



नईदिल्ली
NEW DELHI

याचिकासंख्या./ I.A. No.23 of 2022 in 95/MP/2022

कोरम/ Coram:

श्रीआई. एस. झा, सदस्य/ Shri I. S. Jha, Member
श्रीअरुण गोयल, सदस्य/ Shri Arun Goyal, Member
श्री पी. के. सिंह, सदस्य / Shri P. K. Singh, Member

आदेश दिनांक/ Date of Order: 29th June, 2022

IN THE MATTER OF:

Application under Section 94(2) of the Electricity Act, 2003 seeking interim relief in the nature of directions restraining the Respondents from taking coercive actions against the Petitioner.

AND IN THE MATTER OF:

1. Inox Green Energy Services Pvt. Limited.
Inox Towers, Plot no. 17 Sector-16A,
Film City, Noida- 201301
2. Haroda Wind Energy Pvt. Limited.
3. Khatiyu Wind Energy Pvt. Limited.
4. Ravapar Wind Energy Pvt. Limited.
5. Vigodi Wind Energy Pvt Limited. All having address at:
301, ABS Tower, Old Padra Road,
Vadodara, Gujarat-39007

...Petitioners/Applicants

Versus

1. Solar Energy Corporation of India Limited (SECI),
6th Floor, Plate – B, NBCC Office Block,
Tower – 2, East Kidwai Nagar,

New Delhi – 110023.

2. Haryana Power Purchase Centre (HPPC),
Shakti Bhawan, Sector – 6,
Panchkula – Haryana.
Email – cehppc@uhbvn.org.in
3. Uttar Pradesh Power Corporation Limited (UPPCL),
Shakti Bhawan, 14 Ashok Marg,
Lucknow- Uttar Pradesh.
Email – mduppc12@gmail.com

...Respondents

Parties present: Shri Sanjay Sen, Sr. Advocate, IGESPL
Shri Mayank Bughani, Advocate, IGESPL
Ms. Mandakini Ghopsh, Advocate, IGESPL
Shri M. G. Ramachandran, Sr. Advocate, SECI
Ms. Tanya Sareen, Advocate, SECI
Ms. Shrishti Khindaria, Advocate, SECI
Ms. Neha Singh, SECI
Shri Shreedhar Singh, SECI
Shri Shubham Mishra, SECI
Shri Manoj Dixit, IGESPL
Ms. Shipa Sinni, IGESPL
Shri Bhupesh Juneja, IGESPL
Shri Venkatesh Sonti, IGESPL

आदेश/ ORDER

The Petitioner/Applicant No.1, Inox Green Energy Services Private Limited, is setting up 250 MW Wind Power Project in District - Kutch, Gujarat. On 31.05.2017, Solar Energy Corporation of India (SECI) invited proposals vide Request for Selection (RfS) for setting up grid connected wind power projects in India on “Build Own Operate” basis for an aggregate capacity of 1000 MW. The Petitioner/Applicant No.1 was issued Letter of Award (LOA) for setting up 250 MW Wind Power Project on 03.11.2017. Subsequently, Haroda Wind Energy Pvt. Ltd. (the Petitioner/Applicant No. 2), Khatiyu Wind Energy Pvt. Ltd. (the Petitioner/Applicant No. 3), Ravapar Wind Energy Pvt. Ltd. (the Petitioner/Applicant No. 4), Vigodi Wind Energy Pvt Ltd. (the Petitioner/Applicant No.5) and Nani Virani Energy Pvt.

Ltd. were incorporated as 100% subsidiaries of Inox Green Energy Services Pvt. Ltd. (the Petitioner/Applicant No.1) as Special Purpose Vehicles (SPVs) for setting up 50 MW each under this project. On 21.07.2017, Power Purchase Agreements (PPAs) were entered into between the Petitioners/Applicants (No.s 2 to No.5) and SECI. On 24.11.2017, Haryana Electricity Regulatory Commission (HERC) adopted tariff qua the Petitioners/Applicants while disposing of Petition No. HERC/PRO-79 of 2017. SECI entered into a Power Sale Agreement with Haryana Power Purchase Centre (HPPC) (the Respondent No. 2) and Uttar Pradesh Power Corporation Limited (UPPCL) (the Respondent No. 3) inter alia in respect of the power to be generated from the subject matter projects. On 03.12.2019, this Commission adopted tariff qua the Petitioner while disposing of Petition No.369/AT/2019 filed by SECI. In the main Petition, the Petitioners *inter-alia* are seeking declaration that the execution of the Project awarded to the Petitioners has become commercially and physically impossible on account of various force majeure events and, therefore, ought to be terminated. The Petitioners/Applicants vide instant Application are seeking interim relief in the nature of directions restraining the Respondents from taking coercive actions against the Petitioners/Applicants.

