IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

IA No. 83 OF 2024 IN APL No. 29 OF 2024

Dated: 18th March, 2024

Present : Hon`ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon`ble Ms. Seema Gupta, Technical Member

In the matter of:

Mytrah Vayu (Brahamputra) Private Limited
Through its Assistant General Manager Mr. Debasish das
8001, Survey No. 109, Q City
Nanakramguda, Gachibowli
Hyderabad, Telangana – 500 032 … Appellant(s)

Versus

1 M/s. Solar Energy Corporation of India Limited
Through its Senior Manager (Solar)
1st Floor, A Wing, D-3, District Centre, Saket,
New Delhi -110017 … Respondent No.1

2 Uttar Pradesh Power Corporation Limited
Through its Chairman
Shakti Bhavan, 14, Ashok Marg,
Lucknow, Uttar Pradesh – 226 001 … Respondent No.2

3 Tata Power Delhi Distribution Limited
Through its Addl. GM-Corporate Legal
NDPL House, Hudson Lines
Kingsway Camp Delhi-110 009 … Respondent No.3

4 BSES Yamuna Power Limited
Through its Chief Executive Officer
BSES Corporate Annexe
CBD-III Grid, Ground Floor,
Opposite Agarwal Fun City Mall

Karkardooma, Delhi – 110 032 … Respondent No.4

5 Central Electricity Regulatory Commission
Through its Secretary
3rd & 4th Floor, Chanderlok Building
36, Janpath, New Delhi – 110 001 … Respondent No.5

Counsel on record for the Appellant(s) : Shri Venkatesh
Shryeshth Ramesh Sharma
Suhael Buttan
Himangi Kapoor
Anant Singh
Priya Dhankar
Vineet Kumar
Aditya Tiwari
Nehal Jain
Nikunj Bhatnagar
Kunal Veer Chopra
Vedant Choudhary
Aayush Sinha
Ashutosh Kumar Srivastava
Bharath Gangadharan
Abhishek Nangia
Nihal Bhardwaj
Siddharth Nigotia
Shivam Kumar
Kartikay Trivedi
Mohit Gupta
Manu Tiwari
Aashwyn Singh
Punyam Bhutani
Harsh Vardhan for App. 1

Counsel on record for the Respondent(s) : Anushree Bardhan
Srishti Khindaria
Surbhi Kapoor
Aneesh Bajaj for Res. 1

Anand Kumar Shrivastava
Shruti Kanodia
Neha Sinha
Shivam Sinha
Ishita Jain
Priya Goyal
Manav Goyal
Nilesh Panda
Ankit Bhandari
Amrita Bakhshi

Rishika Garg
Chetan Saxena
Surbhi Gupta
Snehil Ajmera
Widaphi Lyngdoh
Shivi Shrivastava
Rishabh Chauhan
Yash Sharma
Antariksh Anant for Res. 3

ORDER

PER HON'BLE MR. JUSTICE RAMESH RANGANATHAN, CHAIRPERSON

I.INTRODUCTION:

I.A. NO. 83 of 2024 is filed, by the Appellant in Appeal No. 29 of 2024, seeking a direction from this Tribunal to grant ad-interim stay on the operation and enforcement of the Impugned Order passed by the CERC in Petition No. 227/MP/2020 dated 03.01.2024; or, in alternative, pass directions restraining SECI from taking any coercive action against them, in furtherance of the Impugned Order dated 03.01.2024 passed by the CERC, including encashment of the Performance Bank Guarantee furnished by the Applicant-Appellant.

The Appellant, M/s. Mytrah Vayu (Brahmaputra) Private Limited, is a generating company engaged in the business of development, building, owning, operating and maintaining utility scale grid connected solar power projects, for the generation of solar power. In terms of the Request for Selection (RfS) dated 05.02.2018, Mytrah Energy India Private Limited (MEIPL is the holding company of the Appellant) submitted its bid on 05.04.2018 and, at the end of the e-Reverse auction conducted on TCIL portal, MEIPL was declared the successful bidder, for development of the 300 MW power project, having quoted a tariff of Rs. 2.52 per kWh. Subsequently, MEIPL was issued the Letter of Award (LOA) dated

01.06.2018 for the development of the 300MW Project. MEIPL formed a project company, M/s Mytrah Vayu (Brahmaputra) Private Limited (the Appellant), within the provisions of the RfS for development of the Wind Power Project, generation and sale of wind power. The Appellant invoked the jurisdiction of the CERC seeking a declaration that termination of the Power Purchase Agreement dated 04.09.2018, vide their letter dated 25.02.2020, is legally and contractually valid. They also sought consequential relief for releasing the bank guarantee. On the petition filed by them being rejected by the CERC, by its order dated 03.01.2024, the appellant has invoked the jurisdiction of this Tribunal filing Appeal No. 29 of 2024.

By the Impugned Order passed on 03.01.2024, in Petition No. 227/MP/2020 along with IA No. 07 of 2022, the CERC held that the obligations of the Appellant, under the Power Purchase Agreement dated 04.09.2018 executed between the Appellant and SECI, had not become impossible to perform on account of the delay in adoption of the tariff sought by SECI, introduction of the Tamil Nadu Combined Development and Building Rules, 2019 ("**TN Land Allocation Policy**"), as well as the advent of Covid-19 pandemic; and termination of the PPA by the Appellant was not valid and was unlawful.

Thereafter SECI issued letter dated 09.01.2024, to the Branch Manager, Yes Bank, invoking the Performance Bank Guarantee ("the PBG" for short) furnished towards the Wind Power Project. On 10.01.2024, the Appellant filed W.P. No. 1056 of 2024 before the Telangana High Court seeking a writ of mandamus to declare the action of SECI, in issuing letter dated 09.01.2023, as illegal, arbitrary, contrary to the conditions of encashment under the MoP Guidelines, PPA, RFS, the Electricity Act etc. By way of the said Writ Petition, the Applicant also

sought a direction restraining Yes Bank from releasing any payments to SECI under the PBG having validity upto 06.07.2024. On the same day, the Telangana High Court passed an interim order directing Yes Bank not to release/pay any amounts under the Performance Bank Guarantee amounting to Rs. 60 Crores (Rupees Sixty Crores) vide B.G. No. 006GM07181870001, which was valid up to 06.07.2024, for a period of four weeks.

After having invoked the jurisdiction of the Telangana High Court by way of the afore-said Writ Petition on 10.01.2024, and having obtained an interim order on that date, the Appellant thereafter instituted the present appeal before this Tribunal on 16.01.2024. As the Appellant was not entitled to avail parallel remedies concurrently, they again approached the Telangana High Court.

In its order, in IA No. 1 of 2024 in WP No. 1056 of 2024 dated 06.02.2024, the Telangana High Court noted the submissions, urged on behalf of the Appellant herein, that the application seeking stay was coming up for consideration before the Appellate Tribunal on 08.02.2024 against the order passed by the CERC on 03.01.2024 dismissing Petition No. 227/MP/2020 filed by the Appellant; and it was requested that stay be extended for a further period of two weeks to enable them to pursue the stay application filed in the appeal preferred before the Appellate Authority by the Appellant. Taking into consideration the submissions, urged on behalf of the Appellant, the Telangana High Court directed that the interim order granted earlier on 10.01.2024 stood extended for a further period of two weeks.

Thereafter, in its order in WP No. 1056 of 2023 dated 19.02.2024, the Telangana High Court noted the submissions, urged on behalf of the Appellant herein, that the Writ Petition could be disposed of extending the

interim order passed on 06.02.2024 for a period of two weeks; the subject issue was pending before this Tribunal and the same was coming up for hearing on 26.02.2024; and, therefore, the protection granted by the High Court on 06.02.2024 may be extended till 26.02.2024 or at least till the Electricity Tribunal takes up the subject issue for hearing. After noting that the counsel for the Respondents did not dispute the submission made on behalf of the Appellant- Writ Petitioner, and after taking into consideration these submissions, the Telangana High Court extended the interim order granted by it on 10.01.2024 for a further period of two weeks from 19.02.2024, and disposed of the Writ Petition.

II.CONTENTS OF THE IMPUGNED ORDER:

The appellant herein had filed Petition No. 227/MP/2020, before the CERC, under Section 79(1)(f) read with Section 79(1)(k) of the Electricity Act, 2003 along with Regulation 111 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 seeking issuance of appropriate orders/directions to the Solar Energy Corporation of India Limited pursuant to issues arising out of the Power Purchase Agreement dated 04.09.2018, and seeking consequential relief for releasing the bank guarantee issued by the petitioner in favour of Solar Energy Corporation of India Limited. The reliefs, which the appellant sought before the CERC, were (a) to declare and hold that termination of the Power Purchase Agreement dated 04.09.2018, vide Petitioner's letter dated 25.02.2020, was legally and contractually valid; and (b) direct Respondent – Solar Energy Corporation of India Limited ("SECI" for short) to return/release forthwith the Performance Bank Guarantee dated 06.07.2018 [bearing no. 0006GM07181870001] of Rs. 60 Crores issued in its favour by the appellant pursuant to the terms of the Letter of Intent and the Power

Purchase Agreement dated 04.09.2018.

On the basis of the rival submissions urged by the parties, the CERC observed that the following issues arose for adjudication: (i) Issue No. I: "Whether the Petitioner was entitled to terminate the PPA on account of force majeure and impossibility in terms of Article 4.5.3 read with Article 13.5 and be relieved from its obligations?" (b) Issue No. II: **"**Whether the PPA stood frustrated on account of force majeure and impossibility of performance in terms of Section 56 of the Indian Contract Act, 1872?**" and (iii)** Issue No. III: **"**Whether SECI should be restrained from taking any adverse or coercive action against the Petitioner?**"**

In its order, in Petition No. 227/MP/2020 along with I.A. No. 7 of 2022 dated 03.01.2024, the CERC observed, with respect to Issues No, 1 and 2 that, in terms of the PPA, the Petitioner (appellant herein) was to achieve financial closure and condition subsequent within seven (7) months of the effective date i.e. by 30.03.2019, which was later revised by SECI vide letter dated 24.05.2019 till 28.02.2020; the Petitioner raised the issue of adoption of the tariff for the first time in its letter dated 07.08.2019; TPDDL approached the CERC for adoption of tariff on 03.05.2019; SECI filed a transposition application on 07.10.2019, and the tariff was finally adopted by the CERC vide Order dated 19.02.2020 in Petition No. 162/AT/2019 i.e. before the Scheduled date of Commissioning as per PPA, i.e. 29.02.2020; the plea of the petitioner for non- adoption of tariff was only a pretext; as per Article 3.1 of the PPA, the Petitioner had to make Project financing arrangements at its own risk and cost and provide necessary certificates to SECI; Article 11.4 of the PPA excluded *'Insufficiency of finances or funds or the agreements becoming onerous to perform'* as a force majeure event; and, as such, no relief could be extended to the Petitioner for the delay in tariff adoption.

On Change in land policy, and enactment of the TN Land Allocation

Policy, the CERC observed that the Petitioner, vide letters dated 04.03.2019 and 14.03.2019, brought to the knowledge of SECI the unforeseen challenges faced by it in the procurement of land qua the TN Land Allocation Policy, and sought six month extension in timelines for financial closure and SCOD to mitigate the delay; the challenges faced by the Petitioner, as stated by them, were: (a) the minimum required land size had been materially modified; (b) minimum width of the access passage had been changed; (c) lack of clarity in the officials of the Revenue Department of the Government of Tamilnadu with respect to the procedure to be followed for land conversion; (d) the ownership of lands was defective or incomplete, which was highlighted during the due diligence carried out, and it was brought to light that owners of large parcels of land had migrated and were untraceable; the Petitioner, vide letter dated 07.08.2019, brought to the notice of SECI about the occurrence of an alleged force majeure event, i.e. change in TN Land Allocation Policy and sought an extension of 18 months from the date of adoption of tariff by the CERC; MNRE, vide Office Memorandum (OM) dated 22.10.2019, had granted six months extension to wind power projects under SECI tranches I to V on account of modification in land and building rules in Tamil Nadu; in terms of the MNRE notification dated 22.10.2019, SECI, vide letter dated 14.01.2020, further extended the same till 28.08.2020; SECI had already provided extension of SCOD vide letter dated 14.02.2020 on account of a change in land and building rules by the Tamil Nadu State Government in February, 2019; and, as such, no further relief could be extended to the Petitioner on account of the enactment of the TN Land Allocation Policy.

On change in location of the land beyond the boundaries of the State, the CERC observed that the petitioner, vide letters dated 03.09.2019 and 19.09.2019, had requested SECI to grant approval for the

change in location of the project to Koppal district in Karnataka; SECI, vide letter dated 30.10.2019, had rejected the request of the petitioner for change in the project location; from Clause 3.14 of the RfS dated 05.02.2018 and clause 1.6 of the LoA dated 01.06.2018, it was clear that the Petitioner was allowed to change the State of the proposed project location within 30 days of the conclusion of the e-reverse auction, i.e. by 04.04.2018; however the Petitioner, vide letters dated 03.09.2019 & 19.09.2019, had requested SECI to change the State of the proposed project location after the deadline of thirty (30) days as enshrined in RfS dated 05.02.2018, and the LoA dated 01.06.2018; in their view, SECI had acted in accordance with the existing framework as contained in the RfS and LOI and, therefore, the Petitioner could not be allowed to take this plea; and no further relief could be extended to the Petitioner for a change in the location of the land beyond the boundaries of the State.

