

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

COURT I

IA NO. 1294/2022 & IA NO. 719/2022
IN
APPEAL NO. 206/2022 & IA-135/2023

Dated : 30.01.2023

Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member

In the matter of:

Juniper Green Energy Private Limited Appellant(s)
Versus
Maharashtra Electricity Regulatory Commission & Ors. Respondent(s)

Counsel for the Appellant(s) : Mr. Vishrov Mukerjee,
Ms. Juhi Senguttuvan
Mr. Pratyush Singh

Counsel for the Respondent(s) : Mr. Anup Jain
Ms. Prachi Gupta
Mr. Vyom Chaturvedi for Res.2,

ORDER

IA 719 of 2022 was filed, in this Appeal (ie Appeal No.206 of 2022), on 09.05.2022 seeking the following reliefs: (a) to grant *ad interim ex parte* stay of operation of the Impugned Order dated 06.05.2022 in Case No. 50/AT/2022 passed by the Maharashtra State Electricity Distribution Company Ltd ("MSEDCL" for short); and (b) to grant *ad interim ex parte* stay on the Letter of Award dated 10.05.2022 issued by MSEDCL to the Appellant. Thereafter IA No. 1294 of 2022 was filed, by the Appellant on 12.08.2022, seeking the following reliefs: - (a) to stay the Notice dated

10.08.2022 issued by MSEDCL and any consequential action by MSEDCL till final adjudication of Appeal No. 206 of 2022; (b) to issue appropriate directions to MSEDCL so as not to initiate any precipitative/ coercive action against the Appellant; and (c) to stay invocation and / or encashment of the Bank Guarantee.

In the proceedings held on 18.08.2022, this Tribunal recorded the submission, made on behalf of the Respondents, that they would not take any further precipitative action of invocation/encashment of the Bank Guarantee till the next date of hearing, and directed that the matter be listed for hearing on 01.09.2022. In the proceedings held on 01.09.2022, this Tribunal, while listing the matter on 13.09.2022, directed the interim arrangement to continue. Thereafter, in the proceedings held on 27.09.2022, the matter was directed to be listed for hearing on 16.12.2022 and, by proceedings dated 16.12.2022, the appeals were directed to be listed on 24.01.2023.

When the IAs were taken up on 24.01.2023, elaborate submissions were made on merits, by Sri Vishrov Mukerjee, Learned Counsel for the Appellant, with regards all the prayers sought for therein. We have, for the present, confined our examination to the relief sought by way of prayer (c) in IA No. 1294 of 2022, ie to stay invocation and encashment of the Bank Guarantee, in view of the insistence of Sri Vishrov Mukerjee that the interim Order passed by this Tribunal earlier, (whereby encashment of the bank guarantee was restrained), should not be vacated, and must be continued till the main appeal is finally heard; or the main appeal itself should be heard at this stage. As Appeals relating to the year 2014 are still pending, we may not be justified in taking up an Appeal relating to the year 2022 out of turn.

RELEVANT FACTS:

Facts, to the extent relevant for adjudication of prayer (c) in IA No. 1294 of 2022, are that the notice issued by the MSEDCL dated 10.08.2022, (stay

of which was also sought in IA No. 1294 of 2022), records that an LOA was issued to the Appellant for procurement of power, from the 170 MW capacity solar power project, on long term basis through competitive bidding under MSKVY scheme with the following terms and conditions: (a) the Power Purchase Agreement (PPA) shall be signed within 2 (Two) months from the date of issuance of the LoA; (b) the Performance Bank Guarantee (PBG), by way of irrevocable Bank Guarantee in the form and manner as per the provisions of Clause 3.9 of RFS, in favour of MSEDCL shall be submitted within 30 (Thirty) days from the date of issuance of the LOA. The PBG validity period shall be of Fourteen (14) months from the date of issuance of the LOA, and (c) MSEDCL reserved the right for encashment of EMD in the form of Bank Guarantee as per the terms and conditions of the tender documents.