2. The Petitioners/Applicants have made the following prayers:

- a) *Declare that the execution of the Project awarded to the Petitioners vide Letter of Awards dated 03.11.2017, as well as the subsequent Power Purchase Agreements dated 27.12.2017 as Commercially and physically impossible on account of the various force majeure events enumerated above and therefore ought to be terminated;*
- b) *Issue appropriate directions that the Petitioner be relieved from performing its obligations under the Power Purchase Agreements (PPAs) on the ground of force majeure, without any financial implication;*
- c) *Direct Respondent to immediately release the Bank Guarantees furnished by the Petitioners pursuant to the Letter of Awards dated 03.11.2017, as well as the subsequent Power Purchase Agreements dated 27.12.2017;*
- d) *Pass such other or further orders as the Hon'ble Commission may deem fit and proper in the facts and circumstances of the case.*

I.A. 23 of 2022

- a) *Issue appropriate directions restraining the Respondents from encashing the Bank*

Guarantees furnished by the Applicant/Petitioner, till the final adjudication of the above titled Petition by this Hon'ble Commission;

b) Pass such other or further orders as the Hon'ble Commission may deem fit and proper in the facts and circumstances of the case.

3. The petition alongwith I.A. came up for hearing on 21.04.2022. During the hearing, the learned senior counsel for the Petitioners submitted that the present petition has been filed, inter alia, seeking declaration that the execution of the Projects awarded to the Petitioners vide Letter of Awards dated 3.11.2017 as well as the subsequent Power Purchase Agreements dated 27.12.2017 as commercially and physically impossible on account of various force majeure events enumerated in the Petition and therefore, ought to be terminated. Learned counsel further submitted that the Petitioners/Applicants have also filed IA bearing No. 23/IA/2022 seeking interim relief in the nature of appropriate directions restraining the Respondents from encashing the Bank Guarantees furnished by the Petitioners till final adjudication of the petition. Thereafter, the learned senior counsel made detailed submissions in support of the grant of aforesaid interim relief during the pendency of the petition. The learned senior counsel for the Respondent, SECI, on the other hand, also made detailed submissions on the IA and strongly opposed grant of interim relief to the Petitioners. Based on the request of the learned senior counsel for the parties, the Commission permitted the parties to file their respective written submissions on the IA within a week with copy to each other and accordingly, the petition was admitted and I.A. was reserved for order.

Submissions of the Petitioner through 'Note of Argument':

4. The Petitioner filed 'Note of Argument' on 21.04.2022 vide which it has submitted as under:
- a) There is a prima facie case for SECI not to take any coercive action. Extension of SCoD was given by SECI on 07.09.2020 and 08.09.2020 and the SCoD was finally extended up to 28.06.2021 (which is 12 months beyond that of the original SCoD i.e. 03.05.2019). Extension can only be in terms of the PPAs. SECI having accepted the existence of force majeure event has granted such extension of SCoD.
 - b) Under Article 4.5 & 13.5 of the PPAs, the parties have agreed on an exit option in the event of extended force majeure. A right to terminate is crystallized in case force majeure event exists beyond 9/12 months.
 - c) Since the right to terminate exists on account of extended force majeure beyond 9/12

months, SECI cannot invoke the Bank Guarantee. To do so would be in violation of the terms of the PPA. Article 13.5.1 provides that in event of termination due to extended force majeure events, the same shall be “*without further liability*” to either party.

