

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

IA NO. 542 OF 2017

IN

APPEAL NO. 205 OF 2017

Dated: 01st August, 2017

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

In the matter of :

**Simhapuri Energy Limited,)
Madhucon Greenlands, 6-3-866/2,)
3rd Floor, Begumpet, Hyderabad -)
500 016.) **Appellant(s)****

Vs.

**1. Central Electricity Regulatory)
Commission, Through its)
Secretary, Chanderlok)
Building, 36, Janpath Road,)
New Delhi - 110001.)**

**2. PowerGrid Corporation of)
India, a Government of India)
Undertaking, B-9, Qutab)
Industrial Area, Katawaria)
Sarai, New Delhi - 110 016.) **Respondent(s)****

**Counsel for the Appellant(s) : Mr. Ramji Srinivasan, Sr. Adv.
Mr. Matrugupta Mishra
Mr. Hemant Singh
Ms. Shikha Ohri
Mr. Nishant Kumar**

Counsel for the Respondent(s) : Ms. Suparna Srivasatava
Ms. Sanjana Dua for R.2

ORDER

1. The Appellant is a generating company. Respondent No.1 is the Central Electricity Regulatory Commission (“**the Central Commission**”). Respondent No.2 is the Power Grid Corporation of India Limited (“**PGCIL**”), which is the Central Transmission Utility (CTU) as per Section 38 of the Electricity Act, 2003 (“**the said Act**”). In this appeal the Appellant has challenged order dated 06/07/2017 passed by the Central Commission whereby the Central Commission has disposed of the petition filed by the Appellant. In the instant application, the Appellant has prayed that till disposal of this appeal, PGCIL may be restrained from taking any coercive action including but not limited to invocation and encashment of Letter of Credit (“**LC**”) dated 01/02/2017 issued by the State Bank of India, Hyderabad, against the Appellant.

2. Gist of the Appellant’s case needs to be stated. On 24/02/2010 the Appellant entered into Bulk Power Transmission Agreement (“**BPTA**”) with PGCIL for the purpose of evacuation of power from the Appellant’s power plant. On 18/07/2013 the

Appellant executed Transmission Service Agreement (“**TSA**”) with PGCIL for the purpose of payment of transmission charges. The Appellant participated in the bidding process and was selected for sale of 400 MW power to Southern Power Distribution Company of Andhra Pradesh Limited (“**APSPDCL**”) and Eastern Power Distribution Company of Andhra Pradesh Limited (“**APEPDCL**”). The Appellant was unable to enter into Power Purchase Agreement (“**PPA**”) with any distribution company in Western Region qua 135 MW. There was a balance capacity of 146 MW Long Term Access (“**LTA**”) (135 MW qua Western Region and 11 MW qua Southern Region) which the Appellant surrendered vide its letter 28/04/2017. On 10/06/2016 the Appellant wrote a letter to PGCIL apprising it that it had opened LC. The LTA was operationalised by PGCIL in July 2016, pursuant to which the Appellant has been paying transmission charges in terms of invoices raised by PGCIL. Vide its letter dated 02/12/2016 the Appellant informed PGCIL that though it had signed the Power Supply Agreement (“**PSA**”) with the Andhra Pradesh DISCOMs for sale of 400 MW power, pursuant to a tariff based competitive bidding process with power supply envisaged to commence from June, 2016 Andhra Pradesh DISCOMs had

approached Andhra Pradesh Electricity Regulatory Commission (“**APERC**”) on 13/12/2016 as a result of which the bid tariff of Rs.4.439/Kwh could not be adopted by APERC until December, 2016. The Appellant’s case is that the said delay in the adoption of tariff by APERC from June, 2016 to December, 2016 could not have been contemplated by the Appellant and as such was beyond its control.

3. Subsequently, Meenakshi Energy Private Limited (“**Meenakshi**”) filed Writ Petition No.6143 of 2017 in the Andhra Pradesh High Court challenging the disqualification of Meenakshi from the said bidding process on account of change in its ownership wherein the High Court restrained APERC from taking any final decision until disposal of the writ petition. APERC was however directed to continue the process of hearing objections against the adoption of tariff. It is the Appellant’s case that these subsequent developments are *force majeure* events in terms of Clause 9 of the BPTA and Article 14 of the TSA and they were beyond the control of the Appellant which resulted in delay in operationalisation of the PSA and consequent commencement of power under the said PSA.

