APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)

APPEAL NO. 292 OF 2022 &
IA NO. 1010 OF 2022

Dated: 24th February, 2023

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

In the matter of:

1. **Inox Green Energy Services Ltd.**
   Through its authorised Representative
   Inox Towers, Plot No. 17
   Sector-16 A, Film City
   Noida – 201301.

2. **Haroda Wind Energy Pvt. Ltd.,**
   301, ABS Tower
   Old Padra Road
   Vadodara,
   Gujarat – 390007.

3. **Khatiyu Wind Energy Pvt. Ltd.,**
   301, ABS Tower
   Old Padra Road
   Vadodara,
   Gujarat – 390007.

4. **Ravapar Wind Energy Pvt. Ltd.,**
   301, ABS Tower
   Old Padra Road
   Vadodara,
   Gujarat – 390007.

5. **Vigodi Wind Energy Pvt. Ltd.,**
   301, ABS Tower

Old Padra Road
Vadodara,
Gujarat – 390007 **…. Appellant(s)**

Versus

1. **Central Electricity Regulatory Commission**
Through its Secretary
3rd & 4th Floor, Chanderlok Building,
36, Janpath,
New Delhi – 110001

2. **Solar Energy Corporation of India Limited**
Through its Managing Director,
6th Floor, Plate – B, NBCC Office Block,
Tower – 2, East Kidwai Nagar,
New Delhi – 110023

3. **Haryana Power Purchase Centre**
Through its Chief Engineer,
Shakti Bhawan, Sector – 6,
Panchkula, Haryana – 134 109

4. **Uttar Pradesh Power Corporation Limited**
Through its Managing Director,
Shakti Bhawan, 14 Ashok Marg,
Lucknow, Uttar Pradesh – 226001 **... Respondent(s)**

Counsel for the Appellant(s) : Mr. Gopal Jain, Sr. Adv.
Mr. Naveen Chawla
Mr. Rishabh Kumar Thakur
Mr. Mayank Bughania

Counsel for the Respondent(s) : Mr. M. G. Ramachandran, Sr. Adv.
Ms. Anushree Bardhan
Ms. Srishti Khindaria
Mr. Aneesh Bajaj
Ms. Surbhi Kapoor
Ms. Tanya Sareen for R-2

O R D E R

PER HON'BLE MR. JUSTICE RAMESH RANGANATHAN, CHAIRPERSON

1. This Appeal is preferred against the Order passed by the Central Electricity Regulatory Commission (for short "CERC") in IA No. 23 of 2022 in 95/MP/2022 dated 29.06.2022. The Appellant herein filed an IA before the CERC seeking interim directions restraining the Respondents from taking coercive action against them. They filed IA No. 23 of 2022 thereafter to restrain the Respondents from encashing the Bank Guarantee, furnished by them, till final adjudication of the Petition by the CERC.

2. The 2nd Respondent–Solar Energy Corporation of India Limited (for short "SECI") invited proposals on 31.05.2017 for setting up Grid connected wind power projects, on "build own operate" basis, for an aggregate capacity of 1000 MW. The Appellant was issued a letter of award for setting up a 250 MW wind power project on 03.11.2017. A Power Purchase Agreement (for short "PPA") was entered into on 21.07.2017, and the Haryana Electricity Regulatory Commission (for short "Commission") on 24.11.2017 adopted the tariff while disposing of the earlier Petition. The 2nd Respondent entered into a Power Sale Agreement (for short "PSA") with the 3rd Respondent–Haryana Power Purchase Centre (for short "HPPC") and the 4th Respondent – Uttar Pradesh Power Corporation Limited (for short "UPPCL") in respect of the power generated from this project. On 03.12.2019, the Commission adopted the tariff qua the Appellant, while disposing of the Petition filed by the 2nd Respondent. In the Petition presently pending before the CERC, the Appellant herein had sought a declaration that execution of the project,

awarded to them, had become commercially and physically impossible on account of *force majeure* events, and should therefore be terminated.

3. After noting the rival contentions, the CERC, in the Order under appeal, held that, as per the PPA dated 27.12.2027, the SCOD of the project was 03.05.2019; on the Appellant's request, the SCOD was extended by SECI on two occasions, the first up to 28.01.2021 and thereafter up to 28.06.2021; the total extension of time granted for SCOD was 787 days; and SECI had informed the Appellant on 13.08.2021 that, since the project was not commissioned as on 28.06.2021, liquidated damages were applicable with effect from 29.06.2021.

4. The CERC took note of the Appellant's contention that execution of the project had become impossible on account of *force majeure* events, as defined in Article-11, which were beyond their control i.e. (1) non-availability of the requisite infrastructure (connectivity, common infrastructure, land); (2) non-availability of requisite fund; (3) non-availability of WPGS and allied equipment on account of the Covid-19 pandemic; SECI had extended SCOD up to 28.06.2021 which was 12 months beyond the original SCOD i.e. 03.05.2019 due to *force majeure* events; Article 4.5 and 13.5 of the PPA provided for an exit option in the event of extended *force majeure*; right to terminate was crystallised in case *force majeure* events existed beyond 9/12 months and, as such, SECI could not invoke the Bank Guarantee; Article 13.5 provided that, in the event of termination due to extended *force majeure* events, the same shall be "without further liability" to either party; contrary to the terms of the PPA, SECI had, vide letter dated 13.08.2021, levied liquidated damages with effect from 29.06.2021; the PPA terms could not be violated when the matter was pending adjudication; the law of Bank

Guarantee, in relation to jurisdiction over a bank so as to injunct them from making payment, is well settled; in the present case, the Bank Guarantee had not been invoked by SECI, and the bank was not involved at all; and hence there was a prima facie case in their favour to restrain SECI from taking coercive action.

5. The CERC thereafter noted the submission of SECI that the impugned extension in SCOD granted by them was not a *force majeure* event, but pursuant to the notification dated 22.10.2019 and 13.08.2019 issued by MNRE; there was a breach on the part of the Appellant in not fulfilling the terms of the PPA, despite extension being granted till 28.06.2021; and in terms of Article 4.6.1 of the PPA, for the delay up to six months, SECI was entitled to encash the total Performance Bank Guarantee on a per day basis, and proportionate to the balance capacity not commissioned.

6. The CERC, thereafter, observed that the Appellant had filed a Petition for declaration that execution of the project had become commercially and physically impossible on account of various *force majeure* events, and therefore the PPA ought to be terminated and the Bank Guarantee should be released immediately; the Petition was at the initial stage and pleadings were yet to be completed; and, as such, they had no occasion to appreciate the facts of the case or to hear the contracting parties on merits.

7. The CERC then observed that APTEL, in **Shapoorji Pallonji Energy (Gujarat) Private Limited vs. Gujarat Electricity Regulatory Commission & Anr. (IA No. 384 of 2017 in Appeal No. 161 of 2017),** had distinguished the Judgment of the Supreme Court in **Gangotri** vis-à-vis powers of the courts to interfere in the invocation of Bank Guarantee; the Appellant had relied on **Kailash Nath Associates vs. DDA [(2015) 4 SCC 136]** in support

of their contentions that liquidated damages were merely a pre-estimate of damages, and there necessarily had to be a determination on the basis of proof of actual loss suffered, and this requirement could not be dispensed with before encashing the Bank Guarantee to recover the liquidated damages; APTEL, in **Shaporji Pallonji,** had also distinguished the Judgment in **Kailash Nath Associates** from the case relating to encashment of Bank Guarantee; and the Supreme Court had, in a catena of Judgments, held that Bank Guarantee is an independent and distinct contract between the bank and the beneficiary, and did not depend on the result of the decision in the dispute between the parties in case of breach.