The Notice dated 10.08.2022, thereafter, records that the Appellant was required to submit a Performance Bank Guarantee ("PBG" for short) by 10.06.2022, and sign the PPA before 10.07.2022, but till date the PBG was not submitted; in case the Appellant does not submit PBG as per the above terms and conditions then, as per clause 3.10.iv of the RFS, MSEDCL would encash the Performance Bank Guarantee towards EMD in the following case ie "if the bidder fails to furnish the required Performance Bank Guarantee in accordance with Section 3.9"; and in view of the above, and as the Appellant had failed to submit the PBG within 30 days from the date of issuance of the LOA, MSEDCL was constrained to initiate action as per RFS/LOA clauses.

As is evident from the contents of the Notice dated 10.08.2022, Clause 3.10.iv of the RFS (the Underlying Document) enables the Performance Bank Guarantee, furnished towards Earnest Money Deposit, to be encashed if the bidder does not submit the Performance Bank Guarantee within time.

THE CONTRACT OF BANK GUARANTEE IS A CONTRACT INDEPENDENT OF THE UNDERLYING TRANSACTION:

A bank guarantee is an independent and distinct contract, between the bank and the beneficiary, and is not qualified by the underlying transaction between the person at whose instance the bank guarantee was given and the beneficiary. Subject to limited exceptions, the beneficiary cannot be restrained from encashing the bank guarantee even if the dispute, between the beneficiary and the person at whose instance the bank guarantee was given by the bank, had arisen in the performance of the contract. (**Ansal Engg. Projects Ltd. v. Tehri Hydro Development Corpn. Ltd., (1996) 5 SCC 450; Standard Chartered Bank -v- Heavy Engineering Corporation Limited and Anr, (2020) 13 SCC 574**). Both the bank and the beneficiary are bound by, and its invocation should only be in accordance with, the terms of the bank guarantee. (**Standard Chartered Bank v. Heavy Engg. Corpn. Ltd., (2020) 13 SCC 574; Hindustan Construction Co. Ltd. v. State of Bihar, (1999) 8 SCC 436**).

If the bank guarantee furnished is unconditional and irrevocable, the person in whose favour the guarantee is furnished by the bank cannot be prevented by way of an injunction from enforcing the guarantee on the pretext that the condition for enforcing the bank guarantee, in terms of the underlying transaction between the parties, has not been fulfilled. The appellant cannot, merely because a dispute exists in terms of the underlying transaction, prevent MSEDCL from enforcing the bank guarantee by way of injunction save in exceptional circumstances. (**Mahatma Gandhi Sahakra Sakkare Karkhane v. National Heavy Engg. Coop. Ltd., (2007) 6 SCC 470; Adani Agri Fresh -v- Mehboob Sharif and Ors, AIR 2016 14 SCC 517; U.P. State Sugar Corpn. v. Sumac International Ltd., (1997) 1 SCC**

568; *Ansal Engineering Projects Ltd. v. Tehri Hydro Development Corpn. Ltd.*, (1996) 5 SCC 450).

Once the documents are in order, the bank giving the guarantee must, ordinarily, honour the same and make payment. (***U.P. State Sugar Corpn. v. Sumac International Ltd.*, (1997) 1 SCC 568; *State of Maharashtra v. National Construction Co.* [(1996) 1 SCC 735).** Encashment of the amount specified in the bank guarantee does not depend upon the result of the decision in the dispute between the parties, in case of a breach. (***Ansal Engineering Projects Ltd. v. Tehri Hydro Development Corpn. Ltd.*, (1996) 5 SCC 450).**

It is wholly unnecessary for us, in order to decide prayer (c) in this Interlocutory Application, to examine which of the rival contentions, either in the main appeal or in the first two prayers in this IA or the prayers in IA 719 of 2022, necessitate acceptance, since the validity or otherwise of such submissions would be subjected to examination when the main appeal is finally heard, and is of no consequence in considering the relief sought, by the appellant in prayer (c) of this I.A, to restrain the Respondent from invoking /encashing the bank guarantee. What arises for consideration as at present is only whether, pending disposal of the main appeal, this Tribunal would be justified in granting stay of invocation of the subject Bank Guarantee, and nothing more.