- d) It is established that the terms of The PPA cannot be violated pending adjudication. The Law of Bank Guarantee in relation to jurisdiction over a bank so as to injunct the bank from making payment is well settled. In the present case, the Bank Guarantee has not been invoked by SECI and the bank is not involved at all.
- e) SECI has not even crystallized the damages/ claim amount and/or made any demand thereto. In the letter dated 13.08.2021, SECI only stated that “*Since the Project is not commissioned till revised SCD, hence, Article no. 4.6 (Liquidated Damages not amounting to penalty for delay in commencement of supply of power to Buyer) of the Power Purchase Agreement (PPA) signed for the Project has become operational from 29.06.2021.*”
- f) SECI’s alleged demand notice has not even crystalized the quantum of damages. Principles of law of damages in *Kailash Nath Associates V. DDA (2015) 4 SCC 136* are well settled. Liquidated Damages are only the maximum amount that can be claimed. Any claim of damages has to be based on actual loss suffered in the form of reasonable compensation. Liquidated damages are not by themselves the amount payable in the form of damages and instead only a reasonable compensation is payable. Liquidated damages are merely a pre-estimate of damages and there necessarily has to be a determination on the basis of proof of actual loss suffered. This cannot be dispensed with as has been held by the Hon’ble Supreme Court. No attempt has been made by SECI to demonstrate / prove (even prima facie) the actual losses suffered. Reliance is also placed on the *Gangotri Enterprises Ltd. V UOI (2016) 11 SCC 720*), where the Hon’ble Supreme Court has held that once the adjudicatory process has been initiated before the claims/ demand is made or bank guarantee is invoked, the said adjudicatory process cannot be circumvented so as to render the petition otiose or infructuous.
- g) This Commission has issued directions to SECI not to take coercive action in several other cases. SECI has accepted the orders/ directions of this Commission in the *Mytrah Vayu case being Petition No 227/MP/2020 (which was also a case of termination)* and other cases. No review and/ or appeal has been filed by SECI. Having accepted such order restraining coercive measures, SECI being a Government company (i.e., State under

Article 12 of the Constitution), cannot take a different position in the present case. Similar Order has been passed by this Commission in various identical/similar matters (in relation to interim order) which are pending adjudication before this Commission viz. 10/MP/2021,701/MP/2020, 43/MP/2021, 67/MP/2021, 139/2021, 227/MP/2020, 63/MP/2021, 580/MP/2020 and 137/MP/2019.

- h) SECI is a trader and cannot pocket the Bank Guarantee amount and/ or profit from that. In terms of the extant regulations governing trading licensees, SECI is only entitled to a margin. No other loss is to the account of SECI. Invocation of Bank Guarantee has to be preceded by a valid claim by the Distribution Licensee so that SECI can demonstrate loss or potential loss. Reliance has been placed on Order dated 11.10.2017 passed in Petition No. 304/MP/2013 *M/s Godawari Green Energy Limited (GGEL) Vs. NTPC Vidyut Vyapar Nigam Ltd.& Ors.* by this Commission.

Submissions of SECI though ‘Note of Submission’:

5. SECI filed ‘Note of Submission’ on 22.04.2022. Briefly, SECI has submitted as under:
- a) SCoD as per Article 1 of the PPAs is 03.05.2019. SCoD was extended first to 28.01.2021 and then to 28.06.2021. Total extension of time granted for SCOD is 787 days. Extension of SCOD from 03.05.2019 to 28.01.2021 was granted by SECI at the instance of the Petitioners namely in pursuance of letters dated 17.07.2020 and 12.08.2020 of the Petitioners.
 - b) The extension granted by SECI vide the letter dated 07.09.2020 was not for any Force Majeure event, as sought to be alleged by the Petitioner. It was in pursuant to the Notification dated 22.10.2019 of Ministry of New and Renewable Energy, Government of India vide which MNRE had examined various request for ‘Grant of extension to wind power projects under SECI tranches I to V’.
 - c) The second extension from 28.01.2021 to 28.06.2021 was again at the instance of the Petitioners, namely in pursuance of letter dated 20.08.2020 of Petitioners and in accordance with Office Memorandum dated 13.08.2020 of MNRE- Covid-19.
 - d) There is a breach on the part of Petitioner in not fulfilling the terms of the PPAs despite extension granted till 28.06.2021 and even thereafter in terms of Article 4.6.1 of the PPA which allows commissioning with Liquidated damages for a period of nine months i.e. till 28.03.2022 (9 months from 28.06.2021).