8. Relying on the Judgments of the Supreme Court, in **Ansal Energy Projects Limited vs. Tehri Hydro Development Corporation Limited & Anr. [(1996) 5 SCC 450]**; **UP State Sugar Corporation vs. Sumac International Limited [(1997) 1 SCC 450]**; **Mahatma Gandhi Sahakara Sakkare Karkhane vs. National Heavy Engineering Co-operative Limited & Anr. [(2007) 6 SCC 470]**; **Vinitec Electronic Private Limited vs. HCL Infosystem Limited [(2008) 1 SCC 544]**; and **Adani Agri Fresh vs. Mahboob Sariff & Ors. [AIR 2016 SC 92],** the CERC observed that APTEL in **Shaporji Pallonji**, after examining the Judgments of the Supreme Court on Bank Guarantee, had summarised the law; the principles that emerged from the observations of APTEL in **Shaporji Pallonji,** relying on a catena of decisions of the Supreme Court, were (a) Bank Guarantee is an independent contract between the bank and the beneficiary, and 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 beneficiaries and the parties at whose instance the bank had given the guarantee was immaterial and was of no consequence; the bank had to only verify whether

the amount claimed was 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) Courts should not interfere with invocation and encashment of the Bank Guarantee unless there was fraud of egregious nature of which the beneficiaries seek to take advantage and which vitiates the entire underlying transaction or is a case where irretrievable injustice is like 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 was no question of making out any prima facie case by the person seeking injunction; and (e) final adjudication was not a pre-condition to invoke the Bank Guarantee, and that was not a ground to issue injunction restraining the beneficiary from enforcing the Bank Guarantee.

9. Without going into the merits, the CERC held that, as per Article 4.6.1 of the PPA, for delay up to six months, SECI was entitled to encash the 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 the 250 MW wind power project was issued by SECI on 03.11.2017; as per Article 4.6.1 of the PPA, the project was to be commissioned within 18 months from the date of issuance of the Letter of Award i.e. by 03.05.2019 (initial SCOD); however, the SCOD was extended by 787 days i.e. up to 28.06.2021 by SECI, which became the revised SCOD for the purpose of execution of the project; as per Article 4.6.1 of the PPA, SECI was entitled to encash the PBG (on per day basis) in case of delay in commissioning of the project by six months with effect from 28.06.2021 (the revised SCOD); none of the grounds for interference with the invocation of Bank Guarantee, as laid down by the various judgments of the Supreme Court i.e. fraud of egregious nature or

special equity in favour of injunction, existed in this case; and they were of the view that no case had been made out for issue of direction to restrain SECI from encashing the PBGs furnished by the Appellant till final adjudication of the main Petition. The prayer made in IA No. 23 of 2022 was rejected, and it was clarified that invocation of PBG by SECI shall be subject to the final decision in the main Petition.

10. What arises for consideration, in this Appeal, is only whether, pending disposal of the main petition before the CERC, this Tribunal would be justified in granting stay of invocation of the Bank Guarantee furnished, in favour of the Respondents, by the Bank at the Appellant's behest.

11. Elaborate oral submissions were put forth on behalf of the Appellant by Mr. Gopal Jain, Learned Senior Counsel, and on behalf of SECI by Mr. M.G. Ramachandran, Learned Senior Counsel. Learned Counsel on both sides filed their respective gist of submissions. It is convenient to examine them under different heads.

I. CAN THE BANK GUARANTEE BE INVOKED WHERE THE CLAIM FOR LIQUIDATED DAMAGES IS PENDING ADJUDICATION?

12. Mr. Gopal Jain, learned Senior Counsel appearing on behalf of the Appellant, would rely on Clause 4.5 of PPA which relates to extension of time, Clause 4.6 which relates to Liquidated Damages, and Clause 13.5 which relates to termination, to submit that SECI had, vide its letter dated 13.08.2021, invoked Article 4.6 i.e. Liquidated Damages; in view of Clause 4.5 read with Clause 13.5.1, the Contract envisaged that either party shall have the right to terminate the Contract, if a *force majeure* event or its effect continued beyond a period of 12 months, "without any further liability on

either party"; as such, the legality of the trigger point of liquidated damages, vide letter dated 13.08.2021, was pending adjudication before the CERC; invocation of the Bank Guarantee is only as a consequence of such imposition of Liquidated Damages under Clause 4.6; it was not even the case of SECI that it had suffered any loss, as such there was no quantification of loss or even any demand raised by SECI till date; the Appellant was, therefore, seeking stay of imposition of liquidated damages by SECI at this stage, when the legality of letter dated 13.08.2021 itself was pending adjudication; and, as such, invocation of the Bank Guarantee, being an action pursuant to Clause 4.6 (Liquidated Damages), should also be stayed.

13. On the other hand, Mr. M. G. Ramachandran, learned Senior Counsel appearing on behalf of the 2nd Respondent-SECI, would submit that the impugned order dated 29.06.2022 is restricted to consideration of the stay sought by the Appellant against encashment of the Bank Guarantees (4 in number aggregating to Rs.37,18,80,000/-) furnished by IndusInd Bank in favour of SECI; the CERC, relying on the decision of the Supreme Court and this Tribunal, had refused to stay encashment of the Bank Guarantee; the CERC has not gone into other aspects of the dispute raised by the Appellant; the main Petition is pending consideration before the CERC, and SECI has filed its reply to the main Petition; consideration of IA No. 23 of 2022 was not on the inter-se dispute between the Appellant and SECI in the main Petition, and was restricted to the issue whether SECI can be restrained from encashing the Bank Guarantees; independent of the underlying contract i.e. PPA dated 27.12.2017 between the Appellant and SECI, SECI is entitled to enforce its bilateral independent contract of Bank Guarantee with IndusInd Bank and enforce the right to encash it; this is consistent with the order of this Tribunal in **Arina Solar Private Limited vs. Central Electricity Regulatory**

Commission and others (order dated 22.12.2022); and invocation of the Bank Guarantee by the letter dated 01.07.2022 is valid, legal and in accordance with the terms of the Bank Guarantee.

A. THE CONTRACT OF BANK GUARANTEE IS INDEPENDENT OF, AND DISTINCT FROM, THE UNDERLYING CONTRACT:

14. As reliance is placed by Mr. Gopal Jain, Learned Senior Counsel, on certain clauses of the PPA it is necessary, at the outset, to note what they provide. Clause 4.5 of the PPA relates to extensions of time. Clause 4.5.1 stipulates that, in the event that the WPD (ie the Appellant herein) is prevented from performing its obligations under Article 4.1 by the Scheduled Commissioning Date due to (a) any Buyer Event of Default; or (b) Force Majeure Events affecting Buyer/Buying Entity(ies), or (c) Force Majeure Events affecting the WPD, the Scheduled Commissioning Date and the Expiry Date shall be deferred, subject to Article 4.5.6, for a reasonable period but not less than 'day for day' basis, to permit the WPD or SECI/Buying Entity(ies) through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the WPD or SECI/Buying Entity(ies), or till such time such Event of Default is rectified by Buyer.

15. Clause 4.6 of the PPA relates to liquidated Damages not amounting to penalty for the delay in commencement of supply of power to the Buyer. Clause 4.6.1 provides that the selected projects shall be commissioned within 18 months from the date of issuance of the letter of award; and 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. Clause 4.6.2 stipulates that, 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. The maximum time period allowed for commissioning of the full Project capacity, with encashment of Performance Bank Guarantee and reduction in the fixed tariff, shall be limited to 27 months from the date of the LOA, the PPA capacity shall stand reduced / amended to the Project Capacity Commissioned, provided that the commissioned capacity is not below 50 MW or 50% of the allocated Project Capacity, whichever is higher, and the PPA for the balance capacity will stand terminated and shall be reduced from the selected Project Capacity. Clause 4.6.3 however provides that, if as a consequence of the delay in commissioning, the applicable tariff changes, that part of the capacity of the Project for which the commissioning has been delayed shall be paid at the tariff as per Article 9.2 of this Agreement.