4. According to the Appellant, on 23/12/2016 PGCIL encashed the LC of Rs. 14.90 Crores given by the Appellant. As requested by PGCIL the said amount was replenished by the Appellant on 01/02/2017. On 07/03/2017 PGCIL again proceeded to encash the LC amounting to Rs.3.27 Crores on account of outstanding LTA charges. The Appellant's case is that the delay in payment/non-payment of LTA charges is solely on account of reasons beyond the Appellant's control. The Appellant has pleaded occurrence of events of *force majeure* covered by Clause 9 of the BPTA and Article 14 of the TSA. According to the Appellant the unilateral act of PGCIL of encashing LC is unwarranted and unjustified. The Appellant therefore filed a petition before the Central Commission seeking suspension of payment of transmission charges to PGCIL in terms of the BPTA dated 24/02/2010 read with the TSA dated 18/07/2017 till the commencement of supply of power under the PSA to Andhra Pradesh DISCOMs. By the impugned order, the Central Commission has dismissed the said petition. As stated above, in this interim application the Appellant has prayed *inter alia* that PGCIL may be restrained from taking any coercive action against the Appellant.

5. We have heard Mr. Ramji Srinivasan learned Senior Advocate appearing for the Appellant and Ms. Suparna Srivastava learned counsel appearing for PGCIL. We have perused the written submissions filed by them. We notice that several allegations are made by the parties against each other, some of which are of a personal nature. We are not inclined to go into them because we need to consider only the basic facts of the case and the law relating to invocation and encashment of bank guarantee/LC. We shall refer to the submissions of the counsel relating to the above points.

6. Mr. Ramji Srinivasan learned Senior Advocate appearing for the Appellant contended that non-commencement of power supply is entirely due to delay on the part of AP Discoms in getting the PSA approved and tariff adopted by APERC and writ petition filed by Meenakshi in the High Court challenging the disqualification of Meenakshi from the bidding process, in which the High Court restrained APERC from taking any final decision until disposal of the writ petition. Counsel drew our attention to Clause 9 of the BPTA and submitted that the present case is clearly covered by the said clause. The above events were clearly beyond the control of the Appellant. Counsel submitted that the

Appellant has been paying transmission charges since the operationalization of the LTA in July, 2016. But the delay in payment or non-payment of transmission charges is solely due to *force majeure* events. The APERC failed to appreciate this important fact and in an arbitrary manner dismissed the petition. Our attention was also drawn to Article 14 of the TSA which defines *force majeure* giving it a wide amplitude. Counsel submitted that this case is not a typical case where invocation of LC cannot be stopped by injunction on the principle that the bank must honour its commitment and it is not concerned with the underlying dispute between the person who gives the bank guarantee or opens LC and the beneficiary or a third party. Here Clause 9 of the BPTA provides temporary amnesty from the obligations under the BPTA and the TSA. The Appellant is therefore seeking a temporary amnesty till the cessation of *force majeure* events thereby leading to commencement of supply of power under the BPTA. Counsel submitted that as a consequence of *force majeure* events, the liability of the Appellant towards payment of LTA charges to PGCIL stands suspended till the *force majeure* events cease to exist. Counsel submitted that the Appellant has a *prima facie* case. Irreparable loss would be

caused to the Appellant in case PGCIL is not restrained from encashing the LC. Hence it is necessary to restrain PGCIL from taking any coercive steps against the Appellant including but not limited to invocation and encashment of LC.

7. Ms. Suparna Srivastava, learned counsel for PGCIL on the other hand strongly opposed the prayers of the Appellant. Counsel submitted that the Appellant's case does not fall either within the scope of Clause 9 of the BPTA or Article 14 of the TSA. *Force majeure* situations contemplated therein relate to the "flow of power" from the transmission system and have no nexus with the issues faced by the generators with third parties. Counsel submitted that the existence of long term PPA for evacuation of power is not a condition precedent for payment of transmission charges under the BPTA and the TSA. Therefore, pendency of proceedings in the court does not constitute *force majeure* either under the BPTA or under the TSA. Counsel relied on Section 38(2)(d) of the said Act, the CERC (Grant of Connectivity, Long Term Access, Medium Term Open Access in Inter State Transmission and Related Matters) Regulations, 2009 ("**the Connectivity Regulations**") read with CERC Sharing Regulations, 2010 ("**the Sharing Regulations**") and the

