproduce the Termination Letter issued to Essar Power. The relevant portion of the said Termination Notice dated 08/02/2017 reads thus:

“Sub: Notice of Termination, Claim for Liquidated Damages and Encashment of Contract Performance Guarantee under Article 3.4.2 of Power Purchase Agreement dated 15.05.2010 for generation and supply of 800 MW.

Sir,

This has reference to the Power Purchase Agreement dated 15.05.2010 (PPA) entered into between Essar Power Gujarat Limited (EPGL) and Gujarat Urja Vikas Nigam Limited (GUVNL) where under EPGL has agreed to establish the generating station, generate and supply electricity for a contracted capacity of 800 MW on the terms and conditions contained in the PPA. The terms include the fulfilment by EPGL of the conditions subsequent as provided in Article 3.1 of the PPA.

Despite the expiry of the time specified for fulfilment of the conditions subsequent including the extension agreed to by GUVNL and even by 4.8.2015 till when GUVNL was willing to consider the extension of time subject to EPGL furnishing the additional Contract Performance Guarantee provided under Article 3.4.1 of the PPA and fulfilment of other conditions, M/s. EPGL has failed to satisfy the conditions subsequent as well as failed in its obligation to furnish the additional Contract Performance Guarantee as per Article 3.4.1 of the PPA.

In the circumstances, GUVNL is entitled to invoke the consequences provided under Article 3.4.2 of the PPA. GUVNL has already rejected the claim of EPGL that the delay in the fulfilment of the conditions subsequent on the part of EPGL is on account of force majeure or otherwise for any reason attributable to GUVNL.

Accordingly, GUVNL hereby gives to EPGL the “Termination Notice” as provided in Article 3.4.2 of the PPA and notify EPGL that the termination of PPA will be effective upon the expiry of 7 days from the date of notice to EPGL. After expiry of the notice period as provided above, GUVNL shall proceed to encash the Contract Performance Guarantee of Rs.240 Crores furnished by State Bank of India and will be entitled to recovery of an additional amount of Rs.80 Crores (in aggregate Rs.320 Crores as per Article 3.4.2 of the PPA).”

23. This notice indicates that it is GUVNL’s case that under PPA dated 15/05/2010, Essar Power had agreed to establish the generating station, generate and supply electricity for a contracted capacity of 800 MW on the terms and conditions contained in the PPA. The terms include the fulfilment by Essar Power of the conditions subsequent as provided in Article 3.1 of the PPA. It is the case of GUVNL that despite the expiry of the time specified for fulfilment of the condition subsequent including the extension granted by GUVNL and even by 04/08/2015 till which time GUVNL was willing to consider the extension of time subject to Essar Power furnishing the additional Contract Performance Guarantee provided under Article 3.4.1 of the PPA and fulfilment of other conditions, Essar Power failed to satisfy the conditions

subsequent as well as failed to fulfil its obligation to furnish the additional Contract Performance Guarantee as per Article 3.4.1 of the PPA. According to GUVNL, in the circumstances, it is entitled to invoke the consequences provided under Article 3.4.2 of the PPA. GUVNL had rejected the claim of Essar Power that the delay in the fulfilment of the conditions subsequent on the part of Essar Power is on account of Force Majeure or otherwise or any reason attributable to GUVNL. The notice conveyed to Essar Power that after the expiry of the notice period, GUVNL shall proceed to encash the Contract Performance Guarantee of Rs.240 crores furnished by the State Bank of India and will be entitled to recovery of an additional amount of Rs.80 crores (in aggregate Rs.320 crores as per Article 3.4.2 of the PPA).

24. We must first revisit the law on invocation and encashment of Bank Guarantees. Several judgments have been cited by both sides. We shall refer to only a few of them because all the judgments state the same principles.

25. In **Ansal Engineering Projects Ltd. v. Tehri Hydro Development Corporation Ltd. & Anr.**⁹, the Supreme Court held as under:

“4. It is settled law that bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction and the validity of the primary contract between the person at whose instance the bank guarantee was given and the beneficiary. Unless fraud or special equity exists, is pleaded and prima facie established 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 bank unconditionally and irrevocably promised to pay, on demand, the amount of liability undertaken in the guarantee without any demur or dispute in terms of the bank guarantee. 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.

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

⁹ (1996) 5 SCC 450

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.*¹ (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.², 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.”

26. In **U.P. State Sugar Corporation**, the Supreme Court held as under:

“11. These bank guarantees which are irrevocable in nature, in terms, provide that they are payable by the guarantor to the appellant on demand without demur. They further provide that the appellant shall be the sole judge of whether and to what extent the amount has become recoverable from the

respondent or whether the respondent has committed any breach of the terms and conditions of the agreement. The bank guarantees further provide that the right of the purchaser to recover from the guarantor any amount shall not be affected or suspended by reason of any disputes that may have been raised by the respondent with regard to its liability or on the ground that proceedings are pending before any Tribunal, Arbitrator or Court with regard to such dispute. The guarantor shall immediately pay the guaranteed amount to the appellant-purchasers on demand.