On the adverse impact of Covid-19 pandemic, the CERC noted that the Petitioner had filed IA No. 7 of 2022 on 09.02.2022 seeking to amend the Petition in respect of the Covid-19 pandemic, and had sought for termination of PPA; per contra, SECI had submitted that MNRE's OMs dated 20.03.2020, 17.04.2020, 30.06.2020 and 13.08.2021, relied upon by the Petitioner, were in force at the time of filing of rejoinder, by the Petitionery, to the reply of SECI; the Petitioner was raising the ground of Covid-19, as a force majeure event, at a belated stage with a mala fide intention; the Respondent TPDDL had also submitted that the OMs were in force when the Petitioner issued the 1st termination notice dated 25.02.2020, and the Petitioner did not raise the issue there; the OMs relied on by the Petitioner were misplaced as the Petitioner failed to produce documents evidencing the disruption of the supply chain impacting the Petitioner; MNRE had issued OM dated 19.02.2020**;** the Petitioner issued the 1st termination notice on 25.02.2020 (on account of the delay in

adoption of tariff and change in TN Land Allocation Policy); the aforesaid OM was already existing prior to issuance of the termination notice dated 25.02.2020; the Petitioner should have mentioned this event in the 1st termination notice itself; SECI had submitted that the Petitioner had not submitted requisite documents in terms of MNRE OM dated 20.03.2020; MNRE had issued OM dated 13.08.2020; the Petitioner had issued 2nd termination notice dated 05.03.2021; MNRE, in the interest of renewable power developers, had provided a blanket extension of 5 months (i.e. from 25.03.2020 to 24.08.2020) to those projects which were in the implementation stage; SECI, vide letter dated 14.01.2020, had already extended SCoD till 28.08.2020; even if the blanket extension of 5 months granted by MNRE vide OM dated 13.08.2020 (to all renewable power developers who were in the implementation stage), i.e. from 25.03.2020 till 24.08.2020, were to be considered, then also the said extension period fell within the bracket of extension i.e. till 28.08.2020 already granted by SECI vide letter dated 14.01.2020; hence, no further relief could be extended to the Petitioner for the adverse impact of the Covid-19 pandemic.

The CERC observed that, in the given facts and circumstances, the act to be performed by the Petitioner had not become impossible; rather, it might have become difficult to perform the act in a given time frame, which had been duly extended by SECI; in view of the above facts and circumstances, and the extensions granted to implement the project, the various events claimed by the Petitioner could not be treated as force majeure events under Article 11 of the PPA; and the Petitioner had wrongly terminated the PPA dated 04.09.2018 under Article 13.5.1.

On Issue No. III ie "whether SECI should be restrained from taking any adverse or coercive action against the Petitioner?" , the CERC observed that, in view of their findings on Issue Nos. I and II, no

discussion on Issue No III was required, and no relief was made out for the Petitioner under Issue No. III. Petition No. 227/MP/2020, along with I.A. 7 of 2022, was disposed of in the above terms.

III.CONTENTS OF THE I.A. FOR GRANT OF STAY OF INVOCATION OF THE BANK GUARANTEE:

After referring to the three tests for grant of interim relief, the applicant- appellant has stated, in the present I.A. for grant of interim relief, that there was A *prima face* case in the favour of the Applicant due to the following reasons: (a) Clause 12.4 of the *Guidelines for* Tariff *Based Competitive Bidding Process for Procurement of Power from Grid Connected Wind Power Projects'* obligated SECI to approach the Appropriate Commission for adoption of tariff in terms of Section 63 of the Act; this obligation of SECI preceded the Applicant's obligation to ensure timely commissioning of the Wind Power Project; SECI did not initiate any proceedings for adoption of tariff till the end of the 13th month from the Effective Date, and it was only when TPDDL filed Petition No. 162/AT/2019 ("**Adoption Petition**") before the CERC arraying SECI as a respondent (after a lapse of more than one year from the Effective Date of the PPA), that SECI filed a transposition application for adoption of tariff discovered through competitive bidding in the present case; SECI cannot therefore insist upon the Applicant performing their obligations under the PPA; the PPA is voidable at the option of the Applicant (since SECI's failure to fulfil its obligation prevented the Applicant from performing its reciprocal obligation), which option was exercised by the Applicant on 26.02.2020; (b) due to non-adoption of the tariff quoted by the Applicant, there was uncertainty *qua* sanctity of the PPA; as a consequence, the Applicant's lenders were reluctant in extending financial support to the Wind Power Project; therefore, implementation of the Wind Power Project

became un-bankable and impractical; (c) the change in land allocation policy in the State of Tamil Nadu and disruption in global supply chain and non-availability of manpower due to the COVID-19 pandemic and imposition of consequential lockdown in India were force majeure events under Article 11 of the PPA, which had a cascading impact on the commissioning of the Wind Power Project. (d) the consequences of the Force Majeure Events enumerated hereinabove made it impossible for the Applicant to commission the Wind Power Project within the maximum allowed limit of time extension up to 27 months from the Effective Date of the PPA in terms of clause 4.5.3 of the PPA; (e) the PPA gives both parties unequivocal right to exit the PPA on account of continuation of Force Majeure events beyond a period of 9 months; the Applicant, in the present case, has, thus, exercised its right in this regard on occurrence and prevalence of events which were beyond their reasonable control; the PPA stands frustrated in terms of Section 56 of the Indian Contract Act, 1872, and impossibility of performance of the PPA ought to result in discharge of the Applicant from its obligations, including financial obligations and penalties under the PPA. (f) the conduct of SECI in not taking steps for performance of its own obligation (to obtain unconditional tariff adoption) is egregious and unfair.

It is further stated that the findings rendered by the CERC under the Impugned Order are contrary to its own decisions in earlier cases involving similar facts and circumstances involving delay by SECI in tariff adoption which was considered to be a fundamental breach of the contract on the part of SECI; a similar view has been taken by UPERC; no party can be allowed to take advantage of its own wrong; and SECI, despite its own inordinate and unexplained delay in approaching the CERC in a timely manner for adoption of tariff, has been allowed to impose penalties

upon the Applicant, despite the obligations under the PPA becoming impossible to be performed for reasons beyond the control of the Applicant. Reliance is placed by the Applicant on ***Nirmala Anand vs. Advent Corporation (P) Ltd.,*** **(2002) 5 SCC 481;** ***Panchanan Dhara vs. Monmatha Nath Maity (Dead) through LRs.,*** **(2006) 5 SCC 340**.

It is further submitted that the CERC has given a complete go by to the fact that SECI, by not approaching the CERC for tariff adoption in a timely manner, has not only deviated from the provisions of the MoP Guidelines, but has also frustrated the very basis of contractual obligations envisaged under the PPA executed with the Applicant; further, the CERC has also failed to appreciate that tariff adoption by the Commission accords regulatory certainty upon which the contractual milestones such as achievement of FC and commissioning are incumbent; the CERC has also not considered that, under the terms of the PPA, any extension accorded could not have been beyond a period of 27 months from the Effective Date, and the Applicant had time and again highlighted the unforeseen challenges faced on account of the absence of tariff adoption, coupled with the changes introduced by the TN Land Allocation Policy, as well as the advent of Covid-19 pandemic, which materially affected implementation of the Wind Power Project; the CERC also failed to consider that SECI did not initiate the tariff adoption proceedings, and it was only when TPDDL filed the Adoption Petition that SECI filed the transposition application, that too after a period of more than 1 year since execution of the PPA between SECI and the Applicant; the CERC has only on the ground that tariff adoption was done on 19.02.2020, which is prior to the original SCOD of 29.02.2020 (by a mere 10 days) under the PPA, denied relief to the Applicant; regulatory certainty is the very foundation on which a power developer is required to proceed

for implementation of the project; the Impugned Order is contrary to the settled principles of judicial discipline in requiring consistent views to be taken; there exists a *prima face* case in favour of the Applicant for grant of ad-interim ex-parte relief as sought in the instant Application; in order to preserve the interest and rights of the Applicant, it is imperative that the operation and enforcement of the Impugned Order is stayed by this Tribunal; and the impugned Order suffers from non-application of mind as the CERC has failed to deal with all the issues urged by the Applicant.

On balance of convenience and irreparable injury, it is stated that, in the event the Impugned Order's operation is not stayed, it would cause greater inconvenience to the Applicant than the inconvenience which the Respondents would be put to if interim relief is granted; this is particularly on account of pendency of Petition No. 727/MP/2020, whereunder the issue of relinquishment of LTA by MEIPL is under adjudication; the CTU, on account of relinquishment of LTA, has imposed relinquishment charges of Rs. 158 Cr. as well as Rs. 40 Cr. as transmission charges on MEIPL, and the same is pending adjudication before the CERC; since the issues raised in Petition No. 227/MP/2020 are linked to the issues raised in Petition No. 727/MP/2020, the operation of the Impugned Order may entail exorbitant liability upon MEIPL, that too for no fault of its own; the PBG furnished in respect of the Wind Power Project is also alive as on date, and in the event the reliefs sought hereunder are not granted, the same may also be invoked by SECI; this would consequently render the matter *fait accompli*, in addition to financial injury to the Applicant; the balance of convenience lies in favour of the Applicant; further, the Applicant will suffer irreparable injury if the reliefs sought herein is not granted, and if SECI is allowed to invoke/encash the PBG furnished by the Applicant; the following principles govern grant of injunction to restrain

encashment of a bank guarantee (a) 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, (b) 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; if the performance guarantee is allowed to be invoked by SECI, the Applicant would be subjected to irretrievable harm and injustice for no fault at its end; admittedly, SECI did not fulfil its reciprocal obligation under the PPA with respect to timely adoption of the tariff; SECI did not even approach the CERC for adoption of tariff; and it was only after TPDDL filed the Adoption Petition for adoption of 50 MW capacity that SECI filed the transposition application, praying to be transposed as petitioner, comprehensive adoption of tariff for the entire capacity and implementation of the wind power developers with whom it had executed the PPAs; and the said transposition was filed only on 07.10.2019, i.e., after a lapse of more than 1 year from the execution of the PPA.

The applicant-appellant further states that special equities lie in its favour, and SECI ought to be restrained from invoking/encashing the PBG; the spread of Covid-19 pandemic and subsequent lockdown led to disruption in global supply chain; the TN Land Allocation Policy was introduced and put into effect by the GoTN on 04.02.2019 i.e., after the date of bidding (05.02.2018) and execution of the PPA (04.09.2018); the change in TN Land Allocation Policy was an executive action beyond the control of the Applicant, and could not have been contemplated by it while bidding for the Project or at the time of execution of the PPA; the Applicant requested for change of location of the Project to Koppal District in the State of Karnataka; however, the said request of the Applicant was mechanically rejected by SECI relying on RFS, and stating that any

change in the location of the Wind Power Project was required to be intimated within 30 days of the conclusion of the e-reverse auction; such rejection was erroneously upheld by the CERC; hence, it is imperative that this Tribunal restrains SECI from invoking the performance bank guarantee to a tune of Rs. 60 Crores, failing which irretrievable harm and injustice shall be caused to the Applicant; SECI did not argue its Counter Claim before the CERC; allowing SECI to now invoke the PBG furnished by the Appellant, which is what it has been allowed by the CERC by holding that the termination of PPA by Appellant was incorrect, would amount to granting a relief in its favour; the PBG furnished by the Applicant is valid upto 06.07.2024, and may be encashed on or before 06.07.2025; hence there arises no reason for allowing SECI to invoke and encash the PBG, particularly when SECI itself has committed material breach of its obligations under the PPA and MoP Guidelines, and has failed to show any loss that is caused to it.

IV.RIVAL CONTENTIONS:

Elaborate submissions, both oral and written, have been put forth by Dr. Menaka Guruswamy, Learned Senior Counsel appearing on behalf of the appellant, Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the 1st Respondent-SECI, and Ms. Ishita Jain, Learned Counsel appearing on behalf of the 3rd Respondent- TPDDL. It is convenient to examine the rival contentions under different heads.

V.IS THIS TRIBUNAL REQUIRED TO BALANCE EQUITIES IN THE PRESENT APPEAL?

IN SUPPORT OF HER SUBMISSION THAT encashment of the bank guarantee furnished by the Appellant amounting to Rs. 60 Crores ought to be stayed, as the exception of special equities exist in favour of the Appellant, Dr. Menaka Guruswamy, Learned Senior Counsel appearing

on behalf of the appellant, would submit that, as it exercises jurisdiction as a court of first appeal under Section 111 of the Electricity Act, 2003 ('**Act**'), akin to a court of first appeal under Section 96 read with Order XLI of the Civil Procedure Code, 1908, this Tribunal must balance equities, taking into consideration the harm caused to the parties from the decision / decree of the lower court (CERC); and therefore, pending adjudication of the main appeal, encashment of Bank Guarantee, which is valid till 06.07.2025, should be stayed.

A.THE TESTS FOR GRANT OF INTERIM RELIEF WOULD NOT AUTOMATICALLY APPLY TO IAs SEEKING INJUNCTION RESTRAINING INVOCATION OF BANK GUARANTEES:

Section 96 of the Civil Procedure Code relates to appeals from original decree and, under sub-section (1) thereof, save where otherwise expressly provided by any other law for the time being in force, an appeal shall lie from every decree, passed by any Court exercising original jurisdiction, to the Court authorized to hear appeals from the decisions of such Court. Section 111 of the Electricity Act confers power on this Tribunal to entertain appeals, against the orders passed by the appropriate Commissions, both on facts and law and to confirm, modify or set aside the order appealed against. In view of words "*save where otherwise expressly provided by any other law for the time being in force"* used therein, Section 96(1) CPC would yield to the appellate powers conferred on this Tribunal under Section 111 of the Electricity Act. Consequently, the scope of the powers conferred on this Tribunal under Section 111 of the Electricity Act cannot be examined from the prism of what Section 96(1) CPC stipulates.