obligations contained in the BPTA. Counsel submitted that disability which the Appellant may face qua its obligations vis-a-vis a third party is not a subject matter of the BPTA. PGCIL is not concerned with the contractual obligations between the Appellant and its beneficiary. Any dispute between them cannot be claimed as a *force majeure* event for performance of obligations under the BPTA. Counsel submitted that principles relating to enforcement of a bank guarantee or LC are well settled. Bank has to honour its commitment irrespective of any dispute between the party giving the bank guarantee and its beneficiary. There is no fraud or irretrievable injury or injustice in this case. Hence, PGCIL must be allowed to encash the LC. In support of this, Counsel relied on the judgments of the Supreme Court in **U.P. Cooperative Federation Ltd. v. Singh Consultants and Engineers (P) Ltd.**¹, **Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co.**² and **M/s Adani Agri Fresh Ltd. v. Mahaboob Sharif & Ors.**³ Counsel submitted that balance of convenience is also not in favour of the Appellant. Counsel urged that in the circumstances the application be dismissed.

¹ (1988) 1 SCC 174,

² (2007) 8 SCC 110

³ AIR 2016 SC 92

8. The Appellant applied for and was granted LTA. Admittedly, on 24/02/2010 the Appellant entered into BPTA dated 24/02/2010 with PGCIL for the purposes of evacuation of power from its power plant. On 18/07/2013 the Appellant entered into TSA dated 18/07/2013 with PGCIL for the purpose of payment of transmission charges. After the generating station of the Appellant achieved CoD, PGCIL by its letter dated 07/12/2015 intimated to the Appellant that LTA was to commence shortly and it should open LC. The Appellant opened LC for Rs.25.36 crores on 10/06/2016. Consequent to that the Appellant started paying transmission charges to PGCIL since July, 2016. Pertinently the Appellant did not have long term PPA, yet it continued to pay the transmission charges. As stated above according to the Appellant thereafter though the Appellants had signed PSA with AP Discoms, AP Discoms approached the High Court as a result of which the bid tariff of Rs.4.439/Kwh could not be adopted by APERC till December, 2016. In addition to that Meenakshi filed writ petition in the High Court challenging its disqualification from the bidding process wherein APERC was restrained from taking any final decision until final disposal of the writ petition. According to the Appellant these developments

are *force majeure* events covered by Clause 9 of the BPTA and Article 14 of the TSA which were beyond its control and which resulted in delay in operationalisation of the PSA and consequent commencement of power under the PSA. The Appellant's case is that reasons for the non payment of LTA charges are due to these events and therefore payment of transmission charges must be suspended and during the pendency of this appeal PGCIL must be restrained from encashing LC.

9. To examine this contention we must first notice Section 38(2)(d) of the said Act under which PGCIL is enjoined to provide non-discriminatory open access to any licensee or generator on payment of transmission charges. So far as it is relevant it reads thus:

38. Central Transmission Utility and functions –

(1) The Central Government may notify any Government company as the Central Transmission Utility.

xxx xxx xxx xxx
xxx xxx xxx xxx

(2) The functions of the Central Transmission Utility shall be –

xxx xxx xxx xxx

xxx xxx xxx xxx
xxx xxx xxx xxx

(d) to provide non-discriminatory open access to its transmission system for use by-

(i) any licensee or generating company on payment of the transmission charges; or

(ii) any consumer as and when such open access is provided by the State Commission under sub-section (2) of section 42, on payment of the transmission charges and a surcharge thereon as may be specified by the Central Commission:

10. Our attention is drawn to Connectivity Regulations which lay down elaborate scheme for providing open access. The Central Commission has quoted Clause (1) of Regulation 12 of Connectivity Regulations which must be reproduced here. It reads as under:

Clause (1) of Regulation 12

“Provided that in the case where augmentation of transmission system is required for granting open access, if the quantum of power has not been firmed up in respect of the person to whom electricity is required to be supplied or the source from which electricity is to be procured, the applicant shall indicate the quantum of power along with the name of the region(s) in which the electricity is proposed to be interchanged using the inter-State Transmission System;

Provided further that in case augmentation of transmission system is required, the applicant shall have to bear the transmission charges for the same as per these regulations, even if the source of supply or off-take is not identified;”

11. We concur with the Central Commission that the above provision has been made in order to enable CTU/PGCIL to make transmission systems for the LTA customer based on their applications for transfer of power to the target regions in the absence of PPA and the interest of CTU/PGCIL is secured by providing that in the absence of identified beneficiaries for supply of power, the LTA customer shall be liable to pay transmission charges. *Prima facie* it appears to us that as the Appellant is a LTA customer and system strengthening has been carried out by PGCIL based on the Appellant’s application the Appellant is liable to pay transmission charges.