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 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. The two grounds are not necessarily connected, though both may coexist in some cases. In the case of U.P. Coop. Federation Ltd. v. Singh Consultants and Engineers (P) Ltd.¹ which was the case of a works contract where the performance guarantee given under the contract was sought to be invoked, this Court, after referring extensively to English and Indian cases on the subject, said that the guarantee must be honoured in accordance with its terms. The bank which gives the guarantee is not concerned in the least with the relations*

*between the supplier and the customer; nor with the question whether the supplier has performed his contractual obligation or not, nor with the question whether the supplier is in default or not. The bank must pay according to the tenor of its guarantee on demand without proof or condition. There are only two exceptions to this rule. The first exception is a case when there is a clear fraud of which the bank has notice. The fraud must be of an egregious nature such as to vitiate the entire underlying transaction. Explaining the kind of fraud that may absolve a bank from honouring its guarantee, this Court in the above case quoted with approval the observations of Sir John Donaldson, M.R. in *Bolivinter Oil SA v. Chase Manhattan Bank*² (All ER at p. 352): (at SCC p. 197)*

“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 charged.”

This Court set aside an injunction granted by the High Court to restrain the realisation of the bank guarantee.”

27. In **Mahatma Gandhi Sahakara Sakkare Karkhane v. National Heavy Engineering Cooperative Limited & Anr.**¹⁰,

the Supreme Court observed as under:

¹⁰ (2007) 6 SCC 470

“22. In our considered opinion if the bank guarantee furnished is an unconditional and irrevocable one, it is not open to the bank to raise any objection whatsoever to pay the amounts under the guarantee. The person in whose favour the guarantee is furnished by the bank cannot be prevented by way of an injunction in enforcing the guarantee on the pretext that the condition for enforcing the bank guarantee in terms of the agreement entered between the parties has not been fulfilled. Such a course is impermissible. The seller cannot raise the dispute of whatsoever nature and prevent the purchaser from enforcing the bank guarantee by way of injunction except on the ground of fraud and irretrievable injury.

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28. Mere fact that the bank guarantee refers to the principal agreement without referring to any specific clause in the preamble of the deed of guarantee does not make the guarantee furnished by the bank to be a conditional one.”

28. In **Vinitec Electronic Private Limited v. HCL Infosystem Ltd.**¹¹, the Supreme Court held as under:

“11. The law relating to invocation of bank guarantees is by now well settled by a catena of decisions of this Court. The bank guarantees which provided that they are payable by the guarantor on demand is considered to be an unconditional bank guarantee. When in the course of commercial dealings, unconditional guarantees have been given or accepted the beneficiary is entitled to realise such a bank guarantee in terms thereof irrespective of any pending disputes. In *U.P. State Sugar Corpn. v. Sumac International Ltd.*¹ this Court observed that: (SCC p. 574, para 12)

“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

¹¹ (2008) 1 SCC 544

beneficiary is entitled to realise such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realisation of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. 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. The two grounds are not necessarily connected, though both may coexist in some cases.”

12. *It is equally well settled in law that bank guarantee is an independent contract between bank and the beneficiary thereof. The bank is always obliged to honour its guarantee as long as it is an unconditional and irrevocable one. The dispute between the beneficiary and the party at whose instance the bank has given the guarantee is immaterial and of no consequence. In BSES Ltd. v. Fenner India Ltd.² this Court held: (SCC pp. 733-34, para 10)*

“10. There are, however, two exceptions to this rule. The first is when there is a clear fraud of which the bank has notice and a fraud of the beneficiary from which it seeks to benefit. The fraud must be of an egregious nature as to vitiate the entire underlying transaction. The second

exception to the general rule of non-intervention is when there are 'special equities' in favour of injunction, such as when 'irretrievable injury' or 'irretrievable injustice' would occur if such an injunction were not granted. The general rule and its exceptions has been reiterated in so many judgments of this Court³, that in *U.P. State Sugar Corpn. v. Sumac International Ltd.*¹ (hereinafter '*U.P. State Sugar Corpn.*¹') this Court, correctly declared that the law was 'settled'."

22. In the present case the amended clause does not refer to any of the clauses specifically as such but on the other hand the Bank had undertaken responsibility to pay any sum or sums within the guaranteed limit upon receipt of written demand from the Company. The operative portion of the bank guarantee furnished by the Bank does not refer to any of the conditions for payment under the bank guarantee. It is true that the bank guarantee furnished makes a reference to the principal agreement between the parties in its preamble. Mere fact that the bank guarantee refers to the principal agreement in the preamble of the deed of guarantee does not make the guarantee furnished by the Bank to be a conditional one unless any particular clause of the agreement has been made part of the deed of guarantee.

23. The recitals in the preamble in the deed of guarantee do not control the operative part of the deed. After careful analysis of the terms of the guarantee we find the guarantee to be an unconditional one. The appellant, therefore, cannot be allowed to raise any dispute and prevent the respondent from encashing the bank guarantee.

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.....”

29. In **Adani Agri Fresh v. Mehboob Shariff & Ors.**¹², the Supreme Court has observed as under:

“.....”