Ordinarily, while hearing interlocutory applications seeking stay of the order passed by the Commission, this Tribunal would bear in mind the

triple tests for grant of interim relief i.e. a prima facie case, balance of convenience and irreparable injury. With a prima facie case being the *sine qua non*, satisfaction of either one of the other two tests i.e. balance of convenience or irreparable injury would suffice for grant of interim relief. While considering in whose favour the balance of convenience lies, this Tribunal would undoubtedly take into consideration the relative harm which may be caused to the parties on interim relief being granted/refused, and thereby balance equities in the process. But these tests would not apply to cases where an injunction is sought to restrain invocation of bank guarantees, in as much as the question of examining whether a prima facie case is made out, and in whose favour the balance of convenience lies, does not arise in such cases as the Court cannot interfere with the unconditional commitment made by the bank in its guarantee. (***Adani Agri Fresh* v. *Mehboob Sharif*, AIR (2016) 14 SCC 517; *U.P. Coop. Federation Ltd.* v. *Singh Consultants and Engineers (P) Ltd.*, (1988) 1 SCC 174)**.

VI.ARE SPECIAL EQUITIES IN THE APPELLANT'S FAVOUR:

Dr. Menaka Guruswamy, Learned Senior Counsel appearing on behalf of the appellant, would submit that, while the general principle is that existence of a dispute between the parties is not a ground for granting injunction against encashment of the bank guarantee, the exceptions to this rule are: (a) Fraud of an egregious nature (b) irretrievable harm or injustice to one of the parties concerned, and (c) where special equities exist in favour of the party against whom such bank guarantee is sought to be invoked (Refer: ***Standard Chartered Bank vs. Heavy Engineering Corporation Ltd*., (2020) 13 SCC 574,** and ***Hindustan Construction Co. Ltd. vs. National Hydro Electric Power Corp. Ltd.*, OMP (I) Comm. 39/2020 delivered by the Delhi High Court on 13.02.2023**); the Appellant is invoking the third exception *i.e.,* special equities, for seeking

stay against encashment of the 'bank guarantee of Rs. 60 crores furnished by it; and the judicial precedents cited above, establish that the exceptions of 'irretrievable harm/ injustice' and 'special equities' are founded on separate and distinct circumstances.

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the first respondent-SECI, would submit that the decisions of the Supreme Court, on interdicting invocation of the Bank Guarantee, are well settled, and have been considered by this Tribunal recently in **Arina Solar Private Ltd vs CERC** (Order in I.A.No.1467 of 2022 in Appeal No. 378 of 2022 dated 22.12.2022) and **Inox Green Energy Services Ltd vs CERC** (Order in I.A. No. 1010 of 2022 in Appeal No.292 of 2022 dated 24.10.2022); the Delhi High Court, in **Zee Entertainment Enterprises v. Railtel Corporation of India Ltd. 2021 SCC OnLine Del 5004,** has also considered the aspect of special equities; the **first Halliburton** decision, relied upon by the Appellant, was an ad-interim injunction order; subsequently, by order dated 29.05.2020, the injunction was vacated following settled principles; the decision dated 13.02.2023 of the Delhi High Court, in ***Hindustan Construction Co. Ltd. v. NHPC Ltd.*** **[OMP (I) (Comm.) 39/2020,** relied upon by the Appellant, is distinguishable as special equities were found for grant of injunction; in the said case, the bank guarantee was sought to be invoked by NHPC after arbitral awards were passed in favor of Hindustan Construction for a much larger amount, including on matters for which the subject bank guarantee was given; the Delhi High Court has held in ***Consortium of Deepak Cable India Limited & Abir Infrastructure Private Limited (Decil - Aipl) Thr Abir v. Teestavalley Power Transmission Limited*** **[2014 SCC OnLine 4741]** (quoted in **Zee Entertainment Enterprises v. Railtel Corporation of India Ltd)** that special equities is not a separate exception for grant of injunction vis a vis bank guarantee, but is akin to irretrievable justice; it is

settled law that a bank guarantee is an independent contract, and its invocation cannot be injuncted on the basis of the disputes raised in terms of the underlying contract; and the present application for injunction is liable to be rejected

A.IS THE SUBJECT 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. (***Vinitec 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*, 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. (***Vinitec Electronics (P) Ltd.* v. *HCL Infosystems Ltd.*, (2008) 1 SCC 544; *Adani Agri Fresh* v. *Mehboob Sharif*, 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.

B.CONTENTS OF THE SUBJECT BANK GUARANTEE:

YES BANK
24-JUL-18

Solar Energy Corporation of India Ltd
1st Floor. D-3. A Wing,
Religare Building District Centre, Saket, New Delh-110017

Oor reference	: 006GM07181870001
Issue date	: 06-JUL-15
Applicant	: Mytrah Vayu (Brahmaputra) Private Limited
Guarantee Amt.	: INR 600,000,000.00
Ant. in words	: Indian Rupees Six Hundred Million Only
Stated Expiry date	: 30-AUG-20
Stated claim expiry date	: 30-AUG-20

Dear Sir/ Madam,

Please find enclosed the captioned guarantee duly issued by YES Bank ("the Bank").
The beneficiary of this guarantee is entitled to confirm the authenticity of this guarantee directly by contacting the issuing branch or any of below controlling office:

(THREE ADDRESSES ARE MENTIONED IN THE GUARANTEE)

This guarantee is to be returned immediately post its expiry. This letter forms an integral part of the guarantee. Please note that any communication/demand under this guarantee should be made in writing to the issuing branch unless otherwise specified in the enclosed guarantee.

It is confirmed that

1. Mr. P VENKATESHWARLU
2. M. SATISH KUMAR UGPR

who have signed the above guarantee, are authorized to sign the same on behalf of the Bank:.

For YES Bank Limited
DATE: 06-JUL-18
PLACE: YES BANK LTD HYDERABAD BRANCH

BANK GUARANTEE: 006G M07181870001 DATED: 06.07.2018

Performance Bank Guarantee for Wind Power Project

In consideration of the **Mytrah Energy (India) Private Limited** (hereinafter referred to as selected Wand Power Developer) submitting the response to RfS inter alia for selection of the Projected the capacity of **300 MW, at Sokkanur, Tamil Nadu** under **RfS for Setting Up of 2000 MW ISTS connected Wind Power Projects (Tranche-IV),** for supply of power there from on long term basis, in response to the RfS dated 05.02.2018 issued by Solar Energy Corporation of India Ltd. Ist Floor, D-3, A Wing, Religare Building District Centre, Saket, New Delhi - 110017 (hereinafter referred to as SECI) and SECI considering such response to the RfS of Mytrah Energy (India) Private Limited (which expression shall unless repugnant to the context or meaning thereof include its executers, administrators, successors and assignees) and selecting the Wind Power Project of the Wind Power Developer and issuing Letter of Award No. SECI/C&P/WPD/T4/LOA/MEIPL/P1/22066 to Mytrah Energy (India) Private Limited as per terms of RfS and the same having been accepted by the selected WPD resulting in a Power Purchase Agreement (PPA) to be entered into, for purchase of Power from. M/s. Mytrah Vayu (Brahmaputra) Private Limited, 8001, 8th Floor, Q-City, Nanakramguda,

Gachibowli, Hyderabad 500032 (a Special Purpose Vehicle (SPV) formed for this purpose). As per the terms of the RfS, the YES Bank Ltd., a company incorporated and registered under the Companies Act 1956 and a banking company within the meaning of section 5(c) of the Banking Regulation Act, 1949 and having its registered office at Nehru Centre, 9th Floor, Discovery of India, Worli, Mumbai 400 018 & a branch office inter alia at Mayank Towers, Raj Bhavan Road, Somajiguda, Hyderabad - 500 082 hereby agrees unequivocally, irrevocably and unconditionally to pay to SECI at Saket, New Delhi forthwith on demand in writing from SECI or any Officer authorized by it in this behalf, any amount up to and not exceeding Rs.60,00,00,000 (Rupees Sixty Crores only), on behalf of M/s Mytrah Vayu (Brahmaputra) Private Limited

This guarantee shall be valid and binding on this Bank up to and including 30th August 2020 and shall not be terminable by notice or any change in the constitution of the Bank or the term of contract 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 60,00,00,000 (Rupees Sixty Crores only).

Our Guarantee shall remain in force until 30th August 2020 SECI shall be entitled to invoke this Guarantee till 30th August 2020.

The Guarantor Bank hereby agrees and acknowledges that SECI shall have a right to invoke this BANK GUARANTEE in part or in full, as it may deem fit.

The Guarantor Bank hereby expressly agrees that it shall not require any proof in addition to the written demand by SECI, made in any format,

raised at the above mentioned address of the Guarantor Bank, in order to make the said payment to SECI.

The Guarantor bank shall make payment hereunder on first demand without restriction or Conditions and notwithstanding any object by Mytrah Vayu (Brahmaputra) Pvt. Ltd. and/or any other person. The guarantor bank shall not require SECI to justify the invocation of this BANK GUARANTEE, nor shall the Guarantor Bank have any recourse against SECI in respect of any payment made hereunder.

This BANK GUARANTEE shall be interpreted in accordance with the laws of India and the courts at Delhi 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 filled enforceable in accordance with its terms as against the Guarantor Bank in manner provided herein.

This BANK GUARANTEE shall not be affected in any manner by reason of merger, amalgamation, restructuring 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 SECI shall not be obliged before enforcing this BANK GUARANTEE to take any action in any court or arbitral proceedings against the selected Wind Power Developer/ Project Company, to make any claim against or any demand on the selected Wind Power Developer / Project Company or to give any notice to the selected Wind Power Developer/Project Company or to enforce any security held by SECI or to exercise, levy or enforce any distress, diligence or other process against the selected Wind Power Developer / Project Company.

The Guarantor Bank acknowledges that this BANK GUARANTEE is not personal to SECI and may be assigned, in whole or in part, (whether

absolutely or by way of security) by SECI to any entity to whom SECI is entitled to assign its rights and obligations under the PPA.

1. Notwithstanding anything contained hereinabove, our liability under this Guarantee is restricted to Rs.60,00,00,000 (Rupees Sixty Crores only) and it shall remain in force until 30th August 2020

2. We are liable to pay the guaranteed amount or any part thereof under this Bank Guarantee only if SECI serves upon us a written claim or demand.

Dated this 06th day of July, 2018

C.LETTER OF AMENDMENT DATED 26.12.2023: ITS CONTENTS:

DATE: 26-DEC-23

SOLAR ENERGY CORPORATION OF INDIA LTD
1ST FLOOR, D-3, A WING,
RELIGARE BUILDING DISTRICT CENTRE, SAKET, NEW DELHI-110017

BANK GUARANTEE NO : 006GM07181870001
DATED : 06-JUL-18
AMOUNT : INR 600,000,000.00
AMOUNT IN WORDS : INDIAN RUPEES SIX HUNDRED MILLION ONLY
AMENDMENT NO : 9
AMENDMENT DATE : 26-DEC-23

WE YES BANK LIMITED, AT THE REQUEST OF APPLICANT MYTRAH VAYU (BRAHMAPUTRA) PRIVATE LIMITED DO HEREBY AMEND OUR ABOVE MENTIONED BANK GURANTES AS FOLLOWS:

AMENDMENT CLAUSES ARE

EXPIRY DATE IS EXTENDED TO 06-JUL-2024 AND CLAIM DATE IS EXTENDED 06-JUL-2025

ALL OTHER TERMS AND CONDITIONS REMAIN UNCHANGED.

THIS LETTER WILL FORM AN INTEGRAL FANT OF GUARANTEE NUMBER OO6GM07181870001 DATED 06-JUL-18 AND ATTACHED THERETO

NOTWITHSTANDING ANYTHING CONTAINED HEREIN ABOVE;

1.OUR LIABILITY UNDER THIS GUARANTES SHALL NOT EXCEED INR 600, 000, 000.00 INDIAN RUPEES SIX HUNDRED MILLION ONLY

2.THIS BANK GUARANTES SHALL BE VALID UP TO 06-JUL-24 AND

3.WE ARE LIANLE TO PAY THE GUARANTEED AMOUNT OR ANY PART THEREOF ONDER THIS BANK GUARANTEE ONLY AND ONLY IF A WRITTEN CLAIM OR DEMAND, SERVED BY YOU IN ACCORDANCE WITH THE TERMS OF THIS BANK GUARANTEE, 15 RECEIVED BY US ON ON NEFORE 5 P.M. ON OR BEFORE 06-JUL-25 7:

YES BANK LIMITED

GROUND FLOOR, MAYANK TOWERS, SURVEY NO. 31 (OLD), 31/2 (NEW), RAJ BHAVAN ROAD, SOMAZIGUDA, HYDERABAD 500 082

THEREAFTER, ALL YOUR RIGHTS UNDER THIS BANK GUARANTEE SHALL BE FORFEITED AND WE SHALL WE RELIEVED FROM ALL OUR LIABILITIES HENEUNDER TARESPECTIVE OF WHETHER THE

ORIGINAL BANK GUARANTEE HAS BEEN RETURNED TO US OR NOT

D.THE AFORESAID BANK GUARANTEE IS UNCONDITIONAL:

By way of the Bank Guarantee, furnished by it on 06th July, 2018, YES Bank Ltd agreed unequivocally, irrevocably and unconditionally to pay to SECI forthwith on demand, in writing from SECI or any Officer authorized by it in this behalf, any amount up to Rs.60,00,00,000 (Rupees Sixty Crores only), on behalf of the appellant; the Bank Guarantee shall not be terminable by notice or any change in the constitution of the Bank or the term of contract or by any other reasons whatsoever; the liability of the Bank shall not be impaired or discharged by any extension of time or variations or alternations made; they agreed and acknowledged that SECI shall have a right to invoke this bank guarantee in part or in full, as it may deem fit; they expressly agreed that they shall not require any proof in addition to the written demand by SECI, made in any format, in order to make the said payment to SECI; they would make payment under the Bank Guarantee on first demand without restriction or conditions, and notwithstanding any objection by the appellant; they would not require SECI to justify invocation of this bank guarantee, nor shall they have any recourse against SECI in respect of any payment made under the bank guarantee; the bank guarantee shall be a primary obligation of Yes Bank, and SECI shall not be obliged, before enforcing the bank guarantee, to take any action in any court or arbitral proceedings against the selected Wind Power Developer/ Project Company, to make any claim against or any demand on the selected Wind Power Developer / Project Company or to give any notice to the selected Wind Power Developer/Project Company or to enforce any security held by SECI or to exercise, levy or enforce any distress, diligence or other process against the selected Wind

Power Developer / Project Company; and Yes Bank acknowledged that the bank guarantee was not personal to SECI and may be assigned, in whole or in part, (whether absolutely or by way of security) by SECI to any entity to whom SECI was entitled to assign its rights and obligations under the PPA.

