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

% **Date of decision: 30th November, 2012**

\+ **LPA No.718/2012**

PATEL ENERGY LIMITED ..... Appellant

Through: Mr. Neeraj Kishan Kaul, Sr. Adv. with Mr. P.S. Narasimha, Sr. Adv. with Mr. K. Parameshwar, Mr. Kapil Rustagi, Mr. Karan Luthra, Ms. Naomi Chandra, Mr. Rohan Jaitley, Advs.

Versus

UNION OF INDIA & ANR ..... Respondents

Through: Mr. Rajeeve Mehra, ASG with Mr. Sumeet Pushkarna, Adv. for UOI.
Grp. Capt. Karan Singh Bhati, Adv. with Ms. Jyoti Upadhyay, Adv. for R-2.

CORAM :-
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. This intra-court appeal impugns the order dated 19th October, 2012 of the learned Single Judge (in W.P.(C) No.5666/2012 preferred by the appellant) of dismissal of CM No.11610/2012 filed by the appellant for interim relief. The appellant seeks interim relief of -

A. Stay of operation of –

(i). Letter dated 30th July, 2012.

(ii). Letter dated 10th September, 2012.

B. Stay of encashment of Bank Guarantees dated –

(i). 28th May, 2010.

(ii). 27th May, 2011.

(iii). 21st September, 2011.

Considering the nature of the relief claimed, the appeal was finally heard on 31st October, 2012 when it first came up for consideration, with the consent of the learned ASG appearing on behalf of the respondent no.1 and the counsel for the respondent no.2 South Eastern Coal Fields Limited, who appeared on advance notice and the judgment reserved. The learned Single Judge had earlier, vide order dated 19th September, 2012, granted *ad interim* relief. Though on dismissal of application of interim relief, the *ad interim* relief earlier granted stood vacated but the learned Single Judge, to enable the appellant to avail its remedy of appeal, had suspended the impugned order till 30th October, 2012. Accordingly, while reserving judgment, the said order of suspension was continued till the disposal of the appeal.

2. The three bank guarantees of Axis Bank Ltd. (not a party to the proceedings) in favour of Coal India Limited (also not a party to the

proceedings) and South Eastern Coal Fields Ltd., stay of encashment whereof is sought, are identical in language and the portion thereof relevant for the present purposes, may be reproduced as under:-

> *"In consideration of Coal India Limited/ South Eastern Coal Fields Ltd ..... (hereinafter referred to Assurer) having agreed to issue Letter of Assurance for supplying coal (hereinafter referred to as 'LoA') to M/s Patel Energy Limited……(hereinafter referred to as the 'Assured')…… and the Assured being required to furnish the Commitment Guarantee as per the terms of the LoA……We, Axis Bank Ltd.(hereinafter called the Guarantor……)do hereby irrevocably and unconditionally guarantee and undertake to pay……all amounts……. to the extent of Rs._____ at any time upto _____subject to the following terms and conditions:-*
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> 1. *The Guarantor shall pay to the Assurer on demand and without any demur, reservation, contest, recourse or protest and/or without any reference to the Assured as to whether the occasion or ground has arisen for such demand, the decision of the Assurer shall be final.*
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> 6. *The Guarantee shall cover all claims and demand of Assurer to the extent of the amount guaranteed"*

3. "Demur" is defined in the Shorter Oxford English Dictionary, 6th Edition as delay, waiting, procrastination or objecting or a state of indecision. Black's Law Dictionary 6th Edition defines the same as "to take

an exception to the sufficiency in point of law of a pleading or state of facts alleged". Thus when the Bank agreed/undertook that it shall pay the amount of the bank guarantee upon demand, without any demur, it agreed to pay the money without delay, procrastination, lingering and without taking any objection as to the existence or happening of the conditions on happening of which the money was payable.

4. Bank Guarantees are instruments of trade and commerce. The courts have adopted the policy of restraining themselves from interfering therewith for the reason of the same interfering in the trade and commerce. It has been held that where the parties have agreed that the payment under the bank guarantee issued at the instance of one in favour of the other shall be made unconditionally, without any demur and simply on demand being made and the parties have acted on the said premise, the courts ought not to come in the way. The only ground for interference by the court in encashment of bank guarantee is, a fraud of egregious nature so as to vitiate the underlying transaction and the very issuance of bank guarantee. The said fraud is not to be in the encashment of the bank guarantee, but has to be in obtaining the bank guarantee. Reference in this regard can be made to ***Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Company*** AIR 2007 SC

2798 and ***UP Co-operative Federation Limited Vs. Singh Consultants & Engineers (P) Limited***, 1988 (1) SCC 174 and ***UP State Sugar Corporation Vs. Sumac International Ltd*** (1997) 1 SCC 568.

5. Merely because disputes have arisen between the contracting parties and the beneficiary is alleged to be fraudulently encashing the bank guarantee, does not become a ground for the court to restrain encashment thereof. Some judgments have also carved out the ground of special equities in favour of granting injunction, when a case, of it being not possible for the party at whose instance the bank guarantee is given, to upon ultimately succeeding in the disputes, recover the amount received by the other party under the bank guarantee or where harm to the party at whose instance the bank guarantee is furnished, from encashment thereof, will be exceptional and of irretrievable nature.