7. As a proposition of law, learned counsel for the appellant has placed vehement reliance on a number of judgments of this Court, we would refer to only two of them, which would suffice the purpose. In this behalf, reference may first be made to U.P. Cooperative Federation Ltd. vs. Singh Consultants and Engineers (P) Ltd., (1988) 1 SCC 174, wherefrom our attention was invited to the following observations:

"27. Our attention was also drawn to the judgment of the learned Single Judge of the Madras High Court in Arul Murugan Traders v. Rash triya Chemicals and Fertilizers Ltd. Bombay and another, A.I.R. 1986 Madras 161 where the learned Single Judge expressed the opinion that there was no absolute rule prohibiting grant of interim injunction relating to Bank guarantees and in exceptional case courts would interfere with the machinery of irrevocable obligations assumed by banks, and that the plaintiff must establish a prima facie case, meaning thereby that

¹² AIR 2016 SC 92

there is a bona fide contention between the parties or serious question to be tried, and further the balance of convenience was also a relevant factor. If the element of fraud exists, then courts step in to prevent one of the parties to the contract from deriving unjust enrichment by invoking bank guarantee. In that case the learned Single Judge came to the conclusion that the suit involved serious questions to be tried and particularly relating to the plea of fraud, which was a significant factor to be taken into account and claim for interdicting the enforcement of Bank Guarantee should have been allowed.

28. I am, however, of the opinion that these observations must be strictly considered in the light of the principle enunciated. It is not the decision that there should be a prima facie case. In order to restrain the operation either of irrevocable letter of credit or of confirmed letter of credit or of bank guarantee, there should be serious dispute and there should be good prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Otherwise the very purpose of bank guarantees would be negatived and the fabric of trading operation will get jeopardized.

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43. The argument for the Respondent is attractive but it seems to overlook the basic nature of the case. The basic nature of the case relates to the obligations assumed by the bank under the guarantees given to

UPCOF Ltd. If under law, the bank cannot be prevented by SCE(P) Ltd from honouring the credit guarantees, the UPCOF Ltd. also cannot be restrained from invoking the guarantees. What applies to the bank must equally apply to UPCOF Ltd. Therefore, the frame of the suit by not impleading the bank cannot make any difference in the position of law. Equally, it would be futile to contend that the court was justified in granting the injunction since it has found a prima facie case in favour of the SCE(P) Ltd. The question of examining the prima facie case or balance of convenience does not arise if the court cannot interfere with the unconditional commitment made by the bank in the guarantees in question.

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*54. The Court, however, should not lightly interfere with the operation of irrevocable documentary credit. I agree with my learned brother that in order to restrain the operation of the irrevocable letter of credit, performance bond or guarantee, there should be serious dispute to be tried and there should be a good prima facie acts of fraud. As Sir John Donaldson M.R. said in *Bolivinter oil SA v. Chase Manhattan Bank Etors.* [1984] 1 All E.R.351 at 352:*

"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."

55. From the above discussion, what appears to me is this: The sound banking system may, however require more caution in the issuance of irrevocable documentary credits. It would be for the banks to safeguard themselves by other means and generally not for the court to come to their rescue with injunctions unless there is established fraud. In the result, this appeal must be allowed. The judgment and order of the Allahabad High Court dated February 20, 1987 must be set aside and the order of learned Civil Judge, Lucknow dated August 8, 1986 restored."

12. It is equally well settled in law that Bank Guarantee is an independent contract between bank and the beneficiary thereof. The bank is always obliged to honour its guarantee as long as it is an unconditional and irrevocable one. The dispute between the beneficiary and the party at whose instance the bank has given the guarantee is immaterial and of

no consequence. In BSES Limited V/s. Fenner India Ltd. this Court held:

10. There are, however, two exceptions to this rule. The first is when there is a clear fraud of which the Bank has notice and a fraud of the beneficiary from which it seeks to benefit. The fraud must be of an egregious nature as to vitiate the entire underlying transaction. The second exception to the general rule of non-intervention is when there are 'special equities' in favour of injunction, such as when 'irretrievable injury' or 'irretrievable injustice' would occur if such an injunction were not granted. The general rule and its exceptions has been reiterated in so many judgments of this Court, that in U.P. State Sugar Corpn. V. Sumac International Ltd. (1997) 1 SCC 568: (AIR 1997 SC 1644: 1997 AIR SCW 694) (hereinafter V.P. State Sugar Corpn) this Court, correctly declare that the law was 'settled'.

13. In Himadri Chemicals Industries Ltd. V. Coal Tar Refining Company (AIR 2007 SC 2798: 2007 AIR SCW 5080), this court summarized the principles for grant of refusal to grant of injunction to restrain the enforcement of a Bank Guarantee or a letter of credit in the following manner:

"14...(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 realize 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 realization 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.

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12. In deciding the present controversy, we will therefore have to adopt the principles laid down by this Court in U.P. Cooperative Federation Ltd. vs. Singh Consultants and Engineers (P) Ltd. (2007 AIR SCW 7015) (supra), and in Vinitec Electronics Private Ltd. vs. HCL Infosystems Ltd. (supra). Having given our thoughtful consideration to the law laid down by this Court, in respect of grant/ refusal of an injunction of an unconditional bank guarantee, and keeping in mind the terms and conditions, more particularly of the contractual conditions extracted and narrated above, we are satisfied that the courts below were not justified in injuncting the invocation of the three bank guarantees, executed by the State Bank of Mysore, at the instance of M/s RMSFC. We accordingly hereby direct Respondent Nos. 2 and 3 - the State Bank of Mysore to honour the same forthwith.

.....”

30. In the recent judgment in **Gujarat Maritime Board**, the Supreme Court has reiterated the same principles and stated

that the moment there is a written demand for invoking the Bank Guarantee pursuant to breach of the covenants between the parties, the Bank is bound to honour the payment under the guarantee. It is not necessary to multiply the judgments as the law is crystallized in the above judgments and has been followed in all the later judgments.