It is evident, from its contents as referred to herein above, that the Bank Guarantee furnished by Yes Bank in favour of SECI, at the appellant's behest, is unconditional.

E.REFERENCE TO THE UNDERLYING CONTRACT IN THE LETTER INVOKING THE BANK GUARANTEE : ITS CONSEQUENCES:

In ***Gujarat Maritime Board* v. *Larsen and Toubro Infrastructure Development Projects Limited*: (2016) 10 SCC 46**, and ***Vinitec Electronics Private Limited* v. *HCL Infosystems Limited*: (2008) 1 SCC 544**, the Supreme Court held that reference to the underlying contract or breach thereof in the bank guarantee, or in the invocation letter, will not make any difference to the principles of encashment of Bank Guarantee, as long as the terms of the Bank Guarantee are unconditional. In ***Vinitec Electronics (P) Ltd,*** the bank guarantee itself referred to the principal agreement between the parties and, in **Gujarat Maritime Board,** the guarantee itself stipulated that, in case of breach by the lead promoter of the conditions of the agreement, the appellant was free to invoke the bank guarantee, and yet the Supreme Court held that no restraint could be placed on its invocation.

The mere fact that the bank guarantee refers to the appellant having submitted its response to RfS, to SECI having considered such response of the appellant to the RfS and to have issued Letter of Award No. SECI/C&P/WPD/T4/LOA/MEIPL/P1/22066 to the appellant which resulted in a Power Purchase Agreement (PPA) being entered into, and

that, as per the terms of the RfS, YES Bank Ltd had agreed unequivocally, irrevocably and unconditionally to pay to SECI forthwith on demand in writing from SECI or any Officer authorized by it in this behalf, any amount up to and not exceeding Rs.60,00,00,000 (Rupees Sixty Crores only), on behalf of the appellant, does not make any difference to the principles of encashment of the Bank Guarantee, as the terms of afore-said Bank Guarantee are unconditional.

The only requirement, for a valid invocation, is that such invocation should be in terms of the bank guarantee which, as noted hereinabove, only required SECI, or any Officer authorized by it in this behalf, to make a demand in writing and nothing more. In terms of the bank guarantee, the bank agreed that, on any such demand, it would unequivocally, irrevocably and unconditionally pay SECI forthwith, the amount specified in the Bank Guarantee, on behalf of the Appellant, without requiring any proof, in addition to the written demand by SECI made in any format, in order to make payment.

F.TWIN EXCEPTIONS TO THE RULE AGAINST GRANT OF INJUNCTION RESTRAINING INVOCATION OF A BANK GUARANTEE:

The two exceptions, for 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)**. Interference by Courts, with the enforcement of a bank guarantee, is only in cases where fraud or special equities are prima facie made out as a triable issue by strong evidence so as to prevent irretrievable injustice to the parties. (***Ansal Engg. Projects Ltd.* v. *Tehri Hydro Development Corpn. Ltd.*, (1996) 5 SCC 450; *Standard Chartered Bank* v. *Heavy***

***Engineering Corporation Limited*, (2020) 13 SCC 574)**. Otherwise, the very purpose of bank guarantees would be negated and the fabric of trading operation will be in jeopardy.

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*, (2020) 13 SCC 574).**

As no contention of "fraud" has been raised, let us examine whether the second exception to the gener.al rule of non-intervention is attracted. This exception arises 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*, (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).** Cases, under this category, arise where allowing encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties. 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. (***Vinitec Electronics (P) Ltd.* v. *HCL Infosystems Ltd.*, (2008) 1 SCC 544; *Adani Agri Fresh* v. *Mehboob Sharif*, (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*** **2014 SCC OnLine Bom 198).**

As held by this Tribunal, in ***Shahpoorji Pallonji Energy (Gujarat) Private Limited* v. *Gujarat Electricity Regulatory Commission*,** (Order 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 from SECI, the proceeds of the encashed Bank Guarantee, if the main Appeal were to be allowed later.

Proof of loss or damage being suffered by the Respondents, in terms of the underlying contract, is not necessary for invocation and encashment of a Bank Guarantee. (***Shahpoorji Pallonji Energy (Gujarat) Private Limited* v. *Gujarat Electricity Regulatory Commission*, (Order in I.A. No. 384 of 2017 in Appeal No. 161 of 2017 dated 29.05.2017)**. The financial difficulties which the person furnishing it may face, in case the bank guarantee is encashed, is also not relevant. Having furnished an unconditional bank guarantee with its eyes open, and being fully conscious of the right of SECI to encash it in its sole discretion, the Appellant cannot now be heard to contend that severe financial hardship being caused to them as a result, would require interference with the encashment of a bank guarantee.

G.THE PRESENT CASE DOES NOT FALL WITHIN THIS EXCEPTION:

As the exception of “special equities” in favour of grant of injunction must be such as to make it impossible for the Appellant to reimburse themselves if they were to ultimately succeed in the main appeal, the mere apprehension (no such apprehension has even been expressed) that the Respondents will not be able to pay, is not enough. The possibility of payment of the amounts, under the bank guarantee, adversely affecting either the bank, or the Appellant at whose instance the guarantee was

given, does not also justify a restraint order being passed against its invocation. The appellant has neither been able to show that the harm or injustice caused to them, on invocation of the bank guarantee, would 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, 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 the Respondents, even if they were to succeed in the main appeal later.

As shall be detailed later in this Order, the merits of the dispute between the parties, in terms of the underlying contract, does not constitute a third exception to the general rule against interference with the invocation of the bank guarantee. As the twin exceptions to the said rule have neither been pleaded nor proved, we will not be justified in granting the appellant the relief of stay of its invocation.

We shall now examine the judgements relied upon by Dr. Menaka Guruswamy, Learned Senior Counsel appearing on behalf of the appellant, in support of her submission that “special equities” constitute a third exception to the rule against grant of injunction restraining invocation of bank guarantees, and those cited by Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the 1st Respondent-SECI, that there are only two exceptions and not three.

VII.JUDGEMENT OF THE SUPREME COURT RELIED ON BEHALF OF THE APPELLANT:

Reliance is placed, on behalf of the appellant, on **Standard Chartered Bank v. Heavy Engg. Corpn. Ltd., (2020) 13 SCC 574** to contend that special equities constitute a third exception apart from the two exceptions of a clear case of fraud and irretrievable injustice. In para 23 of the judgement in **Standard Chartered Bank,** the Supreme Court

held that "*there are however, exceptions to this Rule when there is a clear case of fraud, irretrievable injustice or special equities",* and again in para 26 of the said judgement, the Supreme Court observed that *"the demand once made would oblige the bank to pay under the terms of the bank guarantee and it is not the case of the appellant bank that its defence falls in any of the exception to the rule of case of fraud, irretrievable injustice and special equities"*

It is well settled that words in a judgement should not be treated as if it were a statutory definition. It will require qualification in new circumstances.' One must not construe a judgment as if it were an Act of Parliament. **(*Bharat Petroleum Corpn. Ltd. v. N.R. Vairamani*, (2004) 8 SCC 579)**. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of courts are neither to be read as Euclid's theorems nor as provisions of a Statute, and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into a lengthy discussion, but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. (***London Graving Dock Co. Ltd.* v. *Horton* [1951 AC 737 : (1951) 2 All ER 1 (HL); *Bharat Petroleum Corpn. Ltd. v. N.R. Vairamani*, (2004) 8 SCC 579; *Rajbir Singh Dalal (Dr.) v. Chaudhari Devi Lal University*, (2008) 9 SCC 284; *C. Ronald v. UT, Andaman & Nicobar Islands*, (2011) 12 SCC 428).**

There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be

remembered that judicial utterances are made in the setting of the facts of a particular case. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. **(*Bharat Petroleum Corpn. Ltd. v. N.R. Vairamani*, (2004) 8 SCC 579)**. Words and expression used in a judgment are not to be construed in the same manner as words and expressions defined in Statutes. (***General Electric Co.* v. *Renusagar Power Co:* 1987 (4) SCC 137).** Observations of courts must be read in the context in which they appear. A line or a word in a judgment cannot be read in isolation, or as if interpreting a statutory provision, to impute a different meaning to the observations (***Haryana Financial Corpn.* v. *Jagdamba Oil Mills* [(2002) 3 SCC 496**; ***Natwar Singh v. Director of Enforcement*, (2010) 13 SCC 255).**

It is necessary for us, therefore, to read the judgement of the Supreme Court, in **Standard Chartered Bank v. Heavy Engg. Corpn. Ltd., (2020) 13 SCC 574**, as a whole to ascertain whether a third exception of '*special equities*' has now been introduced in addition to the established two exceptions of (1) 'a *clear case of fraud'* and *(2) irretrievable injustice.*

In **Standard Chartered Bank v. Heavy Engg. Corpn. Ltd., (2020) 13 SCC 574,** the dispute was with regards two bank guarantees, in terms of the letters of intent, furnished on behalf of the 2nd defendant by the appellant Bank (1st defendant) in favour of the 1st respondent-plaintiff "as advance against supply of plant and equipment" by the 1st respondent-plaintiff to the 2nd respondent (Defendant 2); the said two bank guarantees were furnished for and on behalf of the 2nd respondent towards the sum insured "against any loss or damage caused to or suffered by the Corporation by reason of any breach, or failure by the said supplier, in due performance of the aforesaid contract.

By a letter of intent, the 1st respondent placed an order on the 2nd respondent, Simon Carves India Ltd. (“SCIL”) for the complete design, supply of both indigenous and imported equipment, erection and commissioning of requisite civil and construction works of the Dankuni Coal Complex; pursuant to the letter of intent, a formal memorandum of agreement was executed; thereafter, the 1st respondent (plaintiff), from time to time, advanced money for the said work against several bank guarantees furnished by SCIL; in due course of time, in breach of the contract with the 1st respondent-plaintiff, SCIL failed to duly complete the supply of equipment and the other conditions of the letter of intent; it was alleged that the work had to be abandoned due to which the 1st respondent suffered huge losses and damages; ultimately, a sum of Rs 139.90 lakhs was deducted by the 1st respondent from the final bill which pertained to the apportioned work handed over to SCIL. The 1st respondent-plaintiff demanded encashment of both the guarantees which were refused to be honoured by the bank. Ultimately, the 1st respondent-plaintiff was constrained to institute a suit before the High Court of Calcutta for a decree along with interest being the aggregate sum of both the said guarantees.

The objection taken by the appellant Bank was that invocation of the bank guarantees was not in accordance with either of the said guarantees; it was contrary to the terms thereof; and, accordingly, the appellant Bank was not liable to make payment to the 1st respondent-plaintiff under either of the said guarantees.

The suit in the first instance came to the dismissed. In a concurring judgment, the Division Bench of the Calcutta High Court, while setting aside the judgment of the Single Judge, held that the bank guarantees were properly invoked in law by the 1st respondent-plaintiff, and accordingly passed a decree together with interest.

On the judgement of the Division Bench being subjected to challenge, the Supreme Court, in **Standard Chartered Bank: (2020) 13 SCC 574,** referred to the earlier three-Judge Bench judgement in ***Ansal Engg. Projects Ltd.* v. *Tehri Hydro Development Corpn. Ltd.*, (1996) 5 SCC 450,** and to ***Hindustan Construction Co. Ltd.* v. *State of Bihar*, (1999) 8 SCC 436; *SBI* v. *Mula Sahakari Sakhar Karkhana Ltd.*, (2006) 6 SCC 293**; ***Himadri Chemicals Industries Ltd.* v. *Coal Tar Refining Co.*, (2007) 8 SCC 110; *Gujarat Maritime Board* v. *Larsen & Toubro Infrastructure Development Projects Ltd.*, (2016) 10 SCC 46;** and held that the settled position in law was that the bank guarantee was an independent contract between the bank and the beneficiary, and the bank was always obliged to honour its guarantee as long as it was an unconditional and irrevocable one; the dispute between the beneficiary and the party at whose instance the bank has given the guarantee was immaterial and was of no consequence; there were, however, exceptions to this rule when there was a clear case of fraud, irretrievable injustice or special equities; and the Court ordinarily should not interfere with the invocation or encashment of the bank guarantee so long as the invocation is in terms of the bank guarantee.

The Supreme Court further held that the guarantees, in the instant case, were unconditional, specific in nature and limited in amount; the terms of the guarantee categorically covered money which the 1st respondent had advanced against supply of the plant and equipment by SCIL; the said guarantees covered any loss and damage caused to or suffered by the 1st respondent-plaintiff in due performance of the contract for supply of plant and equipment; the guarantee documents as a whole, and clause 2 of the guarantee document in particular, covered the advance which had been paid by the 1st respondent-plaintiff by reason of any breach or failure by SCIL in due performance of the aforesaid

contracts i.e. against the contract for supply of plant and equipment; once the demand was made in due compliance with the bank guarantees, it was not open for the appellant Bank to determine as to whether invocation of the bank guarantee was justified so long as the invocation was in terms of the bank guarantee; the demand once made would oblige the bank to pay under the terms of the bank guarantee; it was not the case of the appellant Bank that its defence fell within any of the exceptions to the rule, ie of fraud, irretrievable injustice and special equities; in the absence thereof, it was not even open for the Court to interfere with the invocation and encashment of the bank guarantee so long as the invocation was in terms of the bank guarantee; this was what had been observed by the Division Bench of the Calcutta High Court in the impugned judgment (***Heavy Engg. Corpn. Ltd.* v. *Standard Chartered Bank*, 2019 SCC OnLine Cal 617**); and that reflected the correct legal position.