- e) SECI had notified the liability of payment of liquidated damages on 13.08.2021. The liquidated damages payable by the Petitioners is a definitive amount as per Article 4.6.1 of the PPAs.
- f) In any event, there cannot be a stay on the invocation of Bank Guarantees issued by Bank in the sum of Rs. 9,29,70,000/-each for the four PPAs aggregating to Rs 37,18,80,800/- as per the settled principles. SECI has placed its reliance on settled principles regarding encashment of Bank Guarantee and the decisions of the Hon'ble Courts.
- g) The settled position in law is that a bank guarantee is an independent and separate contract between the bank and beneficiary of the guarantee. The Bank Guarantee is not qualified by the contract on performance of the obligations under the main contract. Mere claim of irreparable harm pleaded by the Petitioners is not sufficient cause for granting the injunction against the encashment of the Bank Guarantee. It is not and cannot be the case of the Petitioner that equities cannot be adjusted in favour of the Petitioner if and when the petition filed by the Petitioner is decided on merits or that on such decision being made, the Petitioner will not be able to enforce the recovery against SECI.
- h) It is well-settled that there cannot be restraint on the party from encashing the Bank Guarantee by an order passed by Court/Tribunal/Commission unless there is a:
- (i) Fraud of an egregious nature which vitiates the very foundation of the bank guarantee;
- or
- (ii) Irretrievable injustice of 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.
- i) The interim application for stay filed by the Petitioners does not whisper any of fraud or irretrievable injustice as mentioned above.
- j) As per Clause 3.14 of the Guidelines notified by the Government of India, the amount recovered from encashment of Bank Guarantee is to be deposited in a separate fund under the guidance of MNRE.
- k) With regard to reliance placed by the Petitioners on the decision of the Hon'ble Supreme Court in *Gangotri Enterprises Limited –v- Union of India and Others (2016) 11 SCC 720*, the following extract from the decision dated 29.05.2017 of the Appellate Tribunal passed in I.A. No.384 of 2017 in Appeal No.161 of 2017, *Shahpoorji Pallonj Energy*

(Gujarat) Private Limited –v- Gujarat Electricity Regulatory Commission & Another is relevant:

42. Heavy reliance was placed on behalf of the Applicants on the judgment of the Supreme Court in Gangotri. We are of the opinion that the said judgment is not applicable to this case. We do not think that in that case, the Supreme Court took a different view from the law settled by it in a catena of judgments crystallising principles underlying invocation and encashment of Bank Guarantees. In fact, after referring to number of leading cases, which include U.P. State Sugar Corporation, the Supreme Court has in Gangotri said that, these judgments lay down general principles relating to Bank Guarantees and there can be no quarrel over the propositions laid down in those cases. The Supreme Court then reiterated that every case has to be decided with reference to the facts of the case involved therein and then discussed the peculiar facts of the case before it. Reliance was placed by the Applicants on the observations of the Supreme Court in this case that the sum claimed was neither an admitted sum, nor a sum which was adjudicated upon in any judicial proceedings. It is submitted that even in this case, the sum is not adjudicated upon. But it must be noted that this is not the only circumstance that weighed with the Supreme Court. The Supreme Court observed that the sum claimed by the Respondents from the Appellants therein did not relate to the contract for which the Bank Guarantee had been furnished but it related to another contract dated 22/08/2005 for which no Bank Guarantee had been furnished. Perhaps the most important fact which distinguishes it from other cases and which was noted by the Supreme Court was that the Bank Guarantee was in the nature of a Performance Guarantee furnished for execution work of contract dated 14/07/2006, which was completed and the work having been completed to the satisfaction of the Respondents, they had no right to encash the Bank Guarantee. Thus, this case turns on its own peculiar facts. It does not take a view contrary to the view taken by the Supreme Court in earlier judgments to which we have made a reference that adjudication of claim is not a precondition to invocation and encashment of a Bank Guarantee. Facts of Gangotri can never be equated with the facts of the present case. We may advantageously refer to the Delhi High Court's judgment in TRF Limited v. ENERGO Engineering Projects Limited¹⁵, where the Delhi High Court has distinguished Gangotri

- 1) In the facts and circumstances mentioned above, it is not a fit and proper case for grant of an injunction to restrain the encashment of the Bank Guarantee as sought for the Petitioners or otherwise.