31. The principles laid down by the Supreme Court can be summarized as follows: The Bank Guarantee is an independent contract between the bank and the beneficiary thereof. The bank is always obliged to honour its guarantee as long as it is an unconditional and irrevocable Bank Guarantee. The dispute between the beneficiary and party, at whose instance the bank has given the guarantee is immaterial and is of no consequence. The liability of the bank is absolute and unequivocal. The bank has to only verify whether the amount claimed is within the terms of the Bank Guarantee or Letter of Credit. Any payment by the bank would obviously be subject to the final decision of the court or the tribunal. At the stage of invocation of Bank Guarantee, there is no need for final

adjudication and decision on the amount due and payable by the person giving the Bank Guarantee. The Courts should not interfere with invocation and encashment of Bank Guarantee unless there is fraud of egregious nature of which the beneficiary seeks to take advantage and which vitiates the entire underlying transaction or a case where irretrievable injustice is likely to be caused to either of the parties. That is to say, there must be special equities in favour of injunction such as when irretrievable injury or irretrievable injustice would occur if injunction were not granted. Since in most cases payment of money under 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. There is no question of making out any prima facie case much less strong evidence or special equity for interference by way of injunction by the court in preventing encashment of Bank Guarantee. The bank

must honour Bank Guarantees free from interference by the courts, otherwise trust in commerce, internal and international would be damaged irreparably. There has to be glaring circumstances of deception or fraud warranting interference. Final adjudication is not a pre-condition to invoke the Bank Guarantee and that is not a ground to issue injunction restraining the beneficiary from enforcing the Bank Guarantee. The mere fact that the Bank Guarantee refers to the principle agreement without referring to any specific clause in the preamble of the deed of guarantee does not make the guarantee furnished by the bank to be a conditional one. The present case can be examined in the light of these principles.

32. It is necessary now to go to the text of the Contract Performance Guarantee because it is crucial to the determination of issue involved in this case. We shall quote the Contract Performance Guarantee in Essar Power as the counsel are agreed that the Contract Performance Guarantee in Shapoorji is similar. It reads as under:

“Contract Performance Guarantee

(To be on non-judicial Stamp Paper of appropriate value as per Stamp Act relevant to place of execution. To be provided in the name of the Procurer)

In consideration of the Essar Power Gujarat Limited, a Company incorporated under the Companies Act, 1956 having its registered office at Essar House, 11, Keshavrao Khadye Marg, Mahalaxmi, Mumbai – 400 034 (hereinafter referred to as “the Successful Bidder”) agreeing to undertake the obligations under the PPA and the other RFP Documents and Gujarat Urja Vikas Nigam Limited (hereinafter referred to as “Procurer”), agreeing to execute the RFP Documents with the Successful Bidder for procurement of power on long term basis through tariff based competitive bidding process for meeting the requirements of the Procurer, the State Bank of India, CAG Branch, Mumbai, having its Corporate Office at State Bank Bhavan, Nariman Point, Mumbai – 400 021 (hereinafter referred to as “Guarantor Bank”) hereby agrees unequivocally, irrevocably and unconditionally to pay to the Procurer at Sardar Patel Vidyut Bhavan, Race Course, Vadodara forthwith on demand in writing from the Procurer or any Officer authorized by it in this behalf any amount upto and not exceeding Rupees Two hundred and forty crores only (Rs.240,00,00,000/-) with respect to the Contracted Capacity of the Procurer as per the terms of the PPA on behalf of M/s. Essar Power Gujarat Limited.

This guarantee shall be valid and binding on the Guarantor Bank upto and including 14th August 2015, i.e. three (3) months from the Scheduled Delivery Date and shall in no event be terminable by notice or any change in the constitution of the Bank or the term of the PPA or by any other reasons whatsoever and our liability hereunder shall not be impaired or discharged by any extension of time or variations or alternations made, given, or agreed with or without our knowledge or consent, by or between parties to the respective agreement.

Our liability under this Guarantee is restricted to Rs.240,00,00,000.00 Rupees Two hundred and forty crores only. Our Guarantee shall remain in force until 14th August

2015. The Procurer shall be entitled to invoke this Guarantee upto thirty (30) days of the last date of the validity of this Guarantee i.e. 19/09/2015 by issuance of a written demand to invoke this guarantee.

The Guarantor Bank hereby expressly agrees that it shall not require any proof in addition to the written demand from the Procurer, made in any format, raised at the above mentioned address of the Guarantor Bank, in order to make the said payment to the Procurer.

The Guarantor Bank shall make payment hereunder on first demand without restriction or conditions and notwithstanding any objection by Essar Power Gujarat Limited and/or any other person. The Guarantor Bank shall not require the Procurer to justify the invocation of this BANK GUARANTEE, nor shall the Guarantor Bank have any recourse against the Procurer in respect of any payment made hereunder.

This BANK GUARANTEE shall be interpreted in accordance with the laws of India and the Courts at Vadodara shall have exclusive jurisdiction.

The Guarantor Bank represents that this BANK GUARANTEE has been established in such form and with such content that it is fully enforceable in accordance with its terms as against the Guarantor Bank in the manner provided herein.

This BANK GUARANTEE shall not be affected in any manner by reason of merger, amalgamation, restructuring, liquidation, winding up, dissolution or any other change in the constitution of the Guarantor Bank.

