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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) 2004/2016 & C.M.No.8649/2016**

GSPL INDIA TRANSCO LIMITED

..... Petitioner

Through Mr.Parag Tripathi, Sr.Advocate with
Mr.Piyush Joshi, Ms.Sumiti Yadav
and Ms.Uttara Babbar, Advocates.

versus

**PETROLEUM & NATURAL GAS REGULATORY BOARD &
ANR**

..... Respondents

Through Mr.Prashant Bezboruah with
Mr.Rakesh Dewan, Advocates for R-
1.

Date of Decision: 09th March, 2016

**CORAM:
HON'BLE MR. JUSTICE MANMOHAN**

J U D G M E N T

MANMOHAN, J: (Oral)

1. Present writ petition has been filed seeking stay of encashment of the bank guarantee dated 15th May, 2014 by the respondent no.1
2. Mr. Parag Tripathi, learned senior counsel for petitioner submits that the encashment letter is in violation of Regulation 16 of the Petroleum and Natural Gas Regulatory Board (PNGRB) as no prior notice was issued to the petitioner. Since Regulation 16 of PNGRB has been relied upon by learned senior counsel for the petitioner, the relevant portion of the same is reproduced hereinbelow:-

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

(1) *An authorized entity shall abide by all the terms and conditions specified in these regulations and any failure in doing so, except for the default of the service obligation under sub-regulation (1) of regulation 14 and force majeure, shall be dealt with as per the following procedure, namely:-*

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

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

(c) In case of failure to take remedial action, the Board may encash the performance bond of the entity on the following basis, namely:-.....

(emphasis supplied)

3. Mr. Tripathi further contends that the delay in construction of the project was for reasons beyond the control of the petitioner and constitutes 'force majeure'. In support of his submission, he relies upon the following judgments of this Court:-

(a) M/s Basic Tele Services Ltd. Vs. Union of India & Anr., I.A. No. 11070/96 in Suit No. 2686/96 decided on 5th October, 1999

33. I am also tempted here to cite a few lines from a judgment delivered by the Supreme Court as reported in Delhi Science Forum & Others Vs. Union of India & Anr. Jt. 1996 (2) S.C. 295 the Hon'ble Supreme Court laid down the guidelines as to under what circumstances administrative decision of the Government or of the statutory authority of the Government can be challenged. It was observed "..... Many administrative decisions including decisions relating to awarding of contracts are vested in a statutory authority or a body constituted under an administrative order. Any decision taken by such authority or a body can be questioned primarily on the grounds: (i) decision has been taken in bad faith; (ii) decision is based on irrational or irrelevant considerations; (iii) decision has been taken without following the prescribed

procedure which is imperative in nature. While exercising the power of judicial review even in respect of contracts entered on behalf of the Government or authority which can be held to be State within meaning of Article 12 of the constitution courts have to address while examining of grievance of any petitioner as to whether the decision has been vitiated on one ground or the other. It is well settled that the onus to demonstrate that such decision has been vitiated because of adopting a procedure not sanctioned by law, or because of bad faith or taking into consideration factors which are irrelevant, is on the persons who questions the validity thereof.....”

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37. In the above circumstances I am of the view that the plaintiff have shown a prima facie case in their favour. In case the injunction is not issued in that eventuality the bank guarantee which was furnished by the plaintiff by way of earnest money in favour of defendant No.1 would be encashed, the plaintiff would suffer irreparable loss and injury in a much as they would be deprived of their hard earned money without any justification and for no fault of their own. On the other hand, in case an injunction is granted it would be simply tantamount to delay in encashing the bank guarantee if the defendant ultimately succeed. In any case the plaintiff the institution of the present suit have raised a substantial question which needs investigation and during the course of investigation it would be desirable to direct the parties to maintain the status quo.”

(b) HFCL Bezeq Telecom Ltd. Vs. Union of India, MANU/DE/0206/1998

44.Therefore, the first defendant cannot take advantage of its own wrong and try to invoke the Bank guarantee. The Supreme Court in U.O.I. & Others Vs. Hindustan Development Corporation & Others, MANU/SC/0218/1994: AIR1994SC980, Sterling Computers Limited Vs. M/s M&N Publications Limited & Others, MANU/SC/0439/1993: AIR1996SC51 and Delhi Science Forum & Others Vs. Union of India & Another, MANU/SC/0360/1996; [1996]2SCR767 had pointed out that the Public Authorities are expected to act

fairly, reasonably and in accordance with the principles of fair play and justice. In the case of Delhi Science Forum (supra) the Supreme Court had laid down that the principle is where it is shown that an authority exercising discretion has taken a decision which is devoid of any plausible justification any authority having reasonable person could not have taken the said decision. This is in consonance with the principles laid down by the House of Lord in C.C.S.U. Vs. Minister for the Civil Services, 1984 (3) A.E.R. 935. Nearly 387 years ago, the House of Commons in England had addressed to the king of England about the supremacy of the rule of law. Our Founding Fathers had given us the same polity for the people of India to be ruled by the rule of law. The House of Commons on the 7th of July, 1910 expressed its view:

“Amongst many other points of happiness and freedom which your Majesty’s subjects of this kingdom have enjoyed under your royal progenitors....there is none which they have accounted more dear and precious than this, to be guided and governed by certain rule of law....Out of this root bath grown the indubitable right of the people of this Kingdom not to be made subject to any punishment that shall extend to their lives, lands, bodies or goods, other than such as are ordained by the common laws of this land or the Statutes made by their common consent in parliament.”

Therefore, I am of the view that the first defendant is bound to act in accordance with the terms of the tender document.

4. On the other hand, learned counsel for respondent no.1 has handed over a copy of the letter dated 4th March, 2016 issued by the PNGRB to the petitioner, wherein it is specifically recorded that the procedure prescribed under Regulation 16 has been followed and that ‘force majeure’ is not attracted to the facts of the present case. Since the letter is relevant and deals with the contentions put forward by

Mr. Tripathi, the same is reproduced hereinbelow:-

“Subject: Encashment of Performance Bank Guarantee for Mehsana-Bhatinda Natural Gas Pipeline in accordance with provisions of Regulation 16(1)(c)(i) of PNGRB (Authorizing Entities to Lay, Build, Operate or Expand Natural Gas Pipelines) Regulations, 2008.

This has reference to the letter no. Infra/PL/BID/MBPL/01/2011 dated 07.07.2011 by Petroleum and Natural Gas Regulatory Board (PNGRB) conveying grant of authorization under Regulation 5 of PNGRB (Authorizing Entities to Lay, Build, Operate or Expand Natural Gas Pipelines) Regulations, 2008 (hereinafter referred as NGPL Authorization Regulations) for laying, building, operating or expanding of Mehsana-Bhatinda Natural Gas Pipeline (MBPL) in favour of M/s Gujarat State Petronet Limited. Subsequently, the Letter of Authorization (LOA) was amended in favour of M/s GSPL India Gasnet Limited (GIGL) by PNGRB on 31.05.2012.

2. The scheduled completion period of 36 months for the aforesaid pipeline project has expired on 06.07.2014.

Hearing for MBPL project

3. PNGRB reviewed and evaluated performance for MBPL on 10.07.2014 and it was observed that even though scheduled time period of 36 months has already passed the actual expenditure is approximately one (01) percent of the project cost. It was clarified that it would not be possible to construe procedural delays such as appointment of CA, Clearances, Statutory permissions etc. as ‘Force Majeure’.

4. Entity was advised on 13.08.2014 to submit revised implementation schedule. It responded vide its letter dated GIGL/COMM/2014 dated 11th November, 2014 indicating tentative commissioning of the MBPL project by May 2017.

5. In view of the fact that no physical progress has been made, notice dated 08.10.2015 was issued to the entity i.e. GIGL to appear before the PNGRB for hearing on 05.11.2015 under the provision of Regulation 16 of NGPL Authorization Regulations to explain why action should not be taken under the said provision.

6. The entity vide letter dated 04.11.2015 made various submissions with regard to MBPL. The entity reiterated various constraints faced by it and further stated that the pipeline should be developed within 24 months of receipt of all statutory clearances, i.e., December, 2017.

7. During the hearing held on 05.11.2015, the entity claimed various constraints faced by it as Force Majeure against which the entities were advised to submit justifications including documentary evidence to that effect from the respective Government/Statutory Authorities, urgently.

Examination of Submissions by GIGL for MBPL project

8. Subsequently, the entity submitted the requisite documents detailing the Force Majeure circumstances as advised during the hearing held on 05.11.2015. The documents furnished by the entity were examined and it was found that the entity has reiterated various reasons quoted in its earlier submissions and during the hearing held on 05.11.2015 along with details.