16. Clause 5.2 of the PPA relates to the Performance Bank Guarantee. Clause 5.2.1 stipulates that the Performance Bank Guarantee, furnished by WPD to SECI, shall be for guaranteeing the commencement of the supply of power up to the Contracted Capacity within the time specified in the Agreement. Clause 5.2.2 provides that, if the WPD fails to commence supply of power from the Scheduled Commissioning Date specified in this Agreement, subject to the conditions mentioned in Article 4.5, SECI shall have the right to encash the Performance Bank Guarantee without prejudice to the other rights of the Buyer under this Agreement. Clause 13.5 of the PPA relates to termination due to Force Majeure. Clause 13.5.1 stipulates that, if the Force Majeure Event or its effects continue to be present beyond a period

of twelve (12) months, either Party shall have the right to cause termination of the Agreement; and, in such an event, this Agreement shall terminate on the date of such Termination Notice without any further liability to either Party from the date of such termination.

17. On the delay in commissioning the 50MW Wind Power Project executed by the Appellant, SECI, vide letter dated 13.08.2021, informed them that the revised Schedule Commissioning Date (SCD) of the Project lapsed on 28.06.2021; as on 13.08.2021, no request for additional time extension to SCD of the Project was pending with SECI; and, since the Project was not commissioned till the revised SCD, 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) had become operational from 29.06.2021. While requesting the appellant to take all necessary action to commission the Project at the earliest, SECI informed them that this letter was issued without prejudice to other terms and conditions of the RfS and PPA.

18. While the PPA (ie the underlying contract) no doubt provides for the conditions under which the Performance Bank Guarantee can be encashed, it must also be borne in mind that a 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. Subject to limited exceptions, the beneficiary cannot be restrained from encashing the bank guarantee even if the dispute, between the beneficiary and the person at whose instance the bank guarantee was given by the bank, had arisen in the performance of the contract. (**Ansal**

Engg. Projects Ltd. v. Tehri Hydro Development Corpn. Ltd., (1996) 5 SCC 450; Standard Chartered Bank -v- Heavy Engineering Corporation Limited and Anr, (2020) 13 SCC 574). Both the bank and the beneficiary are bound by, and its invocation should only be in accordance with, the terms of the bank guarantee. (**Standard Chartered Bank v. Heavy Engg. Corpn. Ltd., (2020) 13 SCC 574; Hindustan Construction Co. Ltd. v. State of Bihar, (1999) 8 SCC 436).**

19. The dispute, between the beneficiary and the party at whose instance the bank has given the guarantee, is immaterial and is of no consequence. Ordinarily, the Court should not interfere with the invocation or encashment of the bank guarantee so long as the invocation is in terms of the bank guarantee. (**Standard Chartered Bank v. Heavy Engg. Corpn. Ltd., (2020) 13 SCC 574**). Since a bank guarantee is an independent and separate contract, and is absolute in nature, existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of the bank guarantee (**Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co., (2007) 8 SCC 110; Adani Agri Fresh -v Mehboob Sharif and Ors, AIR 2016 14 SCC 517).**

20. 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 and Another, (2016) 10 SCC 46**). 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 and Another, (2016) 10 SCC 46**).

21. If the bank guarantee furnished is unconditional and irrevocable, it is not open to the bank to raise any objection for payment of the amounts under the guarantee. 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 agreement entered into between the parties, has not been fulfilled. The appellant cannot, merely because a dispute exists in terms of the underlying contract, prevent the respondent-beneficiary from enforcing the bank guarantee by way of injunction save in exceptional circumstances (**Mahatma Gandhi Sahakra Sakkare Karkhane v. National Heavy Engg. Coop. Ltd., (2007) 6 SCC 470; Adani Agri Fresh -v- Mehboob Sharif and Ors, AIR 2016 14 SCC 517; U.P. State Sugar Corpn. v. Sumac International Ltd., (1997) 1 SCC 568; Ansal Engineering Projects Ltd. v. Tehri Hydro Development Corpn. Ltd., (1996) 5 SCC 450).**

22. 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**). As the aforesaid principles apply to an unconditional

bank guarantee, we must examine whether or not the subject bank guarantee is unconditional.

B. IS THE SUBJECT BANK GUARANTEE UNCONDITIONAL?

23. 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**; **SBI v. Mula Sahakari Sakhar Karkhana Ltd., (2006) 6 SCC 293; Standard Chartered Bank v. Heavy Engg. Corpn. Ltd., (2020) 13 SCC 574** On a careful analysis of the terms and conditions of the guarantee, it must be found whether or not the guarantee is unconditional. (**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 and Ors, AIR 2016 14 SCC 517).** Bank guarantees, which are payable by the guarantor on demand, are considered unconditional bank guarantees. (**Vinitec Electronics (P) Ltd. v. HCL Infosystems Ltd., (2008) 1 SCC 544; Adani Agri Fresh -v- Mehboob Sharif and Ors, AIR 2016 14 SCC 517; U.P. State Sugar Corpn. v. Sumac International Ltd., (1997) 1 SCC 568).**

24. In considering whether or not the bank guarantee, in the present case, is unconditional, it is necessary to note its contents. In terms of Bank Guarantee No.OGT0009170016716 dated 06.12.2017, IndusInd Bank 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, the amount specified in the Bank Guarantee 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 terms of contract or by any other reason whatsoever, and the liability of the bank under the guarantee shall not be impaired or discharged by extension of time or variations or alternations made, given, or agreed with or without their knowledge or consent, by or between the parties to the respective agreement; SECI shall have the right to invoke the Bank Guarantee in part or full as it may deem fit; the bank agreed that it shall not require any proof in addition to the written demand by SECI, made in any format, raised at the address of the Guarantor Bank, in order to make payment to SECI; the bank would make payment on first demand without restriction or conditions and notwithstanding any objection from the Appellant and or any person; the bank would not require SECI to justify invocation of the Bank Guarantee, nor would the guarantor bank have any recourse against SECI in respect of any payment made thereunder; the Bank Guarantee shall be the primary obligation of the guarantor 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. IndusInd 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 is entitled to assign its rights and obligations under the PPA. This Bank Guarantee was extended by

letter dated 29.12.2022, and the extended claim date stipulated therein is 31.12.2023.

25. In terms of the bank guarantee, IndusInd Bank agreed unequivocally, irrevocably and unconditionally to pay to SECI forthwith, on demand in writing, the amount specified in the Bank Guarantee; it would not require any proof in addition to the written demand by SECI, made in any format, in order to make payment to SECI; and it would make payment on first demand without restriction or conditions, and notwithstanding any objection from the Appellant. It is evident, therefore, that the subject bank guarantee is unconditional. In any event, it is not even contended otherwise by Mr. Gopal Jain, Learned Senior Counsel appearing on behalf of the appellant.