This BANK GUARANTEE shall be a primary obligation of the Guarantor Bank and accordingly the Procurer shall not be obliged before enforcing this BANK GUARANTEE to take any action in any court or arbitral proceedings against the Successful Bidder/Seller, to make any claim against or any demand on the Successful Bidder/Seller or to give any notice to the Successful Bidder/Seller or to enforce any security held by the Procurer or to exercise, levy or enforce any distress, diligence or other process against the Successful Bidder/Seller.

The Guarantor Bank acknowledges that this BANK GUARANTEE is not personal to the Procurer and may be

assigned, in whole or in part, (whether absolutely or by way of security) by the Procurer to any entity to whom it is entitled to assign its rights and obligations under the PPA.

The Guarantor Bank hereby agrees and acknowledges that the Procurer shall have a right to invoke this Bank Guarantee either in part or in full, as it may deem fit.

Notwithstanding anything contained hereinabove, our liability under this Guarantee is restricted to Rs.240,00,00,000.00 (Rupees Two hundred and forty crores only) and it shall remain in force until 14th August, 2015, with an additional claim period of thirty (30) days thereafter. This BANK GUARANTEE shall be extended from time to time for such period, as may be desired by Essar Power Gujarat Limited. We are liable to pay the guaranteed amount or any part thereof under this Bank Guarantee only if the Procurer serves upon us a written claim or demand.

In witness whereof the Bank, through its authorized officer, has set its hand and stamp on this 10th day of May, 2010 at Mumbai.”

33. In the first paragraph, there is a clear assertion that in consideration of Essar Power agreeing to undertake the obligations in the PPA for procurement of power for meeting the requirement of the Procurer (GUVNL), the Guarantor Bank agrees unequivocally, irrevocably and unconditionally to pay to the Procurer forthwith on demand in writing from the Procurer or any officer authorised by it any amount upto Rs.240,00,00,000/- crores. The words ‘as per the terms of the PPA’ following the above assertion does not make the Bank

Guarantee conditional. These words must be read in context of all the other averments of the Bank Guarantee. No particular clause or article of the PPA is quoted in this paragraph or for that matter in the entire Bank Guarantee. Again in the second paragraph, it is made clear that the Bank Guarantee shall be valid and binding on the Guarantor Bank and shall in no event, be terminated by notice or any change in the constitution of the Bank or the term of the PPA or by any reason whatsoever. The Guarantor Bank has unequivocally declared that its liability shall not be impaired or discharged by any extension of time or variations or alterations made, given or agreed with or without its knowledge or consent, by or between parties. The Guarantor Bank has expressly agreed that it shall not require any proof in addition to the written demand for the Procurer, made in any format.

34. It is important to note that the Bank Guarantee further clearly states that the Guarantor Bank shall make payment on first demand without restriction or condition and

notwithstanding any objection by Essar Power (Shapoorji in the other case) and/or any other person and the Guarantor Bank shall not require the Procurer (GUVNL) to justify the invocation of the Bank Guarantee, nor shall the Guarantor Bank have any recourse against the Procurer in respect of any payment made under the Bank Guarantee.

35. It is further asserted that the Bank Guarantee shall be a primary obligation of the Guarantor Bank and Procurer shall not be obliged to before enforcing it to take any action in any Court or arbitral proceedings against Seller (Essar Power or Shapoorji) or to give any notice to the Seller. The Guarantor Bank has also acknowledged that the Bank Guarantee can be assigned by the Procurers.

36. Thus, all the averments clearly bring out the unconditional character of the Contract Performance Guarantees. There can be no debate over this. The emphasis placed on the words 'as per the terms' found in the first paragraph to contend that it is conditional is totally misplaced.

A document has to be read as a whole and in the context of what precedes it and what follows it. Intent and purport of the document has to be gathered by reading it as a whole. It cannot be dissected. So read, the Contract Performance Guarantees clearly reveal their unconditional nature. Pertinently, there is no mention of any particular clause or articles of the PPA in the Bank Guarantees. In such circumstances, it is not possible to contend that the terms of the PPA are incorporated in the Bank Guarantee. In **Mahatma Gandhi Sahakara Sakkare Karkhane** and **Vinitec**, the Supreme Court has clarified that a mere mention of the principle agreement in the Bank Guarantee without referring to any specific clause thereof in the Bank Guarantee does not make it a conditional Bank Guarantee. It is true that the Supreme Court has in the above cases referred to a situation where the PPA was mentioned in the preamble. In the present cases, the words 'in terms of the PPA' are mentioned in the first introductory paragraph. So the same reasoning would be applicable to the instant Bank Guarantees. However, in our opinion, the same reasoning will

apply even to cases where there is a mere mention of the PPA anywhere in the body of the Bank Guarantee without quoting the articles thereof. In such situation, it cannot be said that because there is a reference to the PPA, PPA overrides the Bank Guarantee or it controls the Bank Guarantee. The Bank Guarantees in the present cases are very clear and unambiguous. Their unconditional nature is unquestionable. Rule of *Contra Proferentem* on which Mr. Kapur has relied upon is attracted only when there is any ambiguity in the interpretation of a document. Sans any ambiguity, this doctrine has no application to the instant Bank Guarantees. This submission must, therefore, be rejected. We have no hesitation in recording a conclusion that the Contract Performance Guarantees in this case are unconditional.