IS THE BANK GUARANTEE UNCONDITIONAL?

The bank is obliged to honour its guarantee as long as it is unconditional and irrevocable. (***Standard Chartered Bank v. Heavy Engg. Corpn. Ltd.*, (2020) 13 SCC 574).** A bank guarantee must be construed on its own terms, as it is considered to be a separate transaction. (***SBI v. Mula Sahakari Sakhar Karkhana Ltd.*, (2006) 6 SCC 293; *Standard Chartered Bank v. Heavy Engg. Corpn. Ltd.*, (2020) 13 SCC 574).** The bank guarantee should be in unequivocal terms, unconditional and recite that the

amount would be paid without demur or objection, and irrespective of any dispute that may have cropped up or may be pending between the beneficiary under the bank guarantee and the person on whose behalf the guarantee was furnished. **(Standard Chartered Bank v. Heavy Engg. Corpn. Ltd., (2020) 13 SCC 574; Hindustan Construction Co. Ltd. v. State of Bihar, (1999) 8 SCC 436).**

The terms of the bank guarantee are material. Since the bank guarantee represents an independent contract between the bank and the beneficiary, both the parties would be bound by its terms. The invocation, therefore, should be in accordance with the terms of the bank guarantee. **(Hindustan Construction Company Limited -v- State of Bihar, (1999) 8 SCC 436).** On a careful analysis of the terms and conditions of the guarantee, it must be found whether or not the guarantee is unconditional. The mere fact that the bank guarantee refers to the principal agreement does not make the guarantee furnished by the bank a conditional one. **(Vintec Electronics (P) Ltd. v. HCL Infosystems Ltd., (2008) 1 SCC 544; Mahatma Gandhi Sahakra Sakkare Karkhane v. National Heavy Engg. Coop. Ltd., (2007) 6 SCC 470; Adani Agri Fresh -v- Mehboob Sharif and Ors, AIR 2016 14 SCC 517)**

It is impermissible in law for an absolute and unequivocal bank guarantee to be read as a conditional one having regard to circumstances attending thereto. **(SBI v. Mula Sahakari Sakhar Karkhana Ltd., (2006) 6 SCC 293; Standard Chartered Bank v. Heavy Engg. Corpn. Ltd., (2020) 13 SCC 574).** Bank guarantees, which are payable by the guarantor on demand, are considered unconditional bank guarantees. When, in the course of commercial dealings, unconditional guarantees are given or accepted, the beneficiary is entitled to realise such a bank guarantee in terms thereof. **(Vintec Electronics (P) Ltd. v. HCL Infosystems Ltd., (2008) 1 SCC 544; Adani Agri Fresh -v- Mehboob Sharif and Ors, AIR**

2016 14 SCC 517; U.P. State Sugar Corpn. v. Sumac International Ltd., (1997) 1 SCC 568).

Bearing in mind the aforesaid principles, let us now examine the contents of the subject Bank Guarantee to ascertain whether or not it is unconditional. The said Performance Bank Guarantee dated 29.12.2021 records that IndusInd Bank Limited had issued the said Bank Guarantee in favour of MSEDCL, towards Earnest Money Deposit, in consideration of the Appellant submitting its response to the RFS, inter alia, for selection of the Project/Projects of the cumulative capacity of 170 MW for procurement of up to 1250 MW power from the Grid connected Solar Power Project on a long term basis, through competitive bidding process in response to the RFS dated 28.10.2021, and MSEDCL considering the response to the RFS of the Appellant as per the terms of the RFS. IndusInd Bank Limited agreed unequivocally, irrevocably and unconditionally to pay MSEDCL forthwith on demand, in writing from MSEDCL or any officer authorised by it in this behalf, any amount up to and not exceeding Rs. 170 Crores on behalf of the Appellant.