II. HAS A VIEW, CONTRARY TO THE LAW DECLARED IN A LINE OF JUDGEMENTS OF THE SUPREME COURT, BEEN TAKEN IN ”GANGOTRI”?

26. In **BSES Ltd. v. Fenner India Ltd., (2006) 2 SCC 728,** the Supreme Court held that the general rule of non-interference against invocation of a bank guarantee, and its exceptions, had been reiterated in several of its judgments including **U.P. State Sugar Corpn. v. Sumac International Ltd., (1997) 1 SCC 568; State of Maharashtra v. National Construction Co., (1996) 1 SCC 735; United Commercial Bank v. Bank of India, (1981) 2 SCC 766; and Centax (India) Ltd. v. Vinmar Impex Inc., (1986) 4 SCC 136;** and that, in **U.P. State Sugar Corpn. v. Sumac International Ltd. [(1997) 1 SCC 568**, the Supreme Court had correctly declared that the law was **“settled”.**

27. The questions which necessitates examination is whether **"GANGOTRI"** has taken a view contrary to the settled law, and if so which of these Judgements should this Tribunal follow?

28. The Appeal before the Supreme Court, in **Gangotri Enterprises Ltd. v. Union of India, (2016) 11 SCC 720**, was filed against the judgment of the Allahabad High Court upholding the order of the District Judge refusing to grant an interim injunction restraining encashment of the bank guarantee by the respondents. It is in this context that the Supreme Court held that the controversy was no more res integra and stood decided in **Union of India v. Raman Iron Foundry, (1974) 2 SCC 231;** the case at hand, being somewhat identical, had to be decided keeping in view the law laid down in **Raman Iron Foundry**; arbitration proceedings, in relation to the contract, were still pending; secondly, the sum claimed by the respondents from the appellant did not relate to the contract for which the bank guarantee had been furnished, but related to another contract for which no bank guarantee had been furnished; thirdly, the sum claimed by the respondents from the appellant was in the nature of damages, which was not yet adjudicated upon in arbitration proceedings; fourthly, the sum claimed was neither a sum due in praesenti nor a sum payable; in other words, the sum claimed by the respondents was neither an admitted sum nor a sum which stood adjudicated by any court of law in any judicial proceedings but was a disputed sum; and lastly, the bank guarantee in question, being in the nature of a performance guarantee furnished for execution work of the contract, and the work having been completed to the satisfaction of the respondents, they had no right to encash the bank guarantee.

29. The Supreme Court observed that both the courts below had committed a jurisdictional error when they failed to take note of the law laid down in **Raman Iron Foundry** which governed the controversy, and had instead placed reliance on **Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co., (2007) 8 SCC 110** and **U.P. State Sugar Corpn. v. Sumac International Ltd., (1997) 1 SCC 568**, which laid down general principles relating to bank guarantees; there could be no quarrel with the proposition laid down in those cases; however, every case had to be decided with reference to the facts involved therein; the case at hand was similar on facts with that of **Raman Iron Foundry,** and hence the law laid down in that case was applicable to this case; the District Judge, having decided the injunction application in the first instance in the appellant's favour, had erred in rejecting the application made by the appellant the second time; the respondents, despite having suffered the injunction order the first time, did not file any appeal against that order; the said order had thus attained finality and was, therefore, binding on the parties; the appellants had made out a prima facie case in their favour for grant of injunction against the respondents; they had also made out a case of balance of convenience and irreparable loss in their favour as held in **Raman Iron Foundry**; and they were, therefore, entitled to claim injunction against the respondent in relation to encashment of the Bank Guarantee. The appeal was allowed, the impugned Order was set aside, in consequence, the injunction application submitted by the appellant under Section 9 of the Arbitration Act was allowed, and injunction was granted in the appellant's favour restraining the respondent from encashing the Bank Guarantee.

A. HAS THE JUDGEMENT IN "*GANGOTRI ENTERPRISES*" BEEN HELD TO BE PER INCURIAM AND NOT BINDING?

30. In **Union of India v. Raman Iron Foundry, (1974) 2 SCC 231,** (which was followed in ***Gangotri Enterprises Limited***), the Supreme Court held that the damages which were claimed were liquidated damages; even if there is a stipulation by way of liquidated damages, a party complaining of breach of contract can recover only reasonable compensation for the injury sustained by him, the stipulated amount being merely the outside limit; such a claim does not give rise to a debt until the liability is adjudicated and damages assessed by an order of a Court or other adjudicatory authority; when there is a breach of contract, the party who commits the breach does not eo-instanti incur any pecuniary obligation, nor does the party complaining of the breach become entitled to a debt due from the other party; the only right which the party, aggrieved by the breach of the contract, has is the right to sue for damages; that is not an actionable claim; a claim for damages for breach of contract is, therefore, not a claim for a sum presently due and payable and the purchaser is not entitled to recover the amount of such claim by appropriating other sums due to the contractor; the appellant had no right or authority to appropriate the amounts of other pending bills of the respondent in or towards satisfaction of its claim for damages against the respondent; and the learned Judge was justified in issuing an interim injunction restraining the appellant from doing so.

31. Reliance was placed, in **State of Gujarat v. Amber Builders, (2020) 2 SCC 540**, on the judgment in **Gangotri Enterprises Ltd. v. Union of India, (2016) 11 SCC 720,** to submit that till the demand of the Government is crystallised or adjudicated upon, the Government cannot withhold the money of the contractor. The Supreme Court, in **Amber Builders**, examined the correctness of the view taken in **Gangotri Enterprises,** and observed that

the said judgement was primarily based on the judgment of a two-Judge Bench, in **Union of India v. Raman Iron Foundry, (1974) 2 SCC 231,** wherein it was held that the Government had no right to appropriate the amount claimed without getting it first adjudicated; the judgment in **Raman Iron Foundry**, was specifically overruled on the issue in hand by a three-Judge Bench in **H.M. Kamaluddin Ansari & Co. v. Union of India, (1983) 4 SCC 417** wherein there was a general condition which entitled the Government to recover the damages claimed by appropriating any sum which may become due to the contractor under other pending bills. The three judge bench, in **Kamaluddin Ansari,** disagreed with the findings in **Raman Iron Foundry** and held that, if an order injuncted a party from withholding the amount due to the other side under pending bills in other contracts, the order necessarily meant that the amount must be paid; and an injunction order, restraining the respondents from withholding the amount due under other pending bills to the contractor, virtually amounted to a direction to pay the amount to the contractor-appellant.

32. The Supreme Court, in **Amber Builders**, concluded holding that, in its opinion, the judgment in **Gangotri Enterprises Ltd,** was per incuriam as it relied upon **Raman Iron Foundry** which had been specifically overruled by the three-Judge Bench in **H.M. Kamaluddin Ansari.**

B. RULE OF PER INCURIAM: ITS SCOPE:

33. The Latin expression “per incurium” means through inadvertence. A decision can be said generally to be given per incurium when the Supreme Court has acted in ignorance of a previous decision of its own or when a High Court has acted in ignorance of a decision of the Supreme Court. **(Punjab Land Devl., & Reclamation Corpn. Ltd. v. Presiding Officer, Labour**

Court: (1990) 3 SCC 682; Commissioner of Income Tax v. B.R. Constructions, 1992 SCC OnLine AP 121).

34. Applying the "Per Incuriam" rule, a Full Bench of the Andhra Pradesh High Court, in **Commissioner of Income Tax v. B.R. Constructions, 1992 SCC OnLine AP 121,** held that a precedent ceases to be a binding precedent, among others, if it is reversed or over-ruled by a higher court or when it is affirmed or reversed on a different ground or when it is inconsistent with the earlier decisions of the same rank. If the ratio of the judgement of the Full Bench of the Andhra Pradesh High Court, in **B.R. Constructions,** were to be applied, the consequences of **"AMBER BUILDERS"** declaring **"GANGOTRI"** per incuriam would require **"GANGOTRI"** not to be followed, albeit its having been reversed on a different ground.