Analysis and Decision:

6. We have heard the learned counsels for the Petitioners/Applicants and the Respondents and have carefully perused the records qua the issue raised by the Petitioners/Applicants in the I.A. 23 of 2022 regarding “Issue appropriate directions restraining the Respondents from

encashing the Bank Guarantees furnished by the Applicant/Petitioner, till the final adjudication of the above titled Petition by this Commission”.

7. The brief facts of the I.A. are that Petitioners/Applicants (No.2 to No.5) and Nani Virani Wind Energy Private Limited were incorporated as 100% subsidiaries of the Petitioner /Applicant No.1 as SPVs for setting up 50MW each under the project. The Petitioners/Applicants (No.2 to No.5) have submitted with the Respondent, the following Bank Guarantees:

Petitioner	Bank Guarantee No.	Amount	SCoD	Validity of Bank Guarantee
Haroda Wind Energy Pvt. Ltd.	OGT0009170016720	9,29,70,000/-	28.06.2021	30.06.2022
Khatiyu Wind Energy Pvt. Ltd.	OGT0009170016709	9,29,70,000/-	28.06.2021	30.06.2022
Ravapar Wind Energy Pvt. Ltd.	OGT0009170016717	9,29,70,000/-	28.06.2021	30.06.2022
Vigodi Wind Energy Pvt Ltd.	OGT0009170016716	9,29,70,000/-	28.06.2021	30.06.2022

8. We observe that as per PPAs dated 27.12.2017, SCoD of the project was 03.05.2019. However, on the request of the Petitioner/Applicant, the SCoD was extended by SECI on two occasions viz. first to 28.01.2021 and then to 28.06.2021. Total extension of time granted for SCoD was for 787 days. On 13.08.2021, SECI informed the Petitioners/Applicants that since the project was not commissioned as on 28.06.2021, Liquidated Damages were applicable w.e.f. 29.06.2021.
9. The Petitioners/Applicants have submitted that the execution of the Project has become impossible on account of the events (Force Majeure events as defined under Article 11) which are beyond the control of the Petitioners/Applicants viz. (i) Non availability of Requisite Infrastructure (Connectivity, Common Infrastructure, Land); (ii) Non availability of Requisite Funds; (iii) Non availability of WTGS and allied equipment on account of Covid 19 Pandemic. SECI has extended SCoD up to 28.06.2021 (which is 12 months beyond that of the original SCoD i.e. 03.05.2019) due to force majeure events. Articles 4.5 and 13.5 of the PPAs provide for an exit option to the parties in the event of extended force majeure. A right to

terminate is crystallized in case force majeure event exists beyond 9/12 months and as such SECI cannot invoke the Bank Guarantee. Article 13.5.1 provides that in the event of termination due to extended force majeure events, the same shall be “*without further liability*” to either party. However, contrary to the terms of PPAs, SECI vide letter dated 13.08.2021 had levied Liquidated Damages w.e.f. 29.06.2021. The PPA terms cannot be violated when the matter is pending adjudication. The Law of Bank Guarantee in relation to jurisdiction over a bank so as to injunct the bank from making payment is well settled. In the present case, the Bank Guarantee has not been invoked by SECI and the bank is not involved at all. Hence, there is a *prima facie* case in favour of the Petitioners/Applicants for SECI not to take any coercive action. ***Per contra***, SECI has submitted that the impugned extensions in SCoD granted by SECI were not for any Force Majeure event but pursuant to the Notification dated 22.10.2019 and 13.08.2019 issued by MNRE. There is a breach on the part of Petitioner in not fulfilling the terms of the PPAs despite extension granted till 28.06.2021. In terms of Article 4.6.1 of the PPAs for delay up to six months SECI is entitled to encash “*total PBG on per day basis and proportionate to the balance Capacity not commissioned.*”