The Bank Guarantee further records that the guarantee shall be valid and binding on the Bank up to and including 18.06.2022, and shall not be terminable by notice or any change in the constitution of the Bank or the terms of contract or by any other reason whatsoever, and their liability shall not be impaired and discharged by any extension of time or variations or alterations made, given, or agreed to, acknowledged or consented, by or between the parties to the respective agreement. Their liability under the guarantee was restricted to Rs. 170 Crores. Their guarantee was to remain in force until 18.06.2022, and MSEDCL was entitled to invoke this guarantee till 18.06.2023. The Guarantor Bank agreed and acknowledged that MSEDCL shall have the right to invoke the bank guarantee in part or in full, as it may deem fit; it did not require any proof in addition to the written demand by MSEDCL, made in any format, raised at their address, in order

to make the said payment to MSEDCL. The Guarantor Bank would make payment on first demand without restriction or conditions, and notwithstanding any objection by the Appellant and/or any other person. The Guarantor Bank would not require MSEDCL to justify the invocation of this Bank Guarantee, nor shall the Guarantor Bank have any recourse against MSEDCL in respect of any payment made under the guarantee. The Bank Guarantee shall be the primary obligation of the Guarantor Bank and MSEDCL shall not be obliged, before enforcing the Bank Guarantee, to take any action in any court or arbitral proceedings against the bidder, to make any claim against or any demand on the Appellant or to give any notice to the Appellant to enforce any security held by MSEDCL or to exercise, levy or enforce any distress, diligence or other process against the Appellant. The Bank Guarantee dated 29.12.2021 concludes recording that IndusInd Bank will be liable to pay the guaranteed amount or any part thereof under the Bank Guarantee only if MSEDCL served upon them a written claim or demand.

Under the aforesaid Bank Guarantee, the Bank agreed unequivocally, irrevocably and unconditionally to pay MSEDCL forthwith on demand, in writing from MSEDCL. It provided that MSEDCL would have the right to invoke the bank guarantee in part or in full, as it may deem fit; it did not require any proof in addition to the written demand by MSEDCL, made in any format, to make payment; it would make payment on first demand without restriction or conditions, and notwithstanding any objection by the Appellant and/or any other person, and it would not require MSEDCL to justify invocation of this Bank Guarantee. It is evident, therefore, that the subject Bank Guarantee is unconditional, and MSEDCL cannot, save exceptions, be restrained from invoking it.

INTERFERENCE WITH ENFORCEMENT PERMISSIBLE ONLY IN CASE OF FRAUD OR SPECIAL EQUITIES:

The question of examining whether a prima facie case is made out,

and in whose favour the balance of convenience lies, does not arise as the Court cannot interfere with the unconditional commitment made by the bank in its guarantee. (**Adani Agri Fresh -v- Mehboob Sharif and Ors, AIR 2016 14 SCC 517; U.P. Coop. Federation Ltd. v. Singh Consultants and Engineers (P) Ltd., (1988) 1 SCC 174**) The two exceptions, for the refusal to grant an order of injunction to restrain the enforcement of a bank guarantee, are (i) fraud committed in the notice of the bank which would vitiate the very foundation of the guarantee; and (ii) injustice of the kind which would make it impossible for the guarantor to reimburse himself. (**Himadri Chemicals Industries Limited -v- Coal Tar Refining Company (2007) 8 SCC 110**). For Courts/Tribunals to interfere, fraud or special equities should, prima facie, be made out as a triable issue by strong evidence. (**Ansal Engg. Projects Ltd. v. Tehri Hydro Development Corpn. Ltd., (1996) 5 SCC 450; Standard Chartered Bank -v- Heavy Engineering Corporation Limited and Anr, (2020) 13 SCC 574**). Otherwise, the very purpose of bank guarantees would be negated and the fabric of trading operation will be in jeopardy. (**Adani Agri Fresh -v- Mehboob Sharif and Ors, AIR 2016 14 SCC 517; U.P. Coop. Federation Ltd. v. Singh Consultants and Engineers (P) Ltd., (1988) 1 SCC 174**)

It is unnecessary for us to examine whether the subject Bank Guarantee is vitiated by fraud, as Sri Vishrov Mukerjee, Learned Counsel for the Appellant, fairly states that the exception of “Fraud” is not attracted in the facts of the present case, and that stay of invocation of the Bank Guarantee is sought on the ground of special equities or irreparable harm being caused to the Appellant in case the Performance Bank Guarantee is encashed.