37. During the course of arguments, counsel urged that invocation of the Bank Guarantees will have to be stayed as there is existence of fraud. To examine this submission, we have carefully gone through the I.A. Nos.3 and 4 of 2017 filed by Essar Power and Shapoorji before the State Commission

and present applications viz. I.A. Nos.383 and 384 of 2017 filed by them in this Tribunal. We find that there is absolutely no mention of fraud in any of these applications. Alleging fraud is a serious matter. It is well settled that material particulars of fraud have to be set out. There is not a whisper about fraud in the applications. The facts of this case disclose that GUVNL has gone on extending time to fulfil Conditions Subsequent. Later, it asked Essar Power and Shapoorji to furnish additional Contract Performance Guarantee of Rs.80 crores so that time can be extended. Number of request letters were sent. During this correspondence, though additional Contract Performance Guarantee was not furnished, time was extended and ultimately, letters were written that if additional Contract Performance Guarantees are not furnished, PPAs will be terminated and Bank Guarantees will be invoked and encashed. Therefore, Essar Power and Shapoorji had enough notice of likelihood of Bank Guarantees being invoked and encashed. If there was any fraud, particulars thereof ought to have been set out in the applications or at least the applications could have been

amended. Interpretation of articles of the PPA and action taken thereunder by GUVNL cannot be termed as fraudulent. Even that is not stated in the applications. No foundation for fraud is laid in the applications. Submissions made across the bar are therefore not supported by pleadings. It was urged that during the hearing of the matters before the State Commission a statement was made by the officers of GUVNL that Bank Guarantees would not be encashed but contrary to this statement, Termination Notices were sent and threat was given that Bank Guarantees would be encashed. This allegation is denied on affidavit by GUVNL. This can by no means be described as fraud. In the circumstances, we reject the submission that there is any fraud in these cases.

38. So far as allegation of irretrievable injustice or injury or special equity is concerned, we do not find any foundation laid by the applicants to substantiate it. Moreover, irretrievable injustice, harm or injury or special equity must be of such an exceptional nature as would override the terms of the Guarantee and the adverse effect of an injunction being

granted restraining encashment of Bank Guarantee on commercial dealings in the country. We have already quoted the observations of the Supreme Court to the above effect in **U.P. State Sugar Corporation**. The Supreme Court has clarified in this case that in most cases, payment of money under a Bank Guarantee would adversely affect the bank and its customer, but for an injunction to be granted case of exceptional nature has to be made out. We may quote yet another paragraph from the said judgment.

“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 Corpn. case. In that case an exporter in USA 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 US 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 he 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 Itek case there was a certainty on this issue.”

Similar view has been taken by the Supreme Court in **Vinitec**. Thus, to avail of the exception of irretrievable injury or special equity exceptional circumstances which make it impossible for the Guarantor to reimburse himself, if he ultimately succeeds, will have to be decisively established, which the Applicants have not done in this case.

39. Reliance placed by the Applicants on **Hindustan Construction Company** is misplaced. In our opinion, the said judgment cannot be applied to the facts of this case and has been rightly distinguished by the State Commission. Paragraphs 13 and 14 of the said judgment read as under:

13. The Bank, in the above guarantee, no doubt, has used the expression “agree unconditionally and irrevocably” to guarantee payment to the Executive Engineer on his first demand without any right of objection, but these expressions are immediately qualified by following:

“... in the event that the obligations expressed in the said clause of the above-mentioned contract

have not been fulfilled by the contractor giving the right of claim to the employer for recovery of the whole or part of the advance mobilisation loan from the contractor under the contract.”

14. *This condition clearly refers to the original contract between HCCL and the defendants and postulates that if the obligations, expressed in the contract, are not fulfilled by HCCL giving to the defendants the right to claim recovery of the whole or part of the “advance mobilisation loan”, then the Bank would pay the amount due under the guarantee to the Executive Engineer. By referring specifically to clause 9, the Bank has qualified its liability to pay the amount covered by the guarantee relating to “advance mobilisation loan” to the Executive Engineer only if the obligations under the contract were not fulfilled by HCCL or HCCL has misappropriated any portion of the “advance mobilisation loan”. It is in these circumstances that the aforesaid clause would operate and the whole of the amount covered by the “mobilisation advance” would become payable on demand. The Bank Guarantee thus could be invoked only in the circumstances referred to in clause 9 whereunder the amount would become payable only if the obligations are not fulfilled or there is misappropriation. That being so, the Bank Guarantee could not be said to be unconditional or unequivocal in terms so that the defendants could be said to have had an unfettered right to invoke that guarantee and demand immediate payment thereof from the Bank. This aspect of the matter was wholly ignored by the High Court and it unnecessarily interfered with the order of injunction, granted by the Single Judge, by which the defendants were restrained from invoking the bank guarantee.”*

40. The above paragraphs make it clear that the Bank Guarantee involved in the said case was conditional. Though the Bank Guarantee uses the expression “agree unconditionally and irrevocably”, it is qualified with the expression that “.....in the event that the obligations expressed

in the said clause of the abovementioned contract have not been fulfilled by the contractor giving the right of claim to the employer for recovery of the whole or part of the Advance Mobilization Loan from the contractor under the contract". The employer was given a right of recovery of whole or part of the Advance Mobilization Loan from the contractor under the contract, if the contractor did not perform his obligations. The employer had no unfettered right to invoke the Bank Guarantee. Reliance placed on this judgment is, therefore, misplaced.