10. We observe that the Petitioners/Applicants have filed the Petition for declaration that the execution of the Project has become commercially and physically impossible on account of the various force majeure events and, therefore, PPAs ought to be terminated and also to immediately release the Bank Guarantees. The said petition is still in the initial stage and the pleadings are yet to be completed. As such, the Commission has no occasion to appreciate the facts of the case or to hear the contracting parties on merit. The Petitioners/Applicants have also filed I.A. for restraining the Respondents from encashing the Bank Guarantees.
11. The limited issue before this Commission in the present IA is whether to pass appropriate directions restraining the Respondents from encashing the Bank Guarantees furnished by the Petitioners/Applicants, till the final adjudication of the above titled Petition by this Commission.
12. We observe that relevant provisions of the PPAs stipulate as under:

“4.6 Liquidated Damages not amounting to penalty for delay in commencement of supply of power to Buyer

4.6.1 The selected projects shall be commissioned within 18 months from date of

issuance of Letter of Award. A duly constituted Committee will physically inspect and certify successful commissioning of the project. In case of failure to achieve this milestone, SECI shall encash the Performance Bank Guarantee (PBG) in the following manner:

Delay upto six (6) months - Buyer will encash total Performance Bank Guarantee on per day basis and proportionate to the balance Capacity not commissioned.”

4.6.2 In case the commissioning of the project is delayed over Six(6) months, the tariff discovered after e-Reverse Auction shall be reduced at the rate of 0.50 paise/kWh per day of delay for the delay in such remaining capacity which is not commissioned. ...”

13. Article 4.6 of the PPA deals with the liquidated damages for delay in commencement of supply of power. Further, the heading clarifies that the said liquidated damages are not in the nature of penalty. As per the above provisions, the failure on the part of the Petitioner to complete the project within the stipulated time and commence supply of power would enable SECI to encash the Performance Bank Guarantee. There is no requirement of determination of loss or damages before the Performance Bank.

14. The Petitioner has relied upon the judgement of the Hon’ble Supreme Court in Gangotri Enterprises Ltd. V UOI (2016) 11 SCC 720) and submitted that as per the said judgement, once the adjudicatory process has been initiated before the claims/ demand is made or bank guarantee is invoked, the said adjudicatory process cannot be circumvented so as to render the petition otiose or infructuous. We observe that the Appellate Tribunal for Electricity (Appellate Tribunal) in its judgement dated 29.5.2017 in **IA No. 384 of 2017 in Appeal No.161 of 2017 (Shaporji Pallonji Energy (Gujarat) Private Limited V. Gujarat Electricity Regulatory Commission &Anr)** [Shaporji Pallonji Case], has distinguished the judgement of the Hon’ble Supreme Court in Gangotri Case vis-a-vis powers of the Courts to interfere in the invocation of Bank Guarantee in the following terms:

“42. Heavy reliance was placed on behalf of the Applicants on the judgment of the Supreme Court in Gangotri. We are of the opinion that the said judgment is not applicable to this case. We do not think that in that case, the Supreme Court took a different view from the law settled by it in a catena of judgments crystallising principles underlying invocation and encashment of Bank Guarantees. In fact, after referring to number of leading cases, which include U.P. State Sugar Corporation, the Supreme Court has in Gangotri said that, these judgments lay down general principles relating to Bank Guarantees and there can be no quarrel over the propositions laid down in those cases. The Supreme Court then reiterated that every case has to be decided with reference to the facts of the case involved therein and then discussed the

peculiar facts of the case before it. Reliance was placed by the Applicants on the observations of the Supreme Court in this case that the sum claimed was neither an admitted sum, nor a sum which was adjudicated upon in any judicial proceedings. It is submitted that even in this case, the sum is not adjudicated upon. But it must be noted that this is not the only circumstance that weighed with the Supreme Court. The Supreme Court observed that the sum claimed by the Respondents from the Appellants therein did not relate to the contract for which the Bank Guarantee had been furnished but it related to another contract dated 22/08/2005 for which no Bank Guarantee had been furnished. Perhaps the most important fact which distinguishes it from other cases and which was noted by the Supreme Court was that the Bank Guarantee was in the nature of a Performance Guarantee furnished for execution work of contract dated 14/07/2006, which was completed and the work having been completed to the satisfaction of the Respondents, they had no right to encash the Bank Guarantee. Thus, this case turns on its own peculiar facts. It does not take a view contrary to the view taken by the Supreme Court in earlier judgments to which we have made a reference that adjudication of claim is not a precondition to invocation and encashment of a Bank Guarantee. Facts of Gangotri can never be equated with the facts of the present case. We may advantageously refer to the Delhi High Court's judgment in TRF Limited v. ENERGO Engineering Projects Limited¹⁵, where the Delhi High Court has distinguished Gangotri.”