Analysis of Statutory Permissions of MBPL

| S.No. | State | No. of permissions sought | Total No. of permission sought | Total No. of permissions received | Percentage of No. of total permission received (%) |
|-------|-----------|---------------------------|--------------------------------|-----------------------------------|--|
| 1 | Guajarat | 50 | 1746 | 48 | 96.00 |
| 2 | Rajasthan | 1447 | | 1443 | 99.72 |
| 3 | Haryana | 191 | | 106 | 55.49 |
| 4 | Punjab | 58 | | 45 | 77.58 |

- (a). The documents/communications furnished by the entity have been analyzed and it has been observed that the entity has hired consultants which carry out various activities and does follow-ups with various statutory bodies on behalf of the entity. Though the entity has received approximately 94.04% of approvals/permissions for MBPL project, the entity didn't start with pipeline laying activities.
- (b). As per the Quarterly Progress Reports (QPR) furnished by the entity, the status of commencement of operations still remains at tendering and award stage, since October 2013 till date which is more than two years and physical progress is zero, which is also evident from the entity's communication to PNGRB dated 30.01.2016.
- (c) As per the QPR for quarter April-June 2014 submitted vide its letter dated 18.07.2014 the technical bids GIGL had published NIT and sale of tender document from 26.12.2013 for those pipelines sections of MBPL project wherever most of the

statutory clearances had been received and EPC bids were received for the same.

(d) As per the entity's recent communication dated 19.01.2016, the technical bids are under evaluation since 20.06.2014 indicating zero progress on technical evaluation in more than 19 months.

Force Majeure

9. As per Clause no.32 of Application cum Bid Document for the said pipelines, Force Majeure is defined as

"32.1 Force Majeure shall mean and be limited to the following:

a) War/hostilities

b) Major Riots or Civil Commotion.

c) Earthquake, flood, tempest, lightening or other natural physical disasters.

d) Restrictions imposed by Central Government or other statutory bodies which prevents or delays the execution of obligations under the Regulations.

32.2 The authorized entity shall within one week of occurrence of above causes notify PNGRB about the occurrence of the force majeure event and provide PNGRB all details of arising and ceasing of the impediment. The time and performance of the respective obligations suspended by the force majeure shall stand extended by the period(s) for which such conditions of force majeure last. PNGRB's decision, whether such force majeure conditions did actually exist shall be final and binding."

10. Upon examination, it was found that the constraints/reasons quoted by the entity for the delay in the execution of the projects cannot be construed as Force Majeure.

11. Based on the above analysis, following was observed:

(a). It has been more than 55 months since authorization and the pipeline laying activity have not yet started even though the scheduled completion period of 36 months has already expired on 06.07.2014.

(b) The entity has published NIT and sale of Tender document from 26th December 2013 for those pipeline sections of MBPL Project wherever most of the statutory clearances obtained and EPC bids received for the same. The technical

bids are under evaluation since 20th June 2014, indicating zero progress on technical evaluation in more than nineteen months even for the stretches of MBPL which already had most of the statutory clearances.

(c) Many of the applications have been made in end 2012 or 2013 even though authorization was issued in July 2011 indicating delay of more than a year in application itself.

(d) The entity was not in a position to decide upon firm time-frame of execution even in September 2014 i.e. after more than three years of authorization. Later, the entity indicated completion by May 2017 with all statutory approval by May 2015. Again recently the entity has shifted the goal post with target of project completion by December 2017 i.e. 24 months from the date of receipt of all approvals.

(e) As per latest quarterly report available, net expenditure done against MBPL and BJSPL projects together is approximately Rs.190 Crores against estimated cost of approximately Rs.8384 Crores.

12. The Statutory permissions may not be in place all in one go. One or the other clearance might remain pending but it does not stop the entity from pursuing other activities related to the project. The situation on ground does not provide sufficient optimism for projections shown by the entity.

13. The Board has provided ample opportunities to the entity of being heard and reasonable time to fulfil its obligations, i.e., approximately 20 months over and above the 36 months time prescribed in the extant Regulations. Also no substantive action is being taken by the entity within the specified period to the satisfaction of the Board. Therefore in accordance with the terms and conditions of authorization and provisions under regulation 16(1)(c)(i) of NGPL Authorization Regulations, PNGRB has come to the conclusion that breach of authorization has occurred with respect to non-completion of the pipeline project within scheduled completion period of 36 months for MBPL and BJSPL.