Mere use of the words "*or special equities"* after the words "*a clear case of fraud, irretrievable injustice",* in para 23, and use of the words "*and special equities"* after the words "*case of fraud, irretrievable injustice"* in para 26 of the judgement in **Standard Chartered Bank**, cannot be construed as the Supreme Court having deviated from its earlier judgements to provide for special equities as a third exception apart from the two exceptions of fraud and irretrievable injustice, especially when reference was made therein to ***Ansal Engg. Projects Ltd.* v. *Tehri Hydro Development Corpn. Ltd.*, (1996) 5 SCC 450; *Hindustan Construction Co. Ltd.* v. *State of Bihar*, (1999) 8 SCC 436; *SBI* v. *Mula Sahakari Sakhar Karkhana Ltd.*, (2006) 6 SCC 293**; ***Himadri Chemicals Industries Ltd.* v. *Coal Tar Refining Co.*, (2007) 8 SCC 110;** and ***Gujarat Maritime Board* v. *Larsen & Toubro Infrastructure Development Projects Ltd.*, (2016) 10 SCC 46** as having settled the position in law. The word "special equities" has evidently been used inter-

changeably with “irretrievable injustice”. Further the facts of the case, in **Standard Chartered Bank**, did not necessitate application of any new third exception.

VIII.JUDGEMENTS OF THE DELHI HIGH COURT RELIED ON BEHALF OF THE APPELLANT AND THE FIRST RESPONDENT:

In ***Halliburton Offshore Services Inc. v. Vedanta Ltd., 2020 SCC OnLine Del 542*** **(Order in O.M.P. (I) (COMM) and I.A. 3697 of 2020 dated 20.04.2020),** the Delhi High Court observed that, while the earlier understanding of the expression “special equities”, as a circumstance in which invocation of bank guarantees could be injuncted, was that such equities were limited to cases where irretrievable injustice resulted, the recent decision in ***Standard Chartered Bank Ltd*** **v.** ***Heavy Engineering Corporation Ltd*****, 2019 SCC OnLine SC 1638** seemed to visualise irretrievable injustice, and special equities, as distinct circumstances, the existence of either of which would justify an order of injunction; where “special equities” exist, the court is empowered, in a given set of facts and circumstances, to injunct invocation or encashment, of a bank guarantee; and where such special circumstances do exist, no occasion arises to revert to the general principle regarding the contractually binding nature of a bank guarantee, or the legal obligation of the bank to honour the bank guarantee, these special circumstances having, in all cases, been treated as exceptions to this general principle.

The Delhi High Court then held that the countrywide lockdown, which came into place on 24th March, 2020, was prima facie in the nature of a force majeure; such a lockdown was unprecedented, and was incapable of having been predicted either by the respondent or by the petitioner; it was submitted on behalf of the petitioner that, till the date of clamping of the lockdown on 22nd March, 2020, they were in the process

of proceeding with the project; and that, had the lockdown not be imposed, the project may have been completed by 31st March, 2020

It is in these circumstances that the Delhi High Court held that, prima facie, special equities did exist, as would justify grant of the prayer, of the petitioner, to injunct the respondent from invoking the bank guarantees of the petitioner, forming the subject matter of these proceedings, till the expiry of a period of one week from 3rd May, 2020, till which date the lockdown had been imposed; if no interim protection was granted at this juncture, and the bank guarantees were allowed to be encashed, even while the lockdown was in place, the injury and prejudice that would result to the petitioner merited being categorised as irretrievable, even if the petitioner may still be able to recover the amounts, were it to succeed finally, in arbitration; a pandemic, of the nature which affected the world today, had not visited during their lifetime; the devastation, human, economic, social and political, that had resulted as a consequence thereof, was unprecedented; the measures, to which the executive administration had to resort, to somehow contain the fury of the pandemic, were equally unprecedented; the situation of a nationwide lockdown had never earlier been imposed on the country; imposition of the lockdown was by way of a sudden and emergent measure, of which no advance knowledge could be credited to the petitioner - or to anyone else; as a consequence, the petitioner's activities had to suddenly discontinue on 22nd March, 2020, and they had not been able to resume ever since; the lockdown, as imposed by the Central and State Government, was presently in place till 3rd May, 2020; restrictions, on free movement of personnel and normal continuance of activities, had come into place even before 22nd March, 2020; the petition, and the rival submissions advanced, threw up issues of some factual and legal complexity, which may necessitate a proper affidavit, by way of response, from the

respondent, and detailed consideration of all these aspects, so as to arrive at a firm conclusion as to whether, till the normalisation of activities of the petitioner, consequent to lifting, or relaxation, of the restrictions imposed by the executive administration as a result of the n-COVID-2019 pandemic, the petitioner would be entitled to an injunction, against the respondent, from invocation of the eight bank guarantees forming subject matter of the present petition; for the present, the Court was convinced, *prima facie*, that, in view of the submission of the petitioner that it was actually working on the project till the imposition of lockdown on 22nd March, 2020, or at least shortly prior thereto, and in view of the sudden and emergent imposition of lockdown, the interests of justice would justify an ad interim injunction, restraining invocation or encashment of the aforesaid eight bank guarantees, till the expiry of exactly one week from 3rd May, 2020, till which date the lockdown stands presently extended.

The Delhi High Court further observed that the question as to whether this interim injunction merits continuance thereafter or not, would be examined on the next date of hearing, consequent to pleadings being completed and all requisite material, including all relevant Governmental instructions, being placed on record; the injunction presently being granted was purely ad interim in nature, and was being granted only in view of the completely unpredictable nature of the lockdown, and its sudden imposition on 22nd March, 2020, of which the petitioner could not legitimately be treated as having been aware in advance; the Court was also persuaded, in this regard, by the fact that the government itself had, after imposition of the lockdown, been issuing instructions, from time to time, seeking to mitigate the rigours and difficulties that had resulted, unavoidably, as a result of imposition of the lockdown; and there was no reason, therefore, why the petitioner ought not to be given limited

protection, till the next date of hearing, subject to orders which may be passed in these proceedings thereafter. Accordingly, ad interim stay on invocation and encashment of the eight Bank guarantees, tabulated in para 3.4 of the petition, was granted till the next date of hearing, and it was held that the aspect of continuance of this interim order would be taken up on the next date of hearing.

Thereafter, the very same petition came up for consideration, in **Halliburton Offshore Services v. Vedanta Ltd., 2020 SCC OnLine Del 2068 (order in OMP (I) (COMM) No. 88/2020 and IAs 3696-3697/2020 dated May 29, 2020),** and the Delhi High Court observed that the law relating to Bank Guarantees was extremely clear and had been repeatedly settled by the Supreme Court including in ***Standard Chartered* v. *Heavy Engineering Corporation Ltd,*** *and the* relevant extracts from the judgment were:

> *"… 23. The settled position in law that emerges from the precedents of this Court is that the bank guarantee is an independent contract between bank and the beneficiary and 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 is of no consequence.* ***There are however, exceptions to this Rule when there is a clear case of fraud, irretrievable injustice or special equities. The Court ordinarily should not interfere with the invocation or encashment of the bank guarantee so long as the invocation is in terms of the bank guarantee.***
>
> *…*

26. In our considered view, once the demand was made in due compliance of bank guarantees, it was not open for the Appellant bank to determine as to whether the invocation of the bank guarantee was justified so long as the invocation was in terms of the bank guarantee. ***The demand once made would oblige the bank to pay under the terms of the bank guarantee and it is not the case of the appellant bank that its defence falls in any of the exception to the rule of case of fraud, irretrievable injustice and special equities.*** *In absence thereof, it is not even open for the Court to interfere with the invocation and encashment of the bank guarantee so long as the invocation was in terms of the bank guarantee and this what has been observed by the Division Bench of the High Court in the impugned judgment and that reflected the correct legal position."*

- (emphasis supplied)

The Delhi High Court noted that, in **Ansal Engineering Projects**, the Supreme Court had observed that adjudication of the quantum of loss and damages was not a precondition for invoking Bank Guarantees which are meant to secure the loss or damage caused due to breach, and on the basis of the terms of the Bank Guarantee the amount would be payable on a mere demand by the beneficiary. The Learned Judge of the Delhi High Court then observed that, at the time when the ad-interim order was passed, the pleadings between the parties were not complete; in fact, most of the relevant correspondence was not filed by the Contractor and had now come on record by way of the reply and the rejoinder and further submissions filed by the parties; thus, the submission on behalf of the Contractor that the ad-interim order ought to be continued was not tenable; the said order being *ad-interim* in nature, was prior to pleadings

between the parties and did not deserve to be continued in favour of the Contractor, for the reasons stated above; and, in so far as invocation of three sets of Bank Guarantees were concerned, no case was made out for passing of any interim order staying invocation or encashment thereof.

The Learned Judge of the Delhi High Court thereafter observed that reconciliation of accounts would be required to determine as to what would be the component of the Advance Bank Guarantees recoverable by the Company; there were no pleadings as to what exactly was the amount recoverable; in so far as the Advance Bank Guarantees were concerned, the Court was of the opinion that the amount recoverable by the Company ought to be ascertained; and, accordingly, it was directed that the amount of only the Advance Bank Guarantees which had been invoked, upon being encashed, shall be placed in a separate *'Joint Account'* which shall be jointly held by the Contractor and the Company; the parties were directed to reconcile the accounts, including payment of any invoices already raised and upon reconciliation as to the unrecovered portion of the advance amount which the Company was entitled to retain, in terms of the clauses in the contract, they may instruct the bank to release the said amounts in favour of the Company; the remaining amounts be released to the Contractor; if the parties were unable to reconcile the same, they were free to approach the Arbitral Tribunal under Section 17 of the Act. The ad-interim order dated 20th April, 2020 (*as modified on 24th April 2020*), was vacated in the above terms.

What constitutes a precedent, binding on courts/tribunals in subsequent cases, is the ratio of the judgement, and not the consequential relief granted. In the afore-said judgement, it has been held that, in so far as invocation of three sets of Bank Guarantees were concerned, no case was made out for passing of any interim order staying invocation or

encashment the said bank guarantees. The direction for reconciliation was given in the facts of the said case, and as a consequence the proceeds of the encashed bank guarantees were directed to be kept in a joint account. There is no dispute, in the present case, regarding reconciliation of accounts, and the relief granted in the aforesaid judgement, of the proceeds being kept in a joint account, would have no application to the present appeal before this Tribunal.

As the ad-interim stay granted, in ***Halliburton Offshore Services Inc. :2020 SCC OnLine Del 542*** **(Order dated 20.04.2020),** was subsequently vacated in **Halliburton Offshore Services: 2020 SCC OnLine Del 2068 (order dated May 29, 2020),** reliance placed, on behalfe of the appellant, on the former order dated 20.04.2020 is of no avail.

In **Consortium of Deepak Cable India Limited & Abir Infrastructure Private Limited vs Teesta valley Power Transmission Limited: 2014 SCC OnLine Del 4741**, a Division Bench of the Delhi High Court noted that, in **Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineering Work P. Ltd: (1997) 6 SCC 450**, it was held that special circumstance of irretrievable injury meant a circumstance which made it impossible for the guarantor to reimburse itself by way of restitution; in **U.P. State Sugar Corporation v. Sumac International Ltd: (1997) 1 SCC 568**, the fact that the beneficiary was a sick company and that a scheme for its revival was pending consideration before BIFR under the Sick Industrial Companies (Special Provisions) Act 1985 was held not to be a circumstance showing that money would be irretrievably lost if the claim ultimately went in favour of the contractor; referring to the decision in **Itek Corporation's** case and the law pertaining to injunction claims qua bank guarantee, it was observed that *"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'; 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 ***BSES Ltd.* v. *Fenner India Ltd.*: (2006) 2 SCC 728** . lack of good faith' and/or '*enforcing with an oblique purpose*' were arguments brought into aid to urge that if a bank guarantee was invoked for an oblique purpose or invocation lacked in good faith, exceptional circumstance existed justifying granting an injunction and the decision of the Court of Appeal in Singapore in *Samwoh Asphalt Premix Ptc. Ltd.* v. *Sum Cheong Piling Pte Ltd:* (2002) 1 SLR 1 was considered wherein it was held that where a bank guarantee was invoked as a '*bargaining chip*' or as a '*deterrent*' or in an '*abusive manner*' it would amount to calling a guarantee for an oblique purpose, justifying the issuance of an injunction; the Supreme Court, in *Femur India's* case, held that, in the face of the law succinctly laid down in **U.P. Coop. Federation** and reiterated in numerous judgments of the Supreme Court, they were unable to accept the wide proposition of law laid down in the foreign judgments; whatever may be the law, as to the encashment of bank guarantees in other jurisdictions, when the law in India was clear, settled and without any deviation whatsoever, there was no occasion to rely upon foreign case-law."