15. Further, the Petitioner relying on the judgement of the Hon'ble Supreme Court in *Kailash Nath Associates V. DDA [(2015) 4 SCC 136]* has submitted that liquidated damages are merely a pre-estimate of damages and there necessarily has to be a determination on the basis of proof of actual loss suffered and this requirement cannot be dispensed with before encashing the Bank Guarantee to recover the liquidated damages. The Appellate Tribunal in Shaporji Pallonji Case has also distinguished the judgement in Kailash Nath Associates from the cases relating to encashment of Bank Guarantee as under:

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

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

16. The Hon'ble Supreme Court in a catena of judgements has held that bank guarantee is an

independent and distinct contract between the bank and beneficiary and does not depend on the results of the decision in the dispute between the parties in case of breach. In Ansal Energy Projects Limited Vs. Tehri Hydro Development Corporation Limited and Anr [(1996) 5 SCC 450], Hon'ble Supreme Court has observed as under:

“4. It is settled law that bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction and the validity of the primary contract between the person at whose instance the bank guarantee was given and the beneficiary. Unless fraud or special equity exists, is pleaded and prima facie established by strong evidence as a triable issue, the beneficiary cannot be restrained from encashing the bank guarantee even if dispute between the beneficiary and the person at whose instance the bank guarantee was given by the bank, had arisen in performance of the contract or execution of the works undertaken in furtherance thereof. The bank unconditionally and irrevocably promised to pay, on demand, the amount of liability undertaken in the guarantee without any demur or dispute in terms of the bank guarantee. The object behind is to inculcate respect for free flow of commerce and trade and faith in the commercial banking transactions unhedged by pending disputes between the beneficiary and the contractor.

5. It is equally settled law that in terms of the bank guarantee the beneficiary is entitled to invoke the bank guarantee and seek encashment of the amount specified in the bank guarantee. It does not depend upon the result of the decision in the dispute between the parties, in case of the breach. The underlying object is that an irrevocable commitment either in the form of bank guarantee or letters of credit solemnly given by the bank must be honoured. The court exercising its power cannot interfere with enforcement of bank guarantee/letters of credit except only in cases where fraud or special equity is prima facie made out in the case as triable issue by strong evidence so as to prevent irretrievable injustice to the parties. The trading operation would not be jettisoned and faith of the people in the efficacy of banking transactions would not be eroded or brought to disbelief.”

17. The above legal position has been reiterated by the Hon'ble Supreme Court in the following judgements:

- (a) U.P. State Sugar Corporation Vs Sumac International Limited [(1997) 1 SCC 450]
- (b) Mahatma Gandhi Sahakara Sakkare Karkhane v. National Heavy Engineering Cooperative Limited & Anr. [(2007) 6 SCC 470]
- (c) Vinitec Electronic Private Limited Vs. HCL Infosystem limited [(2008) 1 SCC 544]
- (d) Adani Agri Fresh Vs. Mehboob Shariff & Ors. [AIR 2016 SC 92]

18. The Appellate Tribunal after examining the judgements of the Hon'ble Supreme Court on bank guarantee summarised the law as under:

“31. The principles laid down by the Supreme Court can be summarized as follows: The Bank Guarantee is an independent contract between the bank and the beneficiary thereof. The bank is always obliged to honour its guarantee as long as it is an unconditional and irrevocable Bank Guarantee. The dispute between the beneficiary and party, at whose instance the bank has given the guarantee is immaterial and is of no consequence. The liability of the bank is absolute and unequivocal. The bank has to only verify whether the amount claimed is within the terms of the Bank Guarantee or Letter of Credit. Any payment by the bank would obviously be subject to the final decision of the court or the tribunal. At the stage of invocation of Bank Guarantee, there is no need for final adjudication and decision on the amount due and payable by the person giving the Bank Guarantee. **The Courts should not interfere with invocation and encashment of Bank Guarantee unless there is fraud of egregious nature of which the beneficiary seeks to take advantage and which vitiates the entire underlying transaction or a case where irretrievable injustice is likely to be caused to either of the parties. That is to say, there must be special equities in favour of injunction such as when irretrievable injury or irretrievable injustice would occur if injunction were not granted.** Since in most cases payment of money under a Bank Guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country. **There is no question of making out any prima facie case much less strong evidence or special equity for interference by way of injunction by the court in preventing encashment of Bank Guarantee. The bank must honour Bank Guarantees free from interference by the courts, otherwise trust in commerce, internal and international would be damaged irreparably.** There has to be glaring circumstances of deception or fraud warranting interference. Final adjudication is not a pre-condition to invoke the Bank Guarantee and that is not a ground to issue injunction restraining the beneficiary from enforcing the Bank Guarantee. The mere fact that the Bank Guarantee refers to the principle agreement without referring to any specific clause in the preamble of the deed of guarantee does not make the guarantee furnished by the bank to be a conditional one. The present case can be examined in the light of these principles.”

19. The principles that emerge from the above observations of the Appellate Tribunal relying on a catena of decisions by The Apex Court are as under:
- (a) The Bank Guarantee is an independent contract between the bank and the beneficiary thereof. The bank is always obliged to honour its guarantee as long as it is an unconditional and irrevocable Bank Guarantee.
 - (b) The dispute between the beneficiary and the party, at whose instance the bank has given the guarantee is immaterial and is of no consequence. The bank has to only verify whether the amount claimed is within the terms of the Bank Guarantee or Letter of Credit. Any payment by the bank would be subject to the final decision of the Court or the Tribunal.
 - (c) The Courts should not interfere with invocation and encashment of Bank Guarantee unless

there is fraud of egregious nature of which the beneficiary seeks to take advantage and which vitiates the entire underlying transaction or a case where irretrievable injustice is likely to be caused to either of the parties. There must be special equities in favour of injunction such as when irretrievable injury or irretrievable injustice would occur if injunction were not granted.

(d) There is no question of making out any prima facie case by the person seeking injunction.

(e) Final adjudication is not a pre-condition to invoke the Bank Guarantee and that is not a ground to issue injunction restraining the beneficiary from enforcing the Bank Guarantee.

20. Without going into the merits of the petition, we find that as per Article 4.6.1 of the PPAs for delay upto six months SECI is entitled to encash total PBG on per day basis and proportionate to the balance Capacity not commissioned. In the instant case, the Letter of Award for setting up 250 MW Wind Power Project was issued by SECI on 03.11.2017. As per Article 4.6.1 of the PPAs, the project was to be commissioned within 18 months from date of issuance of Letter of Award i.e. by 03.05.2019 (initial SCoD). However, the SCoD was extended by 787 days i.e. upto 28.06.2021 by SECI which has become the revised SCoD for the purpose of execution of the project. As per Article 4.6.1 of the PPAs SECI is entitled to encash the PBG (on per day basis) in case of delay in commissioning of the project by six (6) months w.e.f. 28.06.2021 (the revised SCoD). Further, none of grounds for interference in the invocation of bank guarantee as laid down by the various judgements of the Hon'ble Supreme Court i.e. fraud of egregious nature_or special equity in favour of injuction exist in this case. In view of the above, we are of the view that no case has been made out for issue of direction to restrain SECI from encashing the PBG Bank Guarantees furnished by the Applicant/Petitioner, till the final adjudication of the main petition. Accordingly, the prayers made in the I.A. 23 of 2022 are rejected. It is however clarified that invocation of PBG by SECI shall be subject to the final decision in the main petition.

21. Accordingly, I.A. 23 of 2022 in Petition No. 95/MP/2022 is disposed of.

Sd/
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(सदस्य)

Sd/
अरुण गोयल
(सदस्य)

Sd/
आई. एस. झा
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