14. Hence, considering this as first default, as per the provisions of extant regulations, 25% of the Performance Bank Guarantees (PBGs) amounting to Rs.5,00,00,000/- (Rs. Five Crores Only) are being encashed from the PBG No.PBGI00710400184 date 15.05.2015 with Ratnakar Bank Limited submitted by you.

15. The Board has further decided to give time extension up to December 2017 for MBPL projects as sought by GIGL. Accordingly, it is advised to submit revised implementation schedule with milestones, which shall be closely monitored and deviation, if any, shall construe to be second default liable for action as per the provisions of extant Regulations.

16. You are hereby directed to make good the encashed PBG within two weeks of receipt of this letter, failure to do so shall attract the provisions of Regulation 16(1)(d) of NGPL Authorization Regulations. Kindly acknowledge the receipt of the letter.”

(emphasis supplied)

5. Having heard the learned counsel for the parties and having perused the bank guarantee, this Court finds that the same is irrevocable and unconditional. The relevant terms of the bank guarantee is reproduced hereinbelow:-

“2. We, the Bank, here by undertake to pay PNGRB an amount not exceeding Rs.20,00,00,000/- (Rupees Twenty Crores only) against any breach with respect to timely commissioning of the proposed NG Pipeline as per prescribed targets and also meeting service obligations by the authorized entity during the operating phase of the project, including failure to extend the validity of this guarantee or to give a fresh guarantee in lieu of the existing one. The PBG is valid for a period of three years initially, which shall be extended upto the economic life of the project in a block of minimum three years at the request of bidder or PNGRB.

3. We, the Bank hereby, in pursuance of the terms of the said Authorization, absolutely irrevocably and unconditionally guarantee as primary obligor and not merely as surety the payment of an amount of Rs.20,00,00,000/- (Rupees Twenty Crores only) to PNGRB to secure due and faithful performance by the Authorized Entity of all his/their obligations under the said Authorization.

4. We, the Bank, hereby agree that the decision of PNGRB as to whether the Authorized Entity has failed to or neglected to perform or discharge his duties and obligations under the said authorization and/or whether the service is free from deficiencies and defects and is in accordance with or not of the terms & conditions of the said Authorization and as to the amount payable to PNGRB by the Bank here under shall be final and binding on the Bank.

5. WE, THE BANK, DO HEREBY DECLARE AND AGREE THAT:

a) the Guarantee here in contained shall remain in full force and effect for economic life of the NG Pipeline project as specified in PNGRB regulations.

b) the PNGRB shall have the fullest liberty without our consent and without affecting in any manner our obligations here under to vary any of the terms and conditions of the said Authorization or to extend time of performance of any obligations by the said Authorization from time to time or to postpone for any time or from time to time any of the powers exercisable by the PNGRB against the said Authorized Entity and to forbear or to enforce any of the terms and conditions relating to the said Authorization and we shall not be relieved from our liability by reason of any variation or extension being granted to the said Authorized Entity or forbearance act or omission on the part of PNGRB or any indulgence by the Board to the said Authorized Entity or to give such matter or thing whatsoever which under the law relating to sureties would but for this provision, have effect of so relieving us.

c) any claim which we have against the Authorized Entity shall be subject and subordinate to the prior payment and performance in full of all the obligations of us hereunder and we will not without prior written consent of PNGRB exercise any legal right or remedy of any kind in respect of any such payment or performance so long as the obligations of us hereunder remains owing and outstanding.

d) This guarantee shall be irrevocable and the obligations of us herein shall not be conditional of any prior notice by us or by

the Authorized Entity.

6. *We the Bank undertake not to revoke this Guarantee during its currency except with the previous consent of PNGRB in writing.”*

6. From the aforesaid terms, it is apparent that the decision of the respondent No. 1 as to whether the petitioner had failed or neglected to perform or discharge its duties or obligations is final and binding on the respondent No. 2-bank.

7. It is further settled law that it is only in exceptional cases that it is to say in case of fraud or in case of irretrievable injustice that the encashment of the bank guarantee should be stayed.

8. It has also been held in a catena of cases that the underlying contract is independent from the bank guarantee issued by the bank. Consequently, at the behest of a contractor, the Court cannot examine the terms of the underlying contract entered into between the contractor and beneficiary to determine as to whether the delay was occasioned by a party other than the one which had furnished the bank guarantee.

9. This Court is of the view that the decision of respondent No. 1-PNGRB that the ‘force majeure’ is not attracted and the procedure prescribed under Regulation 16 has been followed is final and binding on the respondent No. 2-bank and the same cannot be agitated before this Court for seeking stay of encashment of the bank guarantee.