The Division Bench of the Delhi High Court then observed that the legal position was that a bank guarantee was an independent contract

between the bank and the beneficiary and disputes pertaining to bank guarantees had to be resolved de-hors the terms of the main contract between the parties or disputes relatable to the main contract between the parties; where the guarantee is unconditional and/or the bank has agreed to make payment without demur or protest, on the beneficiary invoking the bank guarantee, the bank is obliged to honour the same for the reason like letters of credit, a bank guarantee if not honoured would cause irreparable damage to the trust in commerce and would deprive vital oxygen to the money supply and money flow in commerce and transaction which is necessary for economic growth; disputes pertaining to the main contract cannot be considered by a court when a claim under a bank guarantee is made, and the court would be precluded from embarking on an enquiry pertaining to the prima facie nature of the respective claim of the litigating parties relatable to the main dispute; that there are serious disputes, on the questions as to who committed the breach of the contract, are not circumstances justifying granting an injunction pertaining to a bank guarantee; plea of lack of good faith and/or enforcing the guarantee with an oblique purpose or that the bank guarantee is being invoked as a bargaining chip, a deterrent or in an abusive manner are all irrelevant and hence have to be ignored; there are only two well recognized exceptions to the rule against permitting payment under a bank guarantee; the same are : - (A) A fraud of egregious nature; (B) Encashment of the bank guarantee would result in irretrievable harm or injustice of an irreversible kind to one of the parties; the irretrievable harm or injustice of an irreversible kind must relate to a situation akin to the one found in ***Itek Corporation's*** case or of the kind in ***Elian's*** case; there is no separate third exception of a special equity justifying grant of an injunction to restrain the beneficiary from receiving under an unconditional bank guarantee and, if there exists any third exception of a special equity, the

same has to be of a kind akin to irretrievable injustice or putting a party in an irretrievable situation.

The Division Bench of the Delhi High Court concluded holding that contractual disputes cannot be projected by attempting to urge that the beneficiary under the bank guarantee is in default; issues of fraud require pleadings to bring out a case of a fraud of an egregious nature; and the irretrievable injury or irretrievable injustice or special equity would mean a situation where the party at whose behest the bank guarantee is issued is rendered remediless.

In **Hindustan Construction Co. Ltd. v. National Hydro Electric Power Corpn. Ltd., 2020 SCC OnLine Del 2777,** the petitioner was aggrieved by the respondent's decision to invoke the bank guarantees on the alleged ground that the petitioner had failed to carry out and deliver work as per contractual requirements.

On the second exception to the rule against interference with the invocation of bank guarantees, the Delhi High Court held that the term ‘special equity’ cannot be compartmentalized and may include cases wherein the petitioner is able to prove that (i) encashment of the bank guarantees would cause irrecoverable loss to the petitioner or (ii) would prick the judicial conscience of the Court; existence of these exceptional circumstances can only be determined from the facts of each case; in the case of irrecoverable loss under the exception of special equity, there was no cause for the petitioner to apprehend an impossibility of reimbursement from the respondent in case these bank guarantees were encashed; while the petitioner had pleaded that the respondent delayed payments and owed it enormous sums, it was a settled position that disputes of that nature do not find relevance in petitions under Section 9 of the Arbitration & Conciliation Act; the second exception of ‘special equities’ was whether

permitting encashment of bank guarantees would invite such harm on the petitioner which would shock the judicial conscience; in ***Hindustan Construction Company Ltd.* v. *Satluj Jal Vidyut Nigam Ltd.*, 2005 SCC OnLine Del 1249,** it had been observed that any attempt to overreach the process of adjudication with an intent to cause irreparable prejudice to the other side was a circumstance which would be capable of being characterized as having shocked the judicial conscience or tilt the 'special equities' in favour of the applicant in that regard; thus, the 'harm which may shock judicial conscience' is a niche demarcation within the exception of 'special equity', in that it travelled beyond the ordinary meaning assigned to the term 'special equity' to include irretrievable injustice of such a nature which shocks the conscience of the Court; in *Technimont*, the beneficiary, notwithstanding the award existing against it, was seeking to invoke bank guarantees furnished for performance of the contract; in those circumstances, the Court had held that once an arbitral award had been passed against it, the respondent/Beneficiary was estopped from invoking the bank guarantees given for performance of the contract; and, In the present case, admittedly the arbitral award was yet to attain finality, and the bank guarantees did not have any connection with the award in question.

On the submission that the bank guarantees had been illegally invoked, without there being any default on the petitioner's part under Clauses 30.1 and 35 of the Contract, the Delhi High Court held that there was no merit in this submission; in the light of the settled legal position, that an unconditional bank guarantee is an independent contract between the Bank and the Beneficiary, the question as to whether the petitioner is in default of the contract or not would not be relevant; and, once these unconditional bank guarantees warrant payment to the beneficiary without

any demur or protest, the Bank is bound to honour the bank guarantees, irrespective of any disputes raised by the petitioner.

On an appeal being preferred against the aforesaid order, the Division Bench of the Delhi High Court, in **Hindustan Construction Co. Ltd. v. National Hydro Electric Power Corpn. Ltd., 2020 SCC OnLine Del 1214,** noted that no fraudulent or deceitful conduct had been made out on the part of the respondent in invoking and seeking to encash the BGs; the present invocation appeared to be as per the terms of the contract itself, and could not be described as a fraud, let alone as an egregious fraud.

The Division Bench then observed that the law relating to encashment of BGs under the second exception had attained wider dimensions over a period of time; Courts were initially very circumspect and required existence of fraud before it prevented encashment of unconditional BGs; then it looked into the question of who was in breach of the contract to determine the relief to be granted under special 'equities; through various judicial pronouncements the scope of what constituted special equities was expanded to include cases of irretrievable injury, extraordinary special equities including the impossibility of the guarantor being reimbursed at a later stage if found entitled to the money, and the invocation of the BG being not in terms of the BG itself; and, in the absence of any straight-jacket formula, Courts were required to examine each case to find out whether it fell within these heads.

The Division Bench referred to the decision of the Supreme Court in ***U.P. State Sugar Corporation*** wherein reliance was placed on the decision in the **Itek Corpn. Case [566 Fed Supp 1210],** and it was held that, to avail of this exception, exceptional circumstances which make it impossible for the guarantor to reimburse himself if he ultimately

succeeds, will have to be decisively established. and a mere apprehension that the other party will not be able to pay is not enough; and to **Himadri Chemical Industries Ltd. v. Coal Tar Refining Co., (2007) 8 SCC 110,** wherein the principles, for grant or refusal to grant injunction to restrain enforcement of a bank guarantee or a letter of credit, were noted as: (i) while dealing with an application for injunction in the course of commercial dealings, and when an unconditional bank guarantee or letter of credit is given or accepted, the beneficiary is entitled to realise such a bank guarantee or a letter of credit in terms thereof irrespective of any pending disputes relating to the terms of the contract, (ii) the bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer, (iii) the courts should be slow in granting an order of injunction to restrain realisation of a bank guarantee or a letter of credit, (iv) since a bank guarantee or a letter of credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of bank guarantees or letters of credit, (v) fraud of an egregious nature which would vitiate the very foundation of such a bank guarantee or letter of credit and the beneficiary seeks to take advantage of the situation, (vi) allowing encashment of an unconditional bank guarantee or a letter of credit would result in irretrievable harm or injustice to one of the parties concerned; applying these principles to the facts of that case, the Supreme Court concluded that no injunction could be granted as fraud or the exceptional circumstances which would make it impossible to reimburse the guarantor were not made out, and only an apprehension was expressed; and this decision was followed by the Supreme Court in ***Standard Chartered Bank*.**

The Division Bench of the Delhi High Court then held that it was thus apparent that one of the most important aspects of irretrievable injury would be that it would be impossible for the guarantor to get back the money if it succeeded in any claim against the beneficiary; such a situation was not even conceivable in the present case as the respondent/NHPC was a Public Sector Undertaking.

While examining whether proportionality would constitute yet another kind of special equities, where the crystallized liability of the guarantor formed only a small portion of the amount assured by way of Bank Guarantees, the Division Bench of the Delhi High Court held that the test of proportionality could be included in the exception of special equities; in its view, it could be applied only where the crystallized liability was significantly lower than the value of the BG furnished, and the contract was a concluded one; in the present case, neither condition prevailed; the contract was not a concluded one; neither had it been terminated; the liabilities were not crystallized; there were also several payments that had been made by the respondent/NHPC on behalf of the appellant/HCC; the facts highlighted on behalf of the appellant/HCC did not disclose special equities in favour of the appellant/HCC; and, in other words, encashment of the unconditional BGs would not result in irretrievable injury to the appellant/HCC requiring this Court to take a view different from the well considered view taken by the learned Single Judge.

On the appellant invoking its jurisdiction against the afore-said order of the Division Bench of the Delhi High Court, the Supreme Court, in **Hindustan Construction Co. Ltd. V. National Hydro Electric Power Corporation Ltd., (Order in Petition for Special Leave to Appeal (c) No. 11510/2020 dated 28.09.2020),** found no ground to interfere with the

impugned order passed by the Delhi High Court; and the special leave petition was, accordingly, dismissed.

In **Zee Entertainment Enterprises Ltd. v. Railtel Corporation of India Ltd., 2021 SCC OnLine Del 5004,** it was contended, on behalf of the petitioners, that invocation of the Bank Guarantees was liable to be interdicted in view of the *Force Majeure* event of outbreak of Covid-19. Reliance was placed on the judgement of the Delhi High Court in ***M/s. Halliburton Offshore Services Inc.* v. *Vedanta Limited*: OMP (I) (COMM) 88/2020** (***Halliburton-1***), to submit that the Delhi High Court had recognized that the restrictions imposed, pursuant to the outbreak of Covid-19, was a *Force Majeure* event, and created special equities in favour of the parties, and the Court had issued an *ad interim* order interdicting invoking or encashment of a bank guarantee issued in that case; reliance was also placed on the subsequent judgment dated 29.05.2020 passed in ***Halliburton – 2*** to submitted that the Court had vacated the *ad interim* order, but had directed that the amount recovered be kept in a separate joint account.

Placing reliance on the decision of the Division Bench of the Delhi High Court, in ***Hindustan Construction Co. Ltd.* v. *National Hydro Electric Power Corporation Ltd*** **:2020 SCC OnLine Del 1214**, it was contended that the scope of special equities had been expanded as a ground for interdicting invocation of a bank guarantee; earlier the bank guarantees would not be interdicted except in cases of established fraud; however, the Courts had now expanded the said scope to include the consideration as to which party was in breach of the contract.

It is in this context that the Division Bench of the Delhi High Court held that the Bank Guarantee was unconditional; it has been held by the Supreme Court in several cases that bank guarantees can be interdicted only in exceptional cases of egregious fraud and special equities; in ***U.P.***

***Cooperative Federation Limited* v. *Singh Consultants and Engineers Pvt. Ltd.* : (1988) 1 SCC 174,** it was held that it was only in exceptional cases, that is to say in case of fraud or in case of irretrievable injustice being done, the court should interfere; in ***Svenska Handelsbanken* v. *M/s. Indian Charge Chrome* : (1994) 1 SCC 502,** the Supreme Court held that there should be prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties; mere irretrievable injustice, without prima facie case of established fraud, was of no consequence in restraining encashment of the bank guarantee; in ***Dwarikesh Sugar Industries Ltd.* v. *Prem Heavy Engineering Works (P) Ltd.* : (1997) 6 SCC 450 : AIR 1997 SC 2477,** the Supreme Court held that the general principle had been summarised in ***U.P. State Sugar Corpn.* (1997) 1 SCC 568** wherein it was held that the second exception related to cases where allowing 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 was 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; in ***Consortium of Deepak Cable India Limited & Abir Infrastructure Private Limited (Dcil-Aipl) Thr Abir* v. *Teestavalley Power Transmission Limited* : 2014 SCC OnLine Del 4741,** the Division Bench of the Delhi High Court had held that there were only two well recognized exceptions to the rule against permitting payment under a bank guarantee; they were (a) a fraud of egregious nature; (b) encashment of the bank guarantee would result in irretrievable harm or injustice of an irreversible kind to one of the parties; there was no separate

third exception of a special equity justifying grant of an injunction to restrain the beneficiary from receiving under an unconditional bank guarantee and, if there existed any third exception of a special equity, the same had to be of a kind akin to irretrievable injustice or putting a party in an irretrievable situation; as was apparent from the decision, in ***Consortium of Deepak Cable India Limited***, special equities could not be considered as a totally separate exception but was more akin to the requirement of irretrievable injustice; 'special equities' were in a sense special circumstances, which would justify granting the exceptional relief for interdicting a bank guarantee, as not granting the said relief would cause irretrievable harm or injury to the party which has otherwise established a compelling case; and commercial disputes, arising in relation to the transactions, do not present special equities.

The Division Bench of the Delhi High Court, in **Zee Entertainment Enterprises Ltd,** held that the earlier decision of the Division Bench of the Delhi High Court, in ***Hindustan Construction Co. Ltd.* v. *National Hydro Electric Power Corporation Ltd,*** was not an authority for the proposition that the principles authoritatively settled by the Supreme Court had been diluted; the observations made by the Division Bench that the scope of what constitutes special equities has been expanded must be read in its context; the Division Bench had specifically noted that Courts had granted injunction on the ground of special equities where there were extraordinary circumstances and the same "*included cases of irretrievable injury, extraordinary special equities including the impossibility of the guarantor being reimbursed at a later stage if found entitled to the money and the invocation of the BG being not in terms of the BG itself*."; in cases where invocation of the bank guarantee is not in terms of the bank guarantee, the courts would intervene and would interdict payment against such an invocation; this is not a case of special equities but

constitutes a seperate ground; the concept of irretrievable injury or extraordinary special equities cannot be expanded to take into its fold disputes regarding the interpretation or performance of the underlying contract; a dispute between the parties relating to performance of obligations under the contract does not give rise to any special equities warranting interdiction of a bank guarantee; and there must be special circumstances that places the party seeking such an injunction in a position where it would suffer irretrievable injury if the injunction as sought for is not granted.