35. It is unnecessary for us to delve further on this aspect, and we shall proceed on the premise that the judgement in **"GANGOTRI"** is not per incuriam on the contentions raised in these proceedings.

C. SHOULD "GANGOTRI" BE UNDERSTOOD AS HAVING CARVED OUT A NEW EXCEPTION, TO THE RULE APPLICABLE TO INVOCATION OF BANK GUARANTEES, IN CASES WHERE IT IS FURNISHED TOWARDS LIQUIDATED DAMAGES STIPULATED IN THE UNDERLYING CONTRACT?

36. The law is well settled, by a series of judgements of the Supreme Court, including the three judge bench judgements in **Ansal Engg. Projects Ltd. v. Tehri Hydro Development Corpn. Ltd., (1996) 5 SCC 450** and **Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineerings Works (P) Ltd, (1997) 6 SCC 450**, that a bank guarantee is an independent and distinct contract between the bank and the beneficiary; it is not qualified by the

underlying transaction or the validity of the primary contract between the person at whose instance the bank guarantee was given and the beneficiary; and, save fraud or special equities, 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 performance of the contract or execution of the works undertaken in furtherance thereof. It would hardly matter, therefore, whether the Bank Guarantee is furnished as security for the liquidated damages stipulated in the underlying contract or for performance of the underlying contract or for fulfilment of any other requirement in terms of the underlying contract.

37. As noted hereinabove, the Supreme Court in **"GANGOTRI"** noticed two of its earlier judgements, relating to the rule applicable to cases where bank guarantees are sought to be invoked, ie **Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co., (2007) 8 SCC 110** and **U.P. State Sugar Corpn. v. Sumac International Ltd., (1997) 1 SCC 568,** and observed that these two judgements laid down general principles relating to bank guarantee; there could be no quarrel with the proposition laid down in those cases; however, every case had to be decided with reference to the facts involved therein. It however held that the case at hand was similar on facts with that of **Raman Iron Foundry,** and hence the law laid down in that case was applicable to the case before it. It is useful to note that **Raman Iron Foundry** was not a case where a bank guarantee was sought to be encashed but related, among others, to a claim for liquidated damages simplicitor.

38. No view, contrary to the law laid down in **Himadri Chemicals Industries** and **Sumac International Ltd**, has been declared by the subsequent co-ordinate Bench in **"Gangotri"**. It is difficult to hold, merely because **"Gangotri"** related to a bank guarantee furnished towards the liquidated damages stipulated in the underlying contract, that such a bank guarantee cannot be encashed till the respondent's claim for liquidated damages is adjudicated, as that would require all the other judgements of the Supreme Court, including by the three judge bench in **Ansal Engg. Projects Ltd. (1996) 5 SCC 450** and **Dwarikesh Sugar Industries Ltd. (1997) 6 SCC 450**, to be ignored.

D. DOCTRINE Of BINDING PRECEDENTS:

39. It must be borne in mind that it is only the principle underlying the decision which would be binding as a precedent in a case which comes up for decision subsequently. **(Shah Prakash Amichand vs State of Gujarat: AIR 1986 SC 468).** As a judgement is only an authority for what it actually decides, it cannot be quoted for a proposition that may seem to follow logically from it. It is not a profitable task to extract a sentence here and there from a judgment and to build up on it. What is of the essence in a decision is its ratio. (**State of Orissa v. Sudhansu Sekhar Misra; Quinn v. Leathem, AIR 1968 SC 647**). Judgments ought not to be read as statutes. (**Sri. Konaseema Cooperative Central Bank Ltd. v. N. Seetharama Raju, AIR 1990 AP 171**)(**Kanwar Amninder Singh v. High Court of Uttarakhand and another, 2018 SCC OnLine UTT 1026).**

40. A decision is available as a precedent only if it decides a question of law **(STATE OF PUNJAB AND OTHERS VS SURINDER KUMAR AND OTHERS, 1992 1 SCC 489),** and cannot be relied upon in support of a

proposition that it did not decide.**(MITTAL ENGINEERING WORKS(P) LTD VERSUS COLLECTOR OF CENTRAL EXCISE, MEERUT, 1997 1 SCC 203).** A judgment delivered without argument is not binding. (**Municipal Corporation of Delhi v. Gurnam Kaur, (1989) 1 SCC 101.** A decision, which is neither founded on reasons nor it proceeds on a consideration of an issue, cannot be deemed to be a law declared to have a binding effect. That which escapes in the judgment without any occasion is not the ratio decidendi. Any declaration or conclusion arrived at, preceded without any reason, cannot be deemed to be the declaration of law or authority of a general nature binding as a precedent. (**Jaisri Sahu v. Rajdewan Dubey, AIR 1962 SC 83 ; Municipal Corporation of Delhi v. Gurnam Kaur, (1989) 1 SCC 101 ; B. Shama Rao v. Union Territory of Pondicherry, AIR 1967 SC 1480; State of Uttar Pradesh v. Synthetics and Chemicals Ltd. (1991) 4 SCC 139**).

41. Since **"GANGOTRI"** did not so specifically hold, no reliance can be placed thereupon to hold that, as a rule, bank guarantees furnished towards liquidated damages should not be permitted to be encashed, till the claim of the beneficiary, for payment of the specified liquidated damages towards breach of the contract, is adjudicated by this Tribunal.

E. THE ATTENTION OF THE TWO JUDGE BENCH IN "GANGOTRI" WAS NOT DRAWN EITHER TO THE EARLIER LARGER, OR TO SEVERAL OTHER CO-ORDINATE BENCH, JUDGEMENTS OF THE SUPREME COURT:

42. While the attention of the two judge bench, in **Gangotri Enterprises Ltd. v. Union of India, (2016) 11 SCC 720**, was no doubt drawn to the earlier co-ordinate bench judgements in **Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co., (2007) 8 SCC 110** and **U.P. State Sugar**

Corpn. v. Sumac International Ltd, none of the other judgements, in the long list of cases where Courts/Tribunals were called upon to exercise restraint against interference with invocation of bank guarantees (ie in **(1) U.P. Cooperative Federation Ltd. v. Singh Consultants and Engineers (P) Ltd., (1988) 1 SCC 174; (2) United Commercial Bank v. Bank of India, (1981) 2 SCC 766; (3) Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineerings Works (P) Ltd, (1997) 6 SCC 450; (4) SBI v. Mula Sahakari Sakhar Karkhana Ltd., (2006) 6 SCC 293; (5) State of Maharashtra & Anr. -v- M/s National Construction Company, Bombay & Anr (1996) 1 SCC 735; (6) Ansal Engineering Projects Ltd -v Tehri Hydro Development Corporation Ltd and Anr (1996) 5 SCC 450; (7) BSES Ltd. v. Fenner India Ltd, (2006) 2 SCC 728; (8) Gujarat Maritime Board -v- L&T Infrastructure Development Projects Ltd and Another (2016) 10 SCC 46; (9) Vinitec Electronics Private Ltd -v- HCL Infosystems Ltd., (2008) 1 SCC 544; (10) Adani Agri Fresh -v- Mehboob Sharif and Ors, AIR 2016 14 SCC 517**) etc were even brought to the notice of the two judge bench of the Supreme Court in **Gangotri Enterprises Ltd**.

F. LARGER BENCH JUDGEMENTS BINDING ON SMALLER BENCHES OF THE SUPREME COURT:

43. Further both the judgements, in **Ansal Engg. Projects Ltd. v. Tehri Hydro Development Corpn. Ltd., (1996) 5 SCC 450** and **Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineerings Works (P) Ltd, (1997) 6 SCC 450,** were rendered by a three-Judge Bench of the Supreme Court, and were therefore binding on the two judge bench which decided **Gangotri Enterprises Ltd**.