12. We have also carefully perused the relevant clauses of the BPTA. *Prima facie* it appears to us from the said clauses that PGCIL has undertaken to provide open access to the Appellant for agreed quantum from the scheduled date of open access and the Appellant has undertaken to share and pay transmission

charges for such open access from the scheduled date of commissioning of generation projects, irrespective of their actual dater of commissioning.

13. Since the Appellant has relied on Clause 9 of the BPTA and Article 14 of the TSA we must reproduce them. They read as under:

Clause 9 of the BPTA dated 24/02/2010

“9.0 The parties shall ensure due compliance with the terms of this Agreement. However, no party shall be liable for any claim for any loss or damage whatsoever arising out of failure to carry out the terms of the Agreement to the extent that such a failure is due to force majeure events such as war, rebellion, mutiny, civil commotion, riot, strike, lock out, fire, flood, forces of nature, major accident, act of God, change of law and any other causes beyond the control of the defaulting party. But any party claiming the benefit of this clause shall satisfy the other party of the existence of such an event and give written notice of 30 days to the other party to this effect. Transmission/drawal of power shall be started as soon as practicable by the parties concerned after such eventuality has come to an end or ceased to exist.”

Article 14 of the TSA dated 18/07/2013

“14.0 Force Majeure

The following terms shall have the meanings given hereunder.

14.1 An 'Affected Party' means any of the DICs or the ISTS Licensees whose performance has been adversely affected by an event of Force Majeure.

14.2 A 'Force Majeure' means any event or circumstance or combination of events and circumstances including those stated below that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices”

14. We are unable to agree with the contention of the Appellant that in view of the *force majeure* situations covered by the above clauses they could not pay the transmission charges, hence the PGCIL must be restrained from invoking LC.

15. The law relating to invocation of bank guarantee / LC is well settled by the Supreme Court. We may refer to the observations of the Supreme Court in **Ansal Engineering**

Projects Ltd. v. Tehri Hydro Development Corporation

Ltd. & Anr.⁴. Following are the relevant observations:

“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 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

⁴ (1996) 5 SCC 450

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.* (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.*, 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.”

16. In **U.P. State Sugar Corporation v. Sumac International Limited**⁵, the Supreme Court observed 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

⁵ (1997) 1 SCC 568

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.* 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* (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.”

17. After referring to the above judgments of the Supreme Court and the judgments of the Supreme Court in **Mahatma Gandhi Sahakara Sakkare Karkhane v. National Heavy Engineering Cooperative Limited & Anr.**⁶, **Vinitec Electronic Private Limited v. HCL Infosystem Ltd.**⁷, **Adani Agri Fresh, and Gujarat Maritime Board v. Larsen & Toubro Infrastructure Development Projects Limited & Anr.**⁸, this Tribunal in **Shapoorji Pallonji Energy (Gujarat) Private Limited v. Gujarat Electricity Regulatory Commission & Anr.**⁹ summed up the law as under:

“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

⁶ (2007) 6 SCC 470

⁷ (2008) 1 SCC 544

⁸ (2016) 10 SCC 46

⁹ Judgment dated 29/05/2017 in IA No.384 of 2017 in Appeal No.161 of 2017

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.”

18. Thus, this Tribunal should not interfere with invocation and encashment of LC 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. There is no question of making out any prima facie case by the person seeking injunction. In this case, there is no fraud. The fact that PGCIL invoked the LC on 04/07/2017 though the Delhi High Court had granted protection does not constitute a fraud much less a fraud of egregious nature.

19. In this connection, we must refer to the explanation offered by PGCIL. PGCIL has pointed out that by its order dated 26/05/2017, the High Court ordered that till the petition is taken up for hearing on 20/06/2017 by the Central Commission, PGCIL shall not invoke the LC. However, PGCIL was given liberty to take all preliminary steps including raising of claim and issuing notices to the Appellant. The Delhi High Court further clarified that in case the petition is taken up by the Central Commission on 20/06/2017 and the Central Commission decides to defer or decline the request of the Appellant for an interim protection, the interim protection granted by the Delhi High Court shall cease and PGCIL would be at liberty to take appropriate steps in accordance with law.