41. It was urged on behalf of the Applicants that the State Commission should have heard the main petition and examined the case of Force Majeure. It was necessary to see whether Bank Guarantees should have been ordered to be returned. It was necessary to compute the claim. It is not possible to accept this submission. Invocation and encashment of Bank Guarantee is not dependent on the final adjudication of liability between the parties. If such a view is taken the sanctity of Bank Guarantee will be eroded and there

will be havoc in the commercial world. We have already quoted relevant paragraph from **Ansal Engineering** where the Supreme Court has rejected this submission. The Supreme Court restated in this judgment that all the clauses of the contract of the Bank Guarantee are to be read together; Bank Guarantee is an independent contract between the Bank and the beneficiary and 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. In coming to this conclusion, the Supreme Court drew support from its previous judgments in **Hindustan Steel Workers Construction Ltd. v. G.S. Atwal & Co. (Engineers) Pvt. Ltd.**¹³ and **Hindustan Steelworks Construction Ltd. v. Tarapore & Co. & Anr.**¹⁴ and held that final adjudication is not a precondition to invoke the Bank Guarantee and that is not a ground to issue injunction restraining the beneficiary from enforcing the Bank Guarantee.

¹³ (1995) 6 SCC 76

¹⁴ (1996) 5 SCC 34

42. Heavy reliance was placed on behalf of the Applicants on the judgment of the Supreme Court in **Gangotri**. We are of the opinion that the said judgment is not applicable to this case. We do not think that in that case, the Supreme Court took a different view from the law settled by it in a catena of judgments crystallising principles underlying invocation and encashment of Bank Guarantees. In fact, after referring to number of leading cases, which include **U.P. State Sugar Corporation**, the Supreme Court has in **Gangotri** said that, these judgments lay down general principles relating to Bank Guarantees and there can be no quarrel over the propositions laid down in those cases. The Supreme Court then reiterated that every case has to be decided with reference to the facts of the case involved therein and then discussed the peculiar facts of the case before it. Reliance was placed by the Applicants on the observations of the Supreme Court in this case that the sum claimed was neither an admitted sum, nor a sum which was adjudicated upon in any judicial proceedings. It is submitted that even in this case, the sum is not adjudicated upon. But it must be noted that this is not the only

circumstance that weighed with the Supreme Court. The Supreme Court observed that the sum claimed by the Respondents from the Appellants therein did not relate to the contract for which the Bank Guarantee had been furnished but it related to another contract dated 22/08/2005 for which no Bank Guarantee had been furnished. Perhaps the most important fact which distinguishes it from other cases and which was noted by the Supreme Court was that the Bank Guarantee was in the nature of a Performance Guarantee furnished for execution work of contract dated 14/07/2006, which was completed and the work having been completed to the satisfaction of the Respondents, they had no right to encash the Bank Guarantee. Thus, this case turns on its own peculiar facts. It does not take a view contrary to the view taken by the Supreme Court in earlier judgments to which we have made a reference that adjudication of claim is not a precondition to invocation and encashment of a Bank Guarantee. Facts of **Gangotri** can never be equated with the facts of the present case. We may advantageously refer to the Delhi High Court's judgment in **TRF Limited v. ENERGO**

Engineering Projects Limited¹⁵, where the Delhi High Court has distinguished **Gangotri**.

43. Reliance placed on **Kailash Nath** is also misplaced. In that case, the Supreme Court was considering the arbitrary forfeiture of earnest money by the DDA. One of the questions urged before the Supreme Court was whether even if there was a contractual stipulation in favour of DDA, it could appropriate the earnest money without any loss being caused to it. The Supreme Court considered Section 74 of the Contract Act and *inter alia* held that damage or loss is *sine qua non* for the applicability of the Section.

44. We cannot apply this judgment to the present case involving invocation and encashment of Bank Guarantee. The settled principles of law laid down by the Supreme Court will have to be applied to it. Proof of loss or damage is not necessary for invocation and encashment of a Bank Guarantee.

¹⁵ Judgment dated 17/02/2017 in O.M.P. (I) (Comm) No.55 of 2017

45. In **Roadways Solutions India Private Limited v. Reliance Infrastructure Limited**¹⁶, the Bombay High Court has held that unfair conduct of the contractor or possible financial crunch (financial civil death) which the person is likely to suffer is no ground for issuing injunction order against encashment of Bank Guarantee. It is held that, it can be a good ground to be urged before the arbitral tribunal. In **BSES Ltd. (Now Reliance Energy Ltd.) v. Fenner India Ltd. & Anr.**¹⁷, while reiterating the well settled principles, the Supreme Court has held that indeed, as per the terms of the Bank Guarantee itself, the Appellant therein was the best judge to decide as to when and for what reason the Bank Guarantee should be encashed and it is no function of the Bank nor of the Supreme Court to enquire as to whether due performance had actually happened when under the terms of the Guarantee, the Bank was obliged to make payment when the Guarantee was called in, irrespective of any contractual dispute between the parties. The Supreme Court noticed that

¹⁶ (2016) SCC Online Bom. 3496

¹⁷ (2006) 2 SCC 728

arbitral proceedings were pending and observed that there was no case of irretrievable injustice, if the Appellant therein was allowed to encash the Bank Guarantee because justice can always be rendered to the first Respondent therein, if it succeeds before the Arbitrators. On the same lines, we feel that equities can be adjusted and relief can be given to the Applicants if they succeed in the pending petitions. Encashment of Bank Guarantees cannot be stayed on that ground.