44. The law laid down by the Supreme Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or co-equal strength A Bench of lesser quorum cannot disagree or dissent from the view of the law taken by a Bench of a larger quorum. (**Central Board of Dawoodi Bohra Community v. State of Maharashtra (2005) 2 SCC 754**; **Union of *India v. Raghubir Singh (Dead) By Lrs* (1989) 2 SCC 754**; **Trimurthi Fragrances (P) Ltd *Versus* Government of N.C.T. of Delhi, 2022 SCC OnLine SC 1247).** The practice is to regard the precedent of a larger Bench as having greater efficacy and binding authority than the precedent of a Bench consisting of a smaller number of Judges. The decision of a larger Bench should be followed in preference to the decision of a smaller Bench. **(Trimurthi Fragrances (P) Ltd *Versus* Government of N.C.T. of Delhi, 2022 SCC OnLine SC 1247; Union of India v. Raghubir Singh, (1989) 2 SCC 754).** All subsequent decisions have to be read in the light of the Larger Bench decision, if they are decisions by Benches comprised of lesser number of Judges. **(N. MEERA RANI VERSUS GOVERNMENT OF TAMIL NADU AND ANOTHER, 1989 4 SCC 418).**

45. When a smaller Bench of the Supreme Court lays down a proposition contrary to and without noticing the ratio decidendi of the earlier larger Benches, such a decision will not become the law declared by the Supreme Court so as to have a binding effect under Article 141 of the Constitution on all the courts within the country. **(Sakinala Harinath v. State of A.P., 1993 SCC OnLine AP 195 (FB)).** A decision by a Bench of more strength cannot be overlooked to treat a later decision by a Bench of lesser strength as of binding authority more so, when the attention of the Judges deciding the latter case was not invited to the earlier decisions available. **(N.S. Giri v. Corpn. of City of Mangalore, (1999) 4 SCC 697).** The proper course for a

High Court (or subordinate courts/tribunals) is to follow the opinion expressed by larger benches of the Supreme Court in preference to those expressed by smaller benches of the Supreme Court. This practice has now crystallized into a rule of law declared by the Supreme Court. **(UNION OF INDIA & ANR VS K.S. SUBRAMANIAN, AIR 1976 SC 2433).**

46. We must, therefore, follow the opinion expressed by the three judge bench of the Supreme Court in **Ansal Engg. Projects Ltd. v. Tehri Hydro Development Corpn. Ltd., (1996) 5 SCC 450** and **Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineerings Works (P) Ltd, (1997) 6 SCC 450,**, in preference to that expressed by the two judge bench in **Gangotri Enterprises Ltd,** more so as the attention of the latter bench was not drawn to the former two.

III. THE THREE JUDGE BENCH JUDGEMENT, IN "*ANSAL ENGG PROJECTS LTD*", HAS BEEN FOLLOWED BY THE SUPREME COURT EVEN IN JUDGEMENTS SUBSEQUENT TO "*GANGOTRI*":

47. Following the three judge bench judgement In ***Ansal Engg. Projects Ltd.*** **v.** ***Tehri Hydro Development Corpn. Ltd.*****, (1996) 5 SCC 450,** the Supreme Court, in ***A.P. Pollution Control Board v. CCL Products (India) Ltd.*****, (2019) 20 SCC 669,** held that a bank guarantee constituted an independent contract between the issuing bank and the beneficiary to whom the guarantee is issued; and such a contract is independent of the underlying contract between the beneficiary and the third party at whose behest the bank guarantee is issued.

48. After taking note of the submissions urged on behalf of the Appellant, and that reliance was placed by them, among others, on ***Gangotri***

***Enterprises Ltd.* v. *Union of India*, (2016) 11 SCC 720,** the Supreme Court, in ***Standard Chartered Bank v. Heavy Engg. Corpn. Ltd.*, (2020) 13 SCC 574,** again followed the three judge bench judgement in ***Ansal Engg. Projects Ltd.* v. *Tehri Hydro Development Corpn. Ltd.*, (1996) 5 SCC 450,** and held that the law relating to invocation of bank guarantees, with the consistent line of precedents of the Supreme Court, was well settled; the settled position in law that emerged from the precedents of the Supreme Court was that the bank guarantee is an independent contract between the bank and the beneficiary and the bank is always obliged to honour its guarantee as long as it is unconditional and irrevocable; the dispute between the beneficiary and the party at whose instance the bank has given the guarantee was immaterial and of no consequence; there were, however, exceptions to this rule ie 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.

49. Even after the judgement in **Gangotri Enterprises Ltd. v. Union of India, (2016) 11 SCC 720**, the Supreme Court in ***A.P. Pollution Control Board v. CCL Products (India) Ltd.*, (2019) 20 SCC 669,** and ***Standard Chartered Bank v. Heavy Engg. Corpn. Ltd.*, (2020) 13 SCC 574,** has followed ***Ansal Engg. Projects Ltd*** which, as noted hereinabove, followed the long line of judgements of the Supreme Court wherein Courts were cautioned to refrain from interfering with the invocation of a bank guarantee. It is relevant to note that despite the judgement in **Gangotri Enterprises Ltd** being brought to its notice, the Supreme Court, in ***Standard Chartered Bank,*** followed ***Ansal Engg. Projects Ltd,*** and not **Gangotri Enterprises Ltd**.

IV. DOES THE PRESENT CASE FALL UNDER THE EXCEPTIONS:

50. The question of examining whether a prima facie case is made out, and in whose favour the balance of convenience lies, does not arise as the Court cannot interfere with the unconditional commitment made by the bank in its guarantees. (**Adani Agri Fresh -v- Mehboob Sharif and Ors, AIR 2016 14 SCC 517; U.P. Coop. Federation Ltd. v. Singh Consultants and Engineers (P) Ltd., (1988) 1 SCC 174**) The two exceptions, for the refusal to grant an order of injunction to restrain the enforcement of a bank guarantee, are (i) fraud committed in the notice of the bank which would vitiate the very foundation of the guarantee; and (ii) injustice of the kind which would make it impossible for the guarantor to reimburse himself. (**Himadri Chemicals Industries Limited -v- Coal Tar Refining Company (2007) 8 SCC 110).**

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

52. No contention of “fraud” has been raised by Sri Gopal Jain, Learned Senior Counsel appearing on behalf of the Appellant. It is, however, contended that permitting SECI to encash the bank guarantee would cripple the Appellant financially; grant of interim stay would not cause prejudice to SECI as the validity of the Bank Guarantee is in force till June 2023; on the

other hand if SECI is permitted to encash the Bank Guarantee, the Appellant would stand to lose Rs. 40 Crores which is being utilised by them for execution of various wind power projects; and non-availability of such a huge sum would result in a domino effect causing catastrophic disruptions in execution of the ongoing wind power project by the Appellant.

53. The second exception, to the general rule of non-intervention, 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 and Ors, AIR 2016 14 SCC 517; U.P. State Sugar Corpn. v. Sumac International Ltd., (1997) 1 SCC 568; Himadri Chemicals Industries Limited -v- Coal Tar Refining Company (2007) 8 SCC 110**). Since, in most cases, payment of money under such a bank guarantee would adversely affect the bank, and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee 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 and Ors, AIR 2016 14 SCC 517; U.P. State Sugar Corpn. v. Sumac International Ltd., (1997) 1 SCC 568**).

54. 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 on stand by 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.

55. 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 - vReliance Infrastructure Limited and Others (2014) SCCOnline Born 198**). 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.