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. (**Vinitec Electronics (P) Ltd. v. HCL**

Infosystems Ltd., (2008) 1 SCC 544; Adani Agri Fresh -v- Mehboob Sharif and Ors, AIR 2016 14 SCC 517; U.P. State Sugar Corpn. v. Sumac International Ltd., (1997) 1 SCC 568; Himadri Chemicals Industries Limited -v- Coal Tar Refining Company (2007) 8 SCC 110). 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. (**Vinitec Electronics (P) Ltd. v. HCL Infosystems Ltd., (2008) 1 SCC 544; Adani Agri Fresh -v- Mehboob Sharif and Ors, AIR 2016 14 SCC 517; U.P. State Sugar Corpn. v. Sumac International Ltd., (1997) 1 SCC 568).**

To attract the ground of irretrievable injury, it must be decisively established and proved, to the satisfaction of the Court, that there would be no possibility whatsoever of recovery of the amount by the beneficiary. The irretrievable injury must be of the kind which was the subject-matter of the decision in **Itek Corporation. v. First National Bank of Boston, (566 Fed Supp 1210)**. In that case an exporter in the U.S.A. entered into an agreement with the Imperial Government of Iran and sought an order terminating its liability in terms of the letters of credit issued by an American bank in favour of an Iranian Bank as part of the contract. The relief was sought on account of the situation created after the Iranian revolution when the American Government cancelled the export licences in relation to Iran, and the Iranian Government had forcibly taken 52 American citizens as hostages. The U.S. Government had blocked all Iranian assets under the jurisdiction of the 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 realization of the bank guarantee/Letters of credit would cause irreparable harm to the plaintiff.

To avail of this exception, therefore, exceptional circumstances which make it impossible for the guarantor to reimburse himself if they ultimately succeed, 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 Corporation. v. First National Bank of Boston, (566 Fed Supp 1210)**, there was certainty on this issue. (**Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineerings Works (P) Ltd; U.P. State Sugar Corpn. v. Sumac International Ltd., (1997) 1 SCC 568; ITD Cementation India Ltd -v- Reliance Infrastructure Limited and Others (2014) SCCOnline Born 198**).

As held by this Tribunal, in **Shahpoorji Pallonji Energy (Gujarat) Private Limited-v- Gujarat Electricity Regulatory Commission& Anr., (decision in I.A. No.384 of 2017 in Appeal No.161 of 2017 dated 29.05.2017)**, 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, in the present case, must be that there would be no possibility whatsoever for the Appellant to recover the amount, received by MSEDCL on encashing the Bank Guarantee, if the main Appeal were to be allowed later.

F. THE PRESENT CASE DOES NOT FALL WITHIN THE EXCEPTION OF SPECIAL EQUITIES:

Let us examine what the Appellant has pleaded in this regard, and whether such pleadings suffice to attract the exception of special equities/irreparable harm or injury warranting MSEDCL being restrained from invoking the Bank Guarantee.

In IA No. 719 of 2022, wherein stay of operation of the order dated 06.05.2022 and the letter of award dated 10.05.2022 was sought, all that is stated is that the Appellant would suffer irreparable harm if the Order was

not stayed as, *inter-alia*, timelines for achieving SCOD and financial closure had already commenced, and the Appellant would be compelled to achieve financial closure as (a) LOA was not considered by the lenders for issuance of credit; and (b) the LOA records that the same shall not create any rights or contractual relationship with MSEDCL until the PPA is executed. The aforesaid plea of irreparable harm is not in the context of invocation of the bank guarantee, but is only in respect of the order dated 06.05.2022 and the letter of award dated 10.05.2022.