The Division Bench of the Delhi High Court, in **Zee Entertainment Enterprises Ltd,** concluded holding that it was undeniable that the outbreak of Covid-19 had resulted in severe commercial difficulties, and had put businesses under immense strain; however, loss of revenue was not a ground for excusing performance of a contract; and commercial difficulties do not frustrate a contract or absolve a party from performing its obligations.

In **Hindustan Construction Co. Ltd v. National Hydro Electric Power Corporation Ltd (order in OMP (I) (Comm.) 39/2020 & IA 13305/2021 & IA 12009/2022 dated 13.02.2023), (**on which reliance is placed on behalf of the appellant), the Delhi High Court noted the submissions urged on behalf of the Writ Petitioner that, on 29.02.2016, the Project was taken over for substantial completion of works; on 28.02.2017, the Defect Liability Period was completed; on 14.08.2021, the Defect Liability Certificate was issued; as per Clause 10.12 of the Contract, the Performance Bank Guarantee was to be returned to the contractor within 14 days of issuance of Defect Liability Certificate; hence, no basis remained for encashment of the Bank Guarantee as the Defect Liability Certificate had already been issued by the Respondent; as the Defect Liability Certificate was already issued in favour of the Petitioner,

the subject Bank Guarantee deserved to be released/returned to them; if the Impugned Letter was not quashed, and the Bank Guarantees were invoked, it would be violative of special equities and would cause irretrievable loss and damage to the Petitioner as a Bank Guarantee issued in favour of the Respondent, during execution of the contract, cannot be said to have been given in perpetuity; once the Defect Liability Certificate has been issued, the Bank Guarantee deserved to be returned, as the purpose for which it was provided had already been achieved; the threat of invocation of the Bank Guarantee, after culmination of all disputes before the five Arbitration Tribunals and after issuance of the Defect Liability Certificate by the Respondent admitting completion of works, can only be seen as an illegal act of the Respondent to prolong clearing its dues payable to the Petitioner, and cause injustice; under five different awards passed by different arbitral tribunals, the Petitioner was entitled to recover a sum in excess of Rs.700 crores from the Respondent; and, even if the said awards are the subject matter of challenge by both the parties in different petitions under Section 34 of the Act, the Respondent ought not to be allowed at this stage to recover any amount from the Petitioner.

After referring to the judgements of the Supreme Court in Supreme Court in ***Ansal Engg. Projects Ltd.*** **v.** ***Tehri Hydro Development Corpn. Ltd.*****, (1996) 5 SCC 450;** ***Standard Chartered Bank v. Heavy Engg. Corpn. Ltd.*****, (2020) 13 SCC 574**; ***SBI v. Mula Sahakari Sakhar Karkhana Ltd.,*** **(2006) 6 SCC 293;** ***Himadri Chemicals Industries Ltd.*** **v.** ***Coal Tar Refining Co.*****, (2007) 8 SCC 110**; ***Gujarat Maritime Board*** **v.** ***Larsen & Toubro Infrastructure Development Projects Ltd.*****, (2016) 10 SCC 46;** the Delhi High Court held that it was evident from the aforesaid judgements that Courts should be slow in granting an injunction to restrain realization of a bank guarantee; existence of a dispute between the parties

to the contract is not a ground for issuing an injunction to restrain the enforcement of bank guarantees; Courts have carved out only two exceptions, a fraud in connection with such a bank guarantee is the first exception whereas the second exception is that allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned; in ***Standard Chartered Bank v. Heavy Engg. Corpn. Ltd.*****,** the Supreme Court held that irretrievable injury, which is the second exception to the rule against granting of injunctions when unconditional bank guarantees are sought to be realised, must be of the kind which was the subject-matter of the decision in the ***Itek Corpn. Case;*** to avail this exception exceptional circumstances, which make it impossible for the guarantor to reimburse himself if he ultimately succeeds, will have to be decisively established; and mere apprehension that the other party will not be. able to pay, is not enough; 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; and there is a *third* exception, being that of special equities operating in favour of the party against whom the bank guarantee is being sought to be invoked.

The Delhi High Court concluded holding that, even if the respondent succeeded in its petition filed under Section 34 of the Arbitration and Conciliation Act, and the arbitral Award, rejecting the counter-claims of the respondent, were to be set aside, that would not result in the counter-claim being decreed in its favour; it would only be open to the respondent to commence fresh proceedings against the petitioners; the exceptions to

the rule, against grant of injunction restraining invocation of the bank guarantee, were in cases where there is a clear case of fraud, irretrievable injustice or special equities; the facts and circumstances of the case cumulatively demonstrated *special equities* in favour of the Petitioner; *Firstly,* it was an admitted fact that the Petitioner had arbitral awards with respect to the Project in its favour wherein the counter-claims of the Respondent had been dismissed; *Secondly,* the Bank Guarantees given during the contract could not be said to have been given in perpetuity, even for the period after the completion of project and adjudication of claims/counter-claims between the parties; *Thirdly,* even if the Respondent succeeds in its challenge to the Award under Section 34, it has to resort to fresh arbitration proceedings with regard to the counter-claims; *Fourthly,* no *prima facie* case was made out in the light of the awards passed in favour of the Petitioner, especially in light of the uncontested facts that, on 29.02.2016, the project was taken over for substantial completion of works, and on 28.02.2017, the Defect Liability Period was completed, and finally on 14.08.2021, the Defect Liability Certificate was issued; therefore, no valid basis for invocation/encashment of the bank guarantee by the respondent existed; *Fifthly* as on date, as per the statements made by the learned counsel, there was no stay on either of the awards passed *qua* the said Project in any of the Section 34 petitions; and *Sixthly,* as per the provisions of the contract, specifically Clauses 10.1 and 10.2, Performance Bank Guarantee ought to be returned to the contractor within 14 days of issuance of Defects Liability Certificate.

It is in these circumstances that the Delhi High Court held that, in view of the aforesaid, the respondent was being restrained from invoking/encashing the bank guarantee till the disposal of and subject to

the judgment in the Section 34 petitions challenging the arbitral awards *qua* the contract between the parties in relation to the Project.

In **Hindustan Construction Co. Ltd v. National Hydro Electric Power Corporation Ltd (order in OMP (I) (Comm.) 39/2020 & IA 13305/2021 & IA 12009/2022 dated 13.02.2023),** the learned Single Judge of the Delhi High Court relied on ***Standard Chartered Bank v. Heavy Engg. Corpn. Ltd.*****,** to hold that Courts have carved out only two exceptions, a fraud in connection with such a bank guarantee is the first exception whereas the second exception is that allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned; the two grounds were not necessarily connected, though both may coexist in some cases; and there was a *third* exception, being that of special equities operating in favour of the party against whom the bank guarantee was sought to be invoked.

The attention of the Learned Single Judge of the Delhi High Court, in **Hindustan Construction Co. Ltd (order dated 13.02.2023)**, was not drawn to the earlier two Division Bench Judgements of the Delhi High Court in ***Consortium of Deepak Cable India Limited & Abir Infrastructure Private Limited (Dcil-Aipl) Thr Abir* v. *Teestavalley Power Transmission Limited*** **: 2014 SCC OnLine Del 4741,** and **Zee Entertainment Enterprises Ltd. v. Railtel Corporation of India Ltd., 2021 SCC OnLine Del 5004,** in both of which it was held that there were only two well recognized exceptions to the rule against permitting payment under a bank guarantee; they were (a) a fraud of egregious nature; (b) encashment of the bank guarantee would result in irretrievable harm or injustice of an irreversible kind to one of the parties; there was no separate third exception of a 'special equity' justifying grant of an injunction to restrain the beneficiary from receiving under an unconditional bank

guarantee and, if there existed any third exception of a special equity, the same had to be of a kind akin to irretrievable injustice or putting a party in an irretrievable situation; special equities could not be considered as a totally separate exception but was more akin to the requirement of irretrievable injustice; 'special equities' were in a sense special circumstances which would justify granting the exceptional relief for interdicting a bank guarantee, as not granting the said relief would cause irretrievable harm or injury to the party which has otherwise established a compelling case; and commercial disputes, arising in relation to the transactions, do not present special equities.

In the light of the law declared in the aforesaid two division bench judgements of the Delhi High Court in ***Consortium of Deepak Cable India Limited*: 2014 SCC OnLine Del 4741,** and **Zee Entertainment Enterprises Ltd: 2021 SCC OnLine Del 5004,** holding that there was no third exception, reliance placed on behalf of the appellant on the single judge judgement of the Delhi High Court, in **Hindustan Construction Co. Ltd (Order dated 13.02.2023),** is misplaced.

Even if it were to be presumed (though it is difficult to do so in the light of the law declared in a catena of judgements of the Supreme Court), that special equities constitute a third exception, it must be of a kind which was explained, in **Hindustan Construction Co. Ltd (2020 SCC OnLine Del 2777),** to mean the kind of 'harm which may shock judicial conscience', in that it travelled beyond the ordinary meaning assigned to the term 'special equity' to include irretrievable injustice of such a nature which shocks the conscience of the Court. It is not even contended before us, on behalf of the appellant, that the "***shocking the judicial conscience***" test is satisfied in the present case.

Even if, as held in **Hindustan Construction Co. Ltd. (2020 SCC OnLine Del 1214),** proportionality is presumed to constitute yet another

kind of special equity, the Division Bench of the Delhi High Court has made it clear that the test of proportionality could be included in the exception of special equities, and applied only where the crystallized liability is significantly lower than the value of the BG furnished and the contract is a concluded one.

It is this proportionality test, prescribed in **Hindustan Construction Co. Ltd. (2020 SCC OnLine Del 1214),** which appears to have been applied by the Learned Single Judge of the Delhi High Court in **Hindustan Construction Co. Ltd (Order dated 13.02.2023).** Special equities were held to exist, in the said case, as arbitral awards had been passed in favour of the Petitioner (for a sum in excess of Rs.700 crores) wherein the counter-claim of the Respondent had been dismissed; even if the Respondent succeeded in its challenge to the Awards under Section 34 of the Arbitration & Conciliation Act, it had to resort to fresh arbitration proceedings with regard to the counter-claims; as on date, there was no stay on the awards passed, *qua* the said Project, in any of the Section 34 petitions; as per Clauses 10.1 and 10.2 of the contract, Performance Bank Guarantee ought to be returned to the contractor within 14 days of issuance of Defects Liability Certificate; and no valid basis existed for invocation/encashment of the bank guarantee by the respondent after the Defect Liability Certificate was issued. It is in these circumstances that the respondent therein was restrained from invoking/encashing the bank guarantee till the disposal of the Section 34 petitions.

The contract of bank guarantee is independent of the underlying contract, and disputes between the parties in terms thereof would have no bearing on the contract of bank guarantee. Special equities can only be said to arise if it is in relation to the contract of bank guarantee, and not with respect to the underlying contract. Unlike in the aforesaid case, the

claim of special equities is made by the Appellant, in the present case, on the basis of the underlying contract, and not in relation to the contract of bank guarantee. Further, neither has any plea been raised in the present appeal, of the present case requiring application of the proportionality test, nor has any such contention been put forth during the course of hearing of the present I.A.

Viewed from any angle the contention, urged on behalf of the appellant, that special equities arise in present case, warranting grant of injunction restraining the 1st Respondent from invoking the bank guarantee, necessitates rejection.

IX.CONTENTIONS ON THE MERITS OF THE UNDERLYING DISPUTE:

A.APPELLANT'S CONTENTIONS:

Dr. Menaka Guruswamy, Learned Senior Counsel appearing on behalf of the appellant, would submit that Section 63 of the Electricity Act has two facets – (i) adoption of tariff and (ii) that such tariff has been determined through a transparent process of bidding in accordance with the MoP Guidelines; hence, it was incumbent upon the nodal agency – SECI, which conducted the e-reverse auction, to approach the CERC for adoption of tariff in a timely fashion; for this, a two-fold determination should have been made early on in the project timeline; neither the Electricity Act nor the MoP Guidelines envisage any role of the Appellant (generator) in adoption of tariff; the 1st Respondent-SECI failed to comply with its statutory and regulatory obligations, under Clause 12.4 of the MoP Guidelines issued under Section 63 of the Electricity Act, 2003, that mandates seeking timely adoption of tariff for the project in question; SECI, being the nodal agency for implementation of the MNRE scheme under which the project in question was developed, had a statutory and regulatory obligation to seek adoption of tariff in a timely manner; such

statutory duty was bestowed upon SECI in terms of Clause 12.4 of the MoP Guidelines issued under Section 63 of the Electricity Act; this statutory obligation, which was fundamental for the execution of the project, was fulfilled by SECI after an inordinate and unexplained delay of more than 18 months from the execution of the Power Purchase Agreement ('PPA'); this delay on the part of SECI has remained unexplained throughout the proceedings before the CERC as well as this Tribunal; Clause 11.4 and 11.5 of the recent MoP Guidelines dated 26.07.2023 (mentioned by both the Appellant and SECI during arguments), issued after the present case, provides a strict timeline for both seeking adoption of tariff (15 days) and adjudication of the adoption petition by the appropriate commission (60 days); if the tariff is not adopted as per the said timeline, the generator will be entitled to appropriate extensions with respect to commissioning of the project; and this is indicative of the regulatory and legislative intent for expeditious fixation of tariff for wind power projects.