56. In **BSES Ltd. (Now Reliance Energy Ltd.) v. Fenner India Ltd. & Anr, (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. After noticing that arbitral proceedings were pending, the Supreme Court observed that there was no case of irretrievable injustice, if the Appellant therein was allowed to encash the Bank Guarantee because justice could always be rendered to the first Respondent therein, if it succeeded before the Arbitrators.

57. Needless to state that encashment of the Bank guarantee, if SECI so choose to exercise its right of invocation, will undoubtedly be subject to the result of the main petition pending before the CERC 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 Petition, encashment of the Bank Guarantee cannot be stayed on the mere possibility of their success in the main Appeal.

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

58. Mr. Gopal Jain, Learned Senior Counsel appearing on behalf of the Appellant, would submit that, even while invoking the bank guarantee vide

letter dated 01.07.2022, SECI had referred to the performance obligation of the Appellant; and, consequently, their entitlement for liquidated damages in terms of the underlying contract must be adjudicated before they are permitted to invoke the bank guarantee.

59. On the other hand, Mr. M. G. Ramachandran, learned Senior Counsel appearing on behalf of the 2nd Respondent-SECI, would submit that ,encashment of the bank guarantee is also consistent with the provisions of Clause 4.6.1 read with Clause 5.2.2 of the PPA; Article 5.2.2 of the PPA stipulates that SECI shall have the right to encash the performance bank guarantee without prejudice to the other rights of the buyer under this Agreement; in **Gujarat Maritime Board vs. Larsen and Toubro Infrastructure Development Projects Limited and Another [(2016) 10 SCC 36]**, and **Vinitec Electronics Private Limited vs. 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 in the principles of encashment of Bank Guarantee, so long as the terms of Bank Guarantee are unconditional; and, in case of liquidated damages, what is necessary to establish is the legal injury and loss, and there is no need to plead and/or prove actual loss.

60. In the letter dated 01.07.2022, addressed to the Branch Manager, IndusInd Bank, SECI referred to the four bank guarantees, totalling to Rs.37,18,80,000/- (Rupees Thirty Seven Crore Eighteen Lakh Eighty Thousand Only) valid up to 31.12.2022, issued by the Bank in their favour as Performance Bank Guarantee, and informed them that, since performance obligation was not fulfilled by the Party, they were invoking the said

guarantee, pursuant to the terms of the NIT, and were hereby making a demand on the bank to remit a sum of Rs.37,18,80,000/- (Rupees Thirty Seven Crore Eighteen Lakh Eighty Thousand Only) to them immediately through RTGS/NEFT.

61. 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.

62. It matters little, therefore, that SECI, in its letter dated 01.07.2022, had stated that they were invoking the bank guarantee since performance obligation was not fulfilled by the Appellant, since a written demand by SECI, in any format, sufficed for the bank to make payment of the sum stipulated in the bank guarantee.

63. Unlike in the present case, where it is only the letter which refers to the Appellant's failure to fulfil its performance obligations as the cause for raising a demand for payment in terms of the bank guarantee, 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.

64. In any event, SECI has, in compliance with the interim order passed by this Tribunal on 26.07.2022, re-deposited the money, (it had received pursuant to its letter dated 01.07.2022), with the Bank; and the validity of the subject bank guarantee has been extended till June, 2023. Even if SECI were to exercise its choice of invocation, it can do so only by way of a fresh demand, and not on the basis of the earlier letter dated 01.07.2022. In the light of events subsequent thereto, the contents of the earlier letter dated 01.07.2022 is of no significance.

VI. ALLEGATIONS OF DISCRIMINATION:

65. Sri Gopal Jain, Learned Senior Counsel appearing on behalf of the Appellant, would submit that the CERC had grossly erred in treating the case of the Appellant differently, and in not granting the interim relief, when the very same relief had been granted to similarly placed Petitioners in nine Petitions; while the submissions made on behalf of the Appellant were recorded in the impugned order, no reasons have been assigned by the CERC as to why the case of the Appellant had been singled out and treated separately; in the other nine Petitions, the CERC had granted interim relief without recording that fraud of an egregious nature had been urged or even pleaded; therefore the Appellant's case could not have been treated differently by the CERC; though similar power, as in Article 4.6.1 of the PPA, was vested in SECI in the other cases also, interim relief was nonetheless granted in those cases; and in Petition No. 117/MP/2021 and Diary Petition No. 136/2021, SECI had stated that it would not encash the Bank Guarantee, whereas in the case of the Appellant, a different approach was taken.

66. Generally speaking, the mere fact that the respondent has chosen not to invoke the bank guarantee in the case of some others, who the Appellant claims are similarly situated, can never be a ground for granting a similar relief in favour of the Appellant on the plea of discrimination. The action of SECI, with respect to the other petitioners before the CERC, may be legal or may not be. That has to be investigated first before it can be directed to be followed in the case of the Appellant. **(Chandigarh Admn. v. Jagjit Singh, (1995) 1 SCC 745).** None of the other petitioners, referred to by the Appellant, are parties to this Appeal. This Tribunal is in no position to ascertain the facts and circumstances in which either the CERC had directed stay of invocation of the bank guarantees or those in which SECI had allegedly agreed not to invoke the bank guarantees in those cases.

67. If the order of the Commission, in favour of the others, is contrary to law or is otherwise not warranted, such illegal or unwarranted acts cannot be made the basis either to compel them to repeat that illegality over again or for an order to passed by us which will have the effect of repeating the illegality in the present case also**. (Chandigarh Admn. v. Jagjit Singh, (1995) 1 SCC 745).**

68. In the light of a long line of judgements of the Supreme Court referred to hereinabove, we are satisfied that Courts/Tribunals cannot, save cases where the two exceptions are attracted, interfere with the invocation of bank guarantees. It is for SECI to decide whether or not to invoke the unconditional bank guarantees, and this Tribunal would neither restrain them nor direct

them to encash the same. The plea of discrimination, urged on behalf of the Appellant under this head, therefore necessitates rejection.

VII. CONDUCT OF THE RESPONDENT: ITS RELEVANCE IN RESTRAINING INVOCATION OF THE BANK GUARANTEE:

69. Sri Gopal Jain, Learned Senior Counsel appearing on behalf of the Appellant, would submit that, in granting interim protection, the conduct of SECI may also be considered in as much as SECI had, in flagrant violation of the interim order of this Tribunal dated 05.07.2022, encashed the Bank Guarantee; and it is only after being directed by the order of this Tribunal dated 26.07.2022, that they had subsequently reversed their earlier action, and had redeposited the encashed amount back with the Bank.

70. On the other hand, Mr. M. G. Ramachandran, learned Senior Counsel appearing on behalf of the 2nd Respondent-SECI, would submit that the Appellant's contention regarding the conduct of SECI, as noted in the order of this Tribunal dated 26.07.2022, is misplaced; SECI has given its reasons in its reply dated 21.07.2022; in any event SECI has duly complied with the order of this Tribunal dated 26.07.2022; and the Appellant cannot be permitted to raise the issue of conduct of SECI at this stage to seek non-encashment of the Bank Guarantee, and the position is well settled.

71. Before examining the rival contentions, urged by Learned Senior Counsel on either side under this head, it is useful to note the contents of both the interim orders passed by this Tribunal, firstly on 05.07.2022, and thereafter on 26.07.2022, and the reply filed in IA No. 1034 of 2022 by SECI on 20.07.2022.