46. Our attention is drawn to the various clauses of the PPA relating to Force Majeure, return of Bank Guarantee, etc. It is pointed out by Mr. Sen that in terms of Article 3.4.3 and Article 11.5.1 of PPA dated 15/05/2010, the Procurer has an obligation to release/return the Bank Guarantee to the Seller if the Seller is able to establish that the termination is on account of Force Majeure Events. It is submitted that when the issue as to whether Force Majeure Events have occurred or not is pending, GUVNL cannot unilaterally invoke the Bank Guarantee as that would render Articles 3.4.3 and 11.5.1 of

the PPA otiose. All these issues, in our opinion, arise in the dispute between GUVNL on the one hand and Essar Power and Shapoorji on the other hand and cannot be used to stall the invocation and encashment of Bank Guarantees. Mr. Sen submitted that in the PPA an exit route was available to Essar Power. Essar Power had issued Termination Notice dated 19/05/2015 to GUVNL terminating the PPA but GUVNL forced it to withdraw the termination notice by threatening that it would issue a termination notice and invoke the Bank Guarantee. The exit route which was provided in the PPA was not made available to Essar Power by issuing threats. This submission is not raised either in the applications before the State Commission or in the present applications. In any case, Mr. Ramachandran, learned counsel for GUVNL has stated that this submission which is raised for the first time is canvassed without stating the implication of the extensive correspondence between the parties and the meetings held between the two sides. It appears that after the Termination Notice dated 19/05/2015 issued by Essar Power, meetings were held between the two parties on 03/08/2015 and

23/09/2015. Thereafter, Essar Power withdrew the termination notice. Thus, even this issue and other issues discussed above arise in the dispute between GUVNL and Essar Power and GUVNL and Shapoorji which will have to be decided after considering all the attendant circumstances. The Bank Guarantee is an independent contract between the Bank and the beneficiary and, is absolute in nature and is not qualified or dependent on the dispute between the beneficiary and the party at whose instance it is given. We have already stated that this case does not fall in any of the exceptions where the encashment of Bank Guarantee can be stayed. Therefore, on account of the aforementioned disputes, the Contract Performance Guarantees of the present case cannot be stayed.

47. It was urged that it was necessary for the State Commission to hear the main petition along with the interim applications. This is not a case where the State Commission was required to consider the merits of the case at the stage of considering whether injunction restraining encashment of

Bank Guarantee should be granted or not. There is no fraud of egregious nature. No case of special equities or irreparable harm or injury is made out. Moreover, the Gujarat High Court had not acceded to the request of Shapoorji that the main petition should be heard on merits and, therefore, the application containing the said prayer was withdrawn by Shapoorji. Besides, while directing that main matter should be disposed of by the State Commission, the Gujarat High Court has expressed that it will be open to the State Commission to dispose of the interim applications. Interim Application Nos.3 and 4 of 2017 were therefore taken up for hearing. The counsel also proceeded with the applications as the Record and Proceedings show. We find nothing wrong therefore in the State Commission taking up the interim applications for hearing and disposal.

48. In the ultimate analysis, we are of the view that the State Commission's orders are well reasoned and are perfectly legal. They merit no reversal. We, however, make it clear that all observations made by us on facts of the case are made for the

disposal of the interim applications. Needless to say that the State Commission shall dispose of the pending proceedings independently, and in accordance with law.

49. In view of the above, I.A. No.383 of 2017 and I.A. No.384 of 2017 are dismissed.

50. Before parting, we must mention a fact which was disclosed to us by Mr. Kapur, learned counsel appearing for Shapoorji. It appears that Shapoorji filed a commercial suit being Commercial Suit (L) No.300 of 2017 in the Bombay High Court against ICICI Bank Limited. A notice of motion was taken out in that suit being Notice of Motion (L) No.301 of 2017. The motion was moved before learned Single Judge in Vacation on 24/05/2017. Shapoorji appears to have prayed for injunction restraining the Bank from making payment pursuant to the invocation of Bank Guarantee at the request of GUVNL. Statement was made by the counsel for ICICI Bank that the matter is scheduled for hearing before this Tribunal on 25/05/2017 and, hence, Bank may not proceed on

GUVNL's request for invocation of Bank Guarantee till 27/05/2017. In view of this statement, the Bombay High Court did not grant any interim relief.

51. Mr. Kapur, learned counsel submitted that the Bank is not a party to the present proceedings, hence, suit was filed in the Bombay High Court. Mr. Ramachandran, learned counsel for GUVNL made a serious grievance that when the Bank Guarantee clearly states that the ICICI Bank has registered office at Vadodara and that the courts at Vadodara shall have exclusive jurisdiction, assuming such a suit could have been filed, it should have been filed in Vadodara. Mr. Ramachandra submitted that several proceedings were filed by the parties in the Gujarat High Court. Shapoorji could have therefore approached the Gujarat High Court. When interim relief was already granted by this Tribunal and the matter was fixed for hearing, the Applicant ought not to have tried to overreach this Tribunal. We find some substance in this submission. We are a little anguished at this conduct of Shapoorji. We leave it at that.

52. Pronounced in the Open Court on this 29th day of May,
2017.

I.J. Kapoor
[Technical Member]

Justice Ranjana P. Desai
[Chairperson]

√ **REPORTABLE/NON-REPORTABLE**