By its order dated 06.05.2022, the Regulatory Commission had approved procurement of power, adopted the tariff, and allowed MSEDCL to enter into Power Purchase Agreements with the successful bidders which included the Appellant. The Regulatory Commission also rejected the Appellant's request to allow the Schedule Commercial Operation Date as prescribed under the guidelines issued by the Ministry of Power etc. The plea of irreparable harm, which the Appellant claimed they would suffer, is in the context of this Order, and not in respect of the Performance Bank Guarantee.

In IA No. 1294 of 2022 all that is stated is that, without filing their response in the subject appeal or to the earlier letter dated 26.05.2022, MSEDCL had issued notice dated 10.08.2022 purporting to invoke the Bank Guarantee; MSEDCL was yet to file its reply in the present appeal despite the directions of the Tribunal in its order dated 25.05.2022, and thus the Appellant was constrained to approach this Tribunal seeking interim stay against invocation of the Bank Guarantee and not to initiate any coercive steps until final adjudication, since the same would cause prejudice, without any fault being attributable to the Appellant.

In IA No. 1294 of 2022, all that the Appellant states is that they have a strong prima facie case and the balance of convenience lies in their favour; if MSEDCL is permitted to encash the security, in the form of Bank Guarantee, it would lead to irretrievable injustice to the Appellant as (a) the

impugned order is clearly contrary to the guidelines issued by the Ministry of Power under Section 63 of the Act, and is thus bad in law; the Appellant would suffer undue loss due to invocation of the Bank Guarantee for no fault on their part; further, MSEDCL would make undue gain by usurping funds from invocation of the Bank Guarantee; and MSEDCL has not suffered any loss and has not proved any loss or irreparable harm. The irreparable harm, which the Appellant claims they would suffer from, is only with reference to the underlying document (ie the RFP). Besides that, they claim that they would suffer loss if the Bank Guarantee is invoked for no fault on their part, and that MSEDCL would make undue gain by usurping the funds from encashing the bank guarantee, though it did not suffer any loss nor did it prove any loss.

The disputes between the parties, relating either to the RFP or the LOA, would not make invocation of the bank guarantee fraudulent. The mere allegation that the Appellant would suffer injury, and MSEDCL would unjustly enrich itself thereby, is not enough to attract the exception of “special equities”. These contentions do not justify a restraint order being passed against invocation of the Bank Guarantee. The appellant has neither been able to show that the harm or injustice caused to them, on invocation of the bank guarantee, is 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, nor have they decisively established and proved, to the satisfaction of this Tribunal, that there would be no possibility whatsoever of recovery of the amount, by them from MSEDCL, even if they were to succeed in the main appeal later. As the said exception, to the rule against interference with the invocation of the bank guarantee, has neither been sufficiently pleaded nor satisfactorily proved, we will not be justified in granting the appellant the relief of stay of its invocation.

CONCLUSION:

Since the Appellant has not made out a case of special equities, justifying MSEDCL being restrained from encashing the Bank Guarantee, the relief sought by them in prayer (c) of this I.A. cannot be granted. Suffice it to make it clear that invocation of the Bank Guarantee by MSEDCL shall be subject to the result of the main appeal pending on the file of this Tribunal; and, in case the Appellant were to succeed therein, this Tribunal may then consider suitably adjusting equities in their favour. Subject to the aforesaid observations, prayer (c) in IA No. 1294 of 2022 fails and is accordingly dismissed, and the earlier interim Order passed by this Tribunal stands vacated.

PRONOUNCED IN OPEN COURT ON THIS 30th DAY OF JANUARY, 2023.

(Sandesh Kumar Sharma)
Technical Member
mk/vt/ks

(Justice Ramesh Ranganathan)
Chairperson