72. After hearing the counsel for the appellant on the prayer for interim relief, this Tribunal, in its order in DFR. No. 262 of 2022 & I.A,N0.1010 of 2022 dated 05.07.2022, while issuing notice returnable on 22.07.2022, noted that the respondent by its communication, in Ref. No. SECI/FIN/BG/2022-23/49828 dated 01.07.2022, had invoked the Performance Bank Guarantees (PBGs); in the facts and circumstances, they were staying encashment of the bank guarantees, pursuant to the said invocation by letter dated 01.07.2022, till the next date of hearing; and the appellant should comply with the requirement of Order XXXIX Rule 3 CPC immediately. The I.A. was the directed to be listed on ***22.07.2022.***

73. In its Order, in I.A. No. 1034 of 2022 dated 26.07.2022, this Tribunal held that the appeal, in the context of which the application had been moved, was filed assailing the order dated 29.06.2022 passed by the CERC in IA No.23/2022 in Petition No. 95/MP/2022; the said petition was still pending before the CERC; by the impugned order, on the interim application, the CERC had permitted SECI to encash the Performance Bank Guarantee that had been furnished by the appellant, it being subject to invocation in the event of delay in commissioning of the project by six months from the SCOD; the appellant had moved, along with the appeal, IA No.1010/2022 for interim protection; while issuing notice on the appeal, and the applications filed therewith, on 05.07.2022, an *ad-interim ex-parte* injunction was granted staying encashment of the Bank Guarantee pursuant to the invocation letter that statedly had been issued by SECI on 01.07.2022, the *ex-parte* order being valid till 22.07.2022; from the reply filed to the application at hand, it was clear that the gist of the order was duly communicated by the learned counsel for the appellant to SECI by an e- mail sent at 12:19 hrs. on 05.07.2022; the application at hand was moved on 06.07.2022 with the

grievance that SECI had received, pursuant to the letter of invocation, the amount of Rs.37,18,80,000/- unlawfully against the said Bank Guarantees furnished by the appellant; the applicant had prayed for return / refund of the said amount; from the reply of SECI, they found that receipt of information, about the *ad interim ex-parte* stay at 12:19 hrs. on 05.07.2022, was admitted; even a copy of the order dated 05.07.2022 was received by SECI later at 14:47 hrs; in between, the bank had remitted the money through digital transfer; SECI had asserted, by the reply, that it had exercised its right to encash the Performance Bank Guarantee on 01.07.2022, and there was no wilful or deliberate act on its part because of transfer of the money by the bank into its account, with which they did not agree; once a stay had been granted against encashment of the Bank Guarantees, pursuant to the letter of invocation dated 01.07.2022, it was the duty of SECI to at least attempt to instruct the concerned bank suitably; SECI, therefore, was clearly guilty of a wilful and deliberate act of omission in not instructing the bank properly, and in silently allowing the encashment to take place; in these circumstances, subject to the final decision being taken on the application for stay, they could not allow SECI to hold on to the money which had been received by it against the Performance Bank Guarantee in the teeth of the stay order granted by them. SECI was directed to presently return the money, without prejudice to its contentions qua invocation, instructing the bank to restore the Bank Guarantee to the position at which it stood as on the date on which the *ex-parte* order was passed on 05.07.2022. This Tribunal further stated that it shall be the duty and obligation of SECI to ensure due compliance with these directions. The application was disposed of accordingly.

74. In its reply filed to IA No. 1034 of 2022 on 21.07.2022, it is stated on behalf of SECI that they had sent notice to the bank invoking the Bank

Guarantee on 01.07.2022; the bank was required to remit the amount under the Bank Guarantee to them digitally within the time specified, as per the guidelines of Reserve Bank of India, without any further or other act to be done by SECI; the amount was to be remitted by the bank to the account of SECI, maintained by IDF First Bank Limited, digitally and not through any instrument to be physically collected by SECI from the bank; in terms thereof, SECI's account with IDFC First Bank was credited with an amount aggregating to Rs.37,18,80,800/- between 14:27 hrs. and 14.53 hrs on 05.07.2022; on 05.07.2022, they received an email from the Appellant at 12:19 PM enclosing the letter of Appellants' counsel regarding the hearing dated 05.07.2022 before this Tribunal; thereafter, the Appellant sent an email at 2:47 PM, forwarding a copy of the Order of this Tribunal dated 05.07.2022; the said communication was also served by the Appellant on IndusInd Bank Limited; though an advance copy of the Appeal was sent by e-mail at 12:24 hrs. on 04.07.2022, no notice was given by the Appellant to SECI of any hearing, which they had sought for on 05.07.2022, or their intent to mention the matter for hearing either in their e-mail dated 04.07.2022 or in any other communication; SECI did not flout the directions of this Tribunal nor had it acted in a contumacious manner or in violation of any directions; invocation of the Bank Guarantee by SECI was on 01.07.2022, and not at any time on 04.07.2022 or 05.07.2022; and SECI had duly exercised its right to encash the PBG on 01.07.2022.

75. It is not in dispute that SECI had sent a notice to the bank, as early as on 01.07.2022, invoking the Bank Guarantee, long before the interim order was passed by this Tribunal on 05.07.2022. It does appear, from the contents of the reply filed before this Tribunal on 20.07.2022, that, while an advance copy of the Appeal was sent to SECI by e-mail at 12:24 hrs. on 04.07.2022,

no notice was given to them by the Appellant of their intent to mention the matter for hearing on 05.07.2022. It is just a little more than a couple of hours before their account with IDFC First Bank was credited with Rs.37,18,80,800/-, (ie between 14:27 hrs. and 14.53 hrs on 05.07.2022), that SECI received an email from the Appellant at 12:19 PM enclosing the letter of Appellants' counsel regarding the hearing dated 05.07.2022 before this Tribunal. A copy of the Order of this Tribunal dated 05.07.2022 was received by SECI at 14.47 hours on 05.07.2022 only after half the proceeds of the bank guarantee was directly credited to their bank account by the Guarantor Bank, and the remaining half was directly credited to their bank account around five minutes thereafter.

76. It needs no emphasis that orders of courts/tribunals necessitate compliance and cannot be permitted to be violated. The fact, however, remains that SECI was unaware of the Order of this Tribunal, till a couple and half hours before the proceeds of the Bank Guarantee was credited directly to their bank account. While they could have been more vigilant and, within the window period of two and half hours, could have communicated to the Guarantor Bank not to act on their letter dated 01.07.2022, their failure to do so cannot be said to be a wilful or deliberate violation of the interim directions of this Tribunal, warranting their conduct being deprecated.

77. It must also be borne in mind that, pursuant to the Order of this Tribunal dated 26.07.2022, SECI has re-deposited the amount received by them, on encashment of the Bank Guarantee, with the Guarantor Bank; and, thereafter, the Bank issued an amendment, to the original Bank Guarantee, on 29.12.2022 extending the validity of the guarantee till 31.12.2023.

78. We are satisfied that the conduct of SECI, in encashing the bank guarantee, is not such as to deny them their right, if they so choose to exercise, to encash the bank guarantee.

VIII. CONCLUSION:

79. Since the Appellant has not made out a case of fraud or special equities, justifying the Respondent-SECI being restrained from encashing the Bank Guarantees, the relief sought by them in this Appeal cannot be granted. Suffice it to make it clear that invocation of the Bank Guarantees, if SECI so choose to do, shall be subject to the result of the main petition pending on the file of the CERC; and, in case the Appellant were to succeed therein, equities can always be suitably adjusted in their favour. Viewed from any angle, the Appellant is not entitled to the relief sought for. The appeal fails and is, accordingly, dismissed. Consequently, the interim order granted earlier stands vacated, and all the I.As therein stand disposed of.

80. Pronounced in the open court on this the **24th day of February, 2023**.

(Sandesh Kumar Sharma)
Technical Member

(Justice Ramesh Ranganathan)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

tpd