10. Also the two judgments cited by the learned senior counsel for the petitioner are clearly inapplicable to the facts of the present case, as in the present instance, the bank guarantee is unconditional,

irrevocable and the decision of the respondent No. 1-PNGRB is final and binding on the respondent No. 2-bank.

11. The Supreme Court in *U.P.Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd. (1998) 1 SCC 174* has held as under:-

“19.....The plaintiffs appealed to the Court of Appeal in England. It was held by a Bench consisting of Lord Denning, M.R., Browne and Geoffrey Lane, L.J. that a performance guarantee was similar to a confirmed letter of credit. Where, therefore, a bank had given a performance guarantee it was required to honour the guarantee according to its terms and was not concerned whether either party to the contract which underlay the guarantee was in default. The only exception to that rule was where fraud by one of the parties to the underlying contract had been established and the bank had notice of the fraud. Accordingly, as the defendants' guarantee provided for payment on demand without proof or conditions, and was in the nature of a promissory note payable on demand, and the plaintiffs had not established fraud on the part of the buyers, the defendants were required to honour their guarantee on the demand made by the Libyan bank. It followed that the judge had been right to discharge the injunction and that the appeal would be dismissed.

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

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34. On the basis of these principles I reiterate that commitments of banks must be honoured free from interference by the courts. Otherwise, trust in commerce internal and international would be irreparably damaged. It is only in exceptional cases that is to say in case of fraud or in case of irretrievable injustice be done, the court should interfere.

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44. The modern documentary credit had its origin from letters of credit. We may, therefore, begin the discussion with the traditional letter of credit. Paul R. Verkuil in an article explains the salient features of a letter of credit in these terms:

“The letter of credit is a contract. The issuing party — usually a bank — promises to pay the ‘beneficiary’ — traditionally a seller of goods — on demand if the beneficiary presents whatever documents may be required by the letter. They are normally the only two parties involved in the contract. The bank which issues a letter of credit acts as a principal, not as agent for its customer, and engages its own credit. The letter of credit thus evidences — irrevocable obligation to honour the draft presented by the beneficiary upon compliance with the terms of the credit.”

45.The bank must pay if the documents are in order and the terms of credit are satisfied. The bank, however, was not allowed to determine whether the seller had actually shipped the goods or whether the goods conformed to the requirements of the contract. Any dispute between the buyer and the seller must be settled between themselves. The courts, however, carved out an exception to this rule of absolute independence. The courts held that if there has been “fraud in the transaction” the bank could dishonour beneficiary's

demand for payment. The courts have generally permitted dishonour only on the fraud of the beneficiary, not the fraud of somebody else.

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49. This was also the view taken by this Court in United Commercial Bank case. There A.P. Sen. J. speaking for the Court, said (pages 323 and 324): (SCC pp. 783-84, paras 40-42)

“ . . .the rule is well established that a bank issuing or confirming a letter of credit is not concerned with the underlying contract between the buyer and seller. Duties of a bank under a letter of credit are created by the document itself, but in any case it has the power and is subject to the limitations which are given or imposed by it, in the absence of the appropriate provisions in the letter of credit.....

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53. Whether it is a traditional letter of credit or a new device like performance bond or performance guarantee, the obligation of banks appears to be the same. If the documentary credits are irrevocable and independent, the banks must pay when demand is made. Since the bank pledges its own credit involving its reputation, it has no defence except in the case of fraud. The bank's obligations of course should not be extended to protect the unscrupulous seller, that is, the seller who is responsible for the fraud. But, the banker must be sure of his ground before declining to pay. The nature of the fraud that the courts talk about is fraud of an “egregious nature as to vitiate the entire underlying transaction”. It is fraud of the beneficiary, not the fraud of somebody else. If the bank detects with a minimal investigation the fraudulent action of the seller, the payment could be refused. The bank cannot be compelled to honour the credit in such cases. But it may be very difficult for the bank to take a decision on the alleged fraudulent action. In such cases, it would be proper for the bank to ask the buyer to approach the court for an injunction.

(emphasis supplied)

12. Consequently, this Court is of the view that no ground for stay of encashment of the bank guarantee is made out. Accordingly the present writ petition along with the application are dismissed.

13. It is however clarified that the findings given by this Court are only in the context of encashment of the bank guarantee.

Order *dasti*.

MANMOHAN, J

MARCH 09, 2016
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