20. According to PGCIL, with respect to the power evacuation from its generation project under the subject LTA, the Appellant had filed two petitions viz. Petition No.103/MP/2017 for exemption from payment of transmission charges due to occurrence of *force majeure* events and Petition No.129/MP/2017 for relinquishment of part LTA without any liability to pay relinquishment charges. The LC given under the LTA was the same under both the petitions. Pertinently, while Petition No.103/MP/2013 (out of which the present proceedings arise) was listed on 20/06/2017 as per the order of the High Court and was taken up for hearing, Petition No.129/MP/2017 was not listed on the said date. The Appellant had made a request to the Central Commission for taking up Petition No.129/MP/2017 and IA No.37/2017 also for hearing along with Petition No.103/MP/2017 for restraining PGCIL from taking any coercive action vis-à-vis invoking the LC for payment of transmission charges. This request was opposed by PGCIL as Petition No.129/MP/2017 had not been listed on the said date. The Central Commission acknowledged PGCIL's objections and refused to grant any relief to the Appellant as reflected in the Record of Proceedings for 20/06/2017 in Petition

No.129/MP/2017. However, in the ordinary course, Central Commission issued notices with directions to the Respondents to file their replies. The Commission had orally observed that it was not to interfere in commercial transactions as between the parties. When during the course of arguments in Petition No.129/MP/2017, the Appellant again insisted for interim protection against any coercive action from PGCIL, the Central Commission observed as under:

“2. Learned senior counsel submitted that the Petitioner has also filed an IA for restraining the Respondent from taking any coercive actions against the Petitioner till decision is taken in Petition No.103/MP/2017 on the issue of payment of PoC charges. The Commission declined to issue any direction in this regard without hearing the respondent.”

21. Thus, the Central Commission reiterated its directions given orally in Petition No.103/MP/2017 declining to give any protection to the Appellant qua coercive actions of PGCIL which naturally included invocation of the available security in the form of LC towards realization of the unpaid transmission charges. According to PGCIL, it was in these circumstances, after the Record of Proceedings in Petition No.129/MP/2017 were

uploaded on the website of the Central Commission that they proceeded to take action towards invocation of the subject LC for utilisation of unpaid transmission charges. It appears to us that PGCIL invoked the LC on a bonafide interpretation of the Delhi High Court's order and the Central Commission's order that the interim order was not continued.

22. Mr. Srinivasan, learned Senior Advocate, however contended that this explanation is misleading and is hogwash and that PGCIL attempted to play fraud qua invocation of LC. We are unable to accept this submission. After considering the explanation offered by the PGCIL, we are unable to attribute any malafides to PGCIL. No fraud can be alleged against PGCIL.

23. We have already noted that the Appellants are bound by the contractual obligations under the BPTA and as per the relevant regulations to pay the transmission charges even if the identified beneficiaries are absent because system strengthening is done by PGCIL on the application of the Appellant.

24. The Central Commission has observed in the impugned order that the LTA was operationalised after CoD of the transmissions covered under the BTTA, even in the absence of long term PPA, and the Appellant had been paying the transmission charges. The Central Commission has further observed that existence of long term PPA is thus not a condition precedent for payment of transmission charges under the BPTA and TSA and if the PSA subsequently entered into by the Appellant could not be given effect on account of pendency of the proceedings in the High Court, the same shall not constitute *force majeure* under either the BPTA or the TSA. *Prima facie*, we find this reasoning to be sound.

25. This case is, in our opinion, completely covered by the above mentioned judgments of the Supreme Court. The dispute between the Appellant-generators and A.P. Discoms-third parties cannot prevent the bank from honouring the LC in the absence of fraud of egregious nature or irreparable harm or injustice to either party. Situations which fall within the exception carved out by the Supreme Court are not present here. Irreparable harm, if any, will be caused to PGCIL, if transmission charges are

not paid by the Appellant for whom the system strengthening is done.

26. In the circumstances, the Appellant is not entitled to any relief. Application is dismissed. Interim protection stands vacated. We, however, make it clear that our observations touching the merits of the case are prima facie observations made for the purpose of dealing with interim application.

27. List the main appeal on **02nd November, 2017**. In the meantime pleadings be completed.

28. Pronounced in the Open Court on this **01st day of August, 2017**.

I.J. Kapoor
[Technical Member]

Justice Ranjana P. Desai
[Chairperson]

√ **REPORTABLE/NON-REPORTABLE**