Dr. Menaka Guruswamy, Learned Senior Counsel, would further submit that due to the aforesaid inordinate delay (a) the lenders / financial institutions refused to finance the Appellant for the project; this led to the Appellant's inability to comply with Article 3.1of the PPA dt. 04.09.2018, which required it to complete financial closure by 30.03.2019 (this was extended upto 29.02.2020 due to changes in the TN Land allocation policy), and (b) the Appellant could not commission the project as per the Scheduled Commissioning Date ('**SCOD'**) provided in the PPA *i.e.,* 29.02.2020. (this was extended upto 29.08.2020 due to changes in the TN Land allocation policy); the Appellant could not comply with the above timelines owing to the unexplained delays solely attributable to SECI; hence the PPA, being a time barred contract, could not be performed; SECI's contention, that there was no timeline in the PPA for seeking

adoption of tariff, deserved to be rejected; all actions under the contract are premised on reasonableness; SECI took 18 months (from the PPA) for seeking adoption of tariff from CERC, and the same cannot be construed as reasonable and just; due to the failure of SECI to comply with its statutory obligation, of seeking timely adoption of tariff, the Appellant was constrained to terminate its Long-term Access ('**LTA'**) Agreement with PGCIL, and also relinquish the LTA which it procured for the project from PGCIL; consequently, the Appellant has been imposed with relinquishment charges of Rs. 158 Crores and transmission charges of Rs. 40 Crores by PGCIL; further, the Appellant's letter of credit of Rs. 5 Crores has also been encashed by PGCIL; the Bank Guarantee is secured by a fixed deposit with the bank of the same amount; if SECI is allowed to encash the Bank Guarantee furnished by the Appellant, it would result in SECI taking benefit of its own wrongs and delays; the Appellant in turn would lose access to Rs 60 crores of its own money for no fault of theirs, and conversely due to inaction and omissions by the statutory nodal agency SECI; in the light of the judgement of the Supreme Court, in **Panchanan Dhara & Ors. vs. Monmatha Nath Maithy, (2006) 5 SCC 340 – para 27,** and this Tribunal in ***Ayana Anathapuramu Solar Pvt. Ltd. vs. Andhra Pradesh Electricity Regulatory Commission,* 2020 SCC OnLine APTEL 32 – para 59**, SECI cannot take advantage of its own inaction, in approaching CERC for adoption of tariff belatedly, to now encash the bank guarantee; their inaction compelled R2 and R3 to seek adoption of tariff from inappropriate forums *i.e.,* DERC and UPERC; DERC approved the Power Sale Agreement between SECI and R3; however, with respect to adoption of tariff, DERC rightly held that the appropriate forum was the CERC; similarly, UPERC approved the Power Sale Agreement between SECI and R2; however, it declined to approve the tariff for lack of jurisdiction; as DERC declined to adopt the tariff, the

3rd Respondent filed the Adoption Petition before the CERC on 04.05.2019 for 50 MW; SECI was arrayed as a Respondent in this Adoption Petition (the 3rd Respondent could only have applied for seeking adoption of tariff for 50 MW as under its Power Sale Agreement with SECI the said capacity was to be sold to it); hence, it was paramount for SECI to seek adoption of tariff; on 05.09.2019, SECI sought permission from CERC to file a transposition application for adoption of tariff (ie after 1 year of execution of the PPA); on 07.10.2019, a transposition application was filed by SECI before CERC (after a delay of (i) 16 months from the letter of award dated 01.06.2018 and (ii) 13 months from the PPA dt. 04.09.2018); on 19.02.2020, tariff was ultimately adopted by CERC. (Tariff was adopted after a delay of more than 18 months from execution of the PPA, and merely 10 days from the Scheduled Commissioning Date *i.e.,* 29.02.2020).

B.CONTENTIONS OF THE 1ST RESPONDENT-SECI:

Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the first respondent-SECI, would submit that, consequent upon the letter of award dated 01.06.2018, Power Sale Agreements (PSAs) were finalized between SECI and TPDDL (50 MW), BYPL (100 MW) and UPPCL (150 MW); initially TPDDL and UPPCL sought approval for the power procurement from the respective State Commissions under Section 86(1)(b) of the Electricity Act with an added prayer for adoption of tariff under Section 63; on 04.05.2018 and 01.06.2018, DERC gave in-principal approval for procurement of power by TPDDL and BYPL; on 18.02.2019, DERC approved power purchase by TPDDL, but held that adoption of tariff could only be decided by CERC; TPDDL filed Petition No. 162/AT/2019 before the CERC on 03.05.2019 for adoption of tariff for 50 MW; SECI then sought to be transposed as a Co-Petitioner, and to pursue adoption of tariff for 300 MW (whole project of Appellant) before the

CERC; on 22.11.2019, UPERC also approved power purchase by UPPCL, but held that the issue of adoption of tariff should be examined by CERC; besides adoption of tariff under Section 63, approval by the two State Commissions, for power procurement, was mandatory under Section 86(1)(b) of the Electricity Act, read with Rule 8 of the Electricity Rules, 2005; further, adoption of tariff could be only for the quantum approved for procurement, and not more; and CERC issued the tariff adoption order on 19.02.2020.

Sri M.G.Ramachandran, Learned Senior Counsel, would further submit that the PPA dated 04.09.2018 neither prescribes any timeline for obtaining the order of adoption of tariff nor does it contain any provision for termination of the PPA for delay in adoption of tariff; the Appellant did not raise any issue regarding the delay in adoption of tariff till 07.08.2019, by which time the CERC was seized of Petition No. 162/AT/2019 filed by TPDDL on 03.05.2019; even in its communications, vide letters dated 07.08.2019, 03.09.2019,19.09.2019 and 20.12.2019, the Appellant only sought extension of time, for scheduled commercial operation, by 18 months from the date of adoption of tariff; the Appellant did not raise any issue regarding termination of the PPA, including before the CERC, though it was made a party before the CERC and notice was issued to them; the timeline provided in the PPA is 18 months for COD, and 7 months for financial closure; the timeline was extended until 28.08.2020; the Appellant did not approach the CERC seeking a longer extension on account of any delay in tariff adoption; after adoption of tariff by the CERC on 19.02.2020, the Appellant, without any discussion, unilaterally proceeded to terminate the PPA on 25.02.2020 because of the delay in adoption of tariff; neither can the conduct of SECI be said to be outrageous nor can it be said that there were irretrievably adverse implications on the

Appellant, caused by the time taken in the adoption of tariff, to fall within the exception of special equities as alleged by the Appellant.

C.CONTENTIONS URGED ON BEHALF OF THE 3RD RESPONDENT-TPDDL:

Ms. Ishita Jain, Learned Counsel for the 3rd Respondent- TPDDL, would submit that the Appellant has averred that, in the present case, special equities exist in its favour as, due to delay in adoption of the tariff, the lenders of the Appellant refused to sanction the finances/loan for Wind Power Project of the Appellant; in this regard, the Appellant has relied on letters dated 06.03.2019 and 18.03.2019, and e-mails dated 07.10.2019 and 05.11.2019, to contend that, due to delay in adoption of tariff by SECI, financial support was not given by the lenders of the Appellant; in the facts and circumstances of the present case, special equities do not exist in favour of the Appellant; in this regard, the following is pertinent to note: (a) it has been the stand of the Appellant that there was a delay of 18 months in adoption of the tariff i.e., as per the Appellant the delay in adoption of tariff was since the effective date of the PPA i.e.. 30.08.2018; as per the termination notice dated 25.02.2020, issued by the Appellant, they were compelled, by the alleged inaction of SECI, to obtain approval of the appropriate commission for adoption of tariff, along with the consequent Force Majeure ("FM") eventualities, to terminate the PPA; in terms of Article 4.5.3. of the PPA, which provides that if a FM event exists for more than 9 months, any party can terminate the PPA; the alleged right of the Appellant to terminate the PPA was available to them from 01.06.2019; the Appellant, however, did not terminate the PPA until 25.02.2020 (after the tariff was adopted); on the contrary, on multiple occasions they sought extension of timelines for Financial Closure and Scheduled Commercial Operation Date ("SCOD") (inter-alia on the ground of delay in adoption of

tariff), vide letters dated 04.03.2019, 14.03.2019, 28.03.2019, 07.08.2019, 03.09.2019, 19.09.2019 and 20.12.2019, which was time and again allowed by SECI vide letters dated 29.03.2019, 24.05.2019, and 14.01.2020, and the timelines were ultimately extended upto 28.08.2020; even after receipt of letters/ emails from the lenders, stating that it cannot sanction/finance the loan, the Appellant did not terminate the PPA, but sought extension of timelines for Financial Closure and SCOD; the lenders had not refused to finance the Project, but had only stated that they would be able to take up the appraisal post receipt of the approval from the appropriate commission; the Appellant has not pleaded that the Lenders had refused to finance the Project even after approval of the tariff by the CERC; however, after adoption of tariff, the Appellant suddenly terminated the PPA on 25.02.2020; the Appellant has not provided any reasons for not terminating the PPA earlier (since, as per the Appellant, the alleged cause for termination of PPA i.e. delay in adoption of tariff existed since the effective date of the PPA), and have terminated it only after approval of the tariff.

Ms. Ishita Jain, Learned Counsel, would further submit that in Petition No. 162/AT/2019 filed, before the CERC by Respondent No. 3, for adoption of tariff, notice was issued to the Appellant; however, the Appellant chose not to appear or file any reply to the petition filed before the CERC; in fact it was only vide its letter dated 07.08.2019 that the Appellant, for the first time, raised the issue that, due to delay in adoption of tariff by SECI, the Appellant was unable to secure financing for the Project; thus, the ground raised by the Appellant, for pleading special equities, i.e., the lender refused to finance the Project because of the delay in adoption of tariff by SECI, which forced the Appellant to terminate the PPA, does not exist, as is evident from the conduct of the Appellant

pursuant to receipt of letters from its lenders; and, therefore, the IA is liable to be dismissed.

In examining the question whether the 1st Respondent should be injuncted from invoking the bank guarantee, what is required to be ascertained is whether the said bank guarantee is unconditional and, if so, whether any of the exceptions, to the rule requiring courts/tribunals to desist from injuncting invocation of bank guarantees, is attracted. The underlying dispute between the parties is wholly extraneous to any such enquiry, as the Contract of Bank Guarantee is independent of the underlying contract (ie the PPA) in terms of which it was furnished.

D.THE CONTRACT OF BANK GUARANTEE IS 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*****, (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).** Invocation of a bank guarantee does not depend on termination of the underlying

contract. The bank guarantee is a separate contract, and is not qualified by the contract on performance of obligations. (***Gujarat Maritime Board* v. *L&T Infrastructure Development Projects Ltd.*, (2016) 10 SCC 46)**.

While it is true that Section 63 of the Electricity Act requires the appropriate Commission to adopt the tariff, if such tariff has been determined through a transparent process of bidding in accordance with the guidelines issued by the Central Government, questions as to whether (i) a petition for adoption of tariff should have been filed by SECI or by the distribution licensees, (ii) whether delay in invoking the jurisdiction of the CERC, seeking adoption of tariff, justified the appellant terminating the PPA or whether they were entitled only for grant of extension of time for commissioning of their plant, (iii) whether absence of time lines, specified in this regard in the PPA, justified belated applications being filed for adoption of tariff, (iv) the scope and purport of Clause 12(4) of the MoP guidelines, (v) whether the amendments made to the said guidelines on 26.07.2023 would have a bearing on the PPAs entered into prior thereto, (vi) whether the CERC was justified in rejecting the Petition filed by the Appellant, to declare termination of the PPA as legal and valid, (vii) whether the events referred to by the appellant constitute force majeure events etc, are all matters relating to the merits of the dispute between the parties, and must await a final hearing of the main appeal.

Whether the action of the beneficiary is legal and proper and whether, on the basis of such a decision, the bank guarantee could have been invoked, are not matters of inquiry. Between the Bank and the beneficiary, the moment there is a written demand for invoking the bank guarantee, the Bank is bound to honour the payment under the guarantee. (***Gujarat Maritime Board* v. *L&T Infrastructure***

Development Projects Ltd.*, (2016) 10 SCC 46).** 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 SECI from enforcing the bank guarantee, as the exceptions do not apply. (Mahatma Gandhi Sahakra Sakkare Karkhane* v. *National Heavy Engg. Coop. Ltd.*, (2007) 6 SCC 470; *Adani Agri Fresh* v. *Mehboob Sharif*, 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).**

The duty of the bank under the guarantee is created by the document itself. 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)**. None of the contentions raised by learned Counsel on both sides, on the merits of the order under appeal including those referred to herein above, have any bearing on the contract of bank guarantee between the bank and the 1st Respondent-SECI.

It is wholly unnecessary for us therefore, in this Interlocutory Application, to examine which of the rival contentions on merits

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 interlocutory relief sought by the appellant 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. As we have held earlier in this order that the appellant's case does not fall within any of the exceptions, we may not be justified in acceding to their request that SECI be restrained from invoking the bank guarantees.

In ***BSES Ltd. (Now Reliance Energy Ltd.)*** **v.** ***Fenner India Ltd.*****, (2006) 2 SCC 728,** the Supreme Court held that, as per the terms of the Bank Guarantee itself, the beneficiary was the best judge to decide as to when and for what reason the Bank Guarantee should be encashed; and it was no function of the Bank or of the 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.

In ***Shapoorji Pallonji Energy (Gujarat) Private Limited*** **v.** ***Gujarat Electricity Regulatory Commission*****, 2017 SCC OnLine APTEL 35,** this Tribunal concluded holding that equities could be adjusted, and relief could be given to the Appellants if they succeeded in the pending Appeals; but encashment of Bank Guarantees could not be stayed on that ground.

Needless to state that encashment of the Bank guarantee, if the Respondents so choose to do so, will undoubtedly be subject to the result of the main appeal and, while equities can be adjusted and the relief, of refund of the amount along with interest, can also be considered if the Appellant were to succeed in the main Appeal, encashment of

the Bank Guarantee cannot be stayed on the mere possibility of their success in the main Appeal.

CONCLUSION:

Subject to the afore-said observations, the I.A, seeking grant of interim relief, fails and is, accordingly, dismissed.

Pronounced in the open court on this ***18th day of March, 2024.***

(Seema Gupta)
Technical Member

(Justice Ramesh Ranganathan)
Chairperson