6. A reading of the order of the learned Single Judge impugned before us does not show either of the only two grounds aforesaid on which the courts can interfere in the encashment of the bank guarantee, to have been urged, save to the effect that the invocation was inequitable as huge amount of money, time and effort had been spent by the appellant in attempting to set up a power plant for feeding which the Letter of Assurance (LoA) was

obtained; rather the grounds of defaults/breach by the respondents of the LoA and which grounds as per the law noticed above are irrelevant for the purposes of interfering with the bank guarantee, were urged and in which also no merit was found by the learned Single Judge. The learned Single Judge has further noticed that though lip service was paid to the grounds of fraud and special equities but without any basis whatsoever.

7. We have scanned the memorandum of appeal and do not find therein also, any basis, for the only grounds on which interference is permissible, to have been laid. The senior counsel for the appellant in his submissions also has not urged any fraud of egregious nature having been played by the respondents in obtaining the Bank Guarantee or of any special equities. The only argument of special equities is of the appellant having at a huge cost acquired land for setting up the power plaint, for requirement of coal for which LoA was issued. However, the said land remains with the appellant and the appellant, if ultimately succeeds, can again apply for and obtain a fresh LoA.

8. Need is not felt to discuss herein the arguments raised of breach/defaults by respondents of the LoA in as much as the same have no relevance as aforesaid. Though the senior counsel for the appellant

emphasized that the guarantees supra, are Commitment Guarantees and not Performance Bank Guarantee but in our view the same would not make any difference. The respondent no.2 had issued the LoA, in pursuance to which the appellant had arranged the bank guarantees aforesaid, assuring supply of coal for consumption in the power plant proposed to be set-up by the appellant. However since the respondent no.2, on issuance of such LoA was required to reserve certain coal fields/coal for supply to the appellant, the appellant as a pre-condition to the said LoA had agreed to arrange for Commitment Bank Guarantees aforesaid, of the amount equivalent to 10% of the base price as on the date of application for issuance of LoA of the quantity of coal, supply whereof was assured by the respondent no.2 to the appellant and which guarantees the respondent no.2 was entitled to encash in the event of the appellant failing to fulfill the activities/milestone mentioned in the said LoA within a period of 24 months. It would thus be seen that the argument of the appellant, of the Commitment Bank Guarantee being different from a Performance Bank Guarantee or the same having any impact on encashment thereof, has no merit.

9. Another argument of the senior counsel for the appellant which may be noticed is of the respondents having not allowed a change of location to

the appellant and which has been allowed to the others. Needless to state that the same has been controverted by the learned ASG. We are afraid the same is a dispute between the appellant and the respondents and not relevant in so far as the question of encashment of bank guarantee is concerned.

10. The senior counsel for the appellant has also contended that the learned Single Judge has wrongly conceived the writ petition to be aimed at seeking stay of encashment of bank guarantee when the principal challenge therein is to the letters dated 30th July, 2012 and 10th September, 2012, stay of operation whereof has also been sought. The said argument is also found to be without any weight. The contract of bank guarantee, in ***Vinitec Electronics Private Ltd Vs HCL Infosystems Ltd*** (2008) 1 SCC 544 has been reiterated to be an independent one between the bank and the beneficiary, *de hors* the contract between the beneficiary and the person at whose instance the bank has given the guarantee. Moreover, validity of the letters dated 30th July, 2012 and 10th September,2012 is to be gone into in the writ petition which has been amended and in which pleadings are yet to be completed and what the appellant today is seeking is in fact stay of encashment of bank guarantees, though behind the veil of stay of operation of the letters dated 30th July, 2012 and 10th September, 2012.

11. We therefore do not find any error in the reasoning of the learned Single Judge in declining the stay of encashment of the bank guarantees which admittedly stand invoked.

12. As far as the interim relief sought of stay of operation of the letters dated 30th July, 2012 and 10th September, 2012 is concerned, Ministry of Coal of the Government of India had vide letter dated 30th July, 2012 to the appellant intimated that the LoA was for 24 months which had expired on 11th July, 2012 and rejected the request of the appellant for change of location of the proposed power plant and for extension of the validity of the LoA. It was stated that the request of the appellant for change of location could not be entertained as the appellant had failed to achieve the milestones to be fulfilled within the period of validity of LoA. The plea of the appellant of *force majeure* was also rejected. It was further observed that there was no provision for grant of extension of validity of LoA. The letter dated 10th September, 2012 is of cancellation/withdrawal, as per the Clause 3.4.1 of the LoA, followed by encashment of Commitment Guarantee.

13. The learned Single Judge in the impugned judgment has held that the relief sought of restraining the respondents from cancelling the LoA was misconceived in as much as the LoA has expired by efflux of time. It was

further held that the question whether the request of the appellant for change of location was rightly rejected or not could be decided only at the final stage but the appellant had not made out a *prima facie* case for stay of operation of the letter dated 30th July, 2012 *inter alia* for the reason that though the appellant had obtained approval for change of location of its power plant from the State Government way back on 16th February, 2009 but did not inform the Standing Linkage Committee (Long Term) for Power constituted under the Ministry of Coal, under authorization from whom the LoA was issued, of the same till 21st August, 2010. It was further held that the appellant had not achieved the milestone of bringing about finance.

14. Of course, the senior counsel for the appellant has argued that financial closure could not have been effected without the change of location having been sanctioned and `in principle' approval of the financers had been obtained. However we are of the opinion that the interim stay of the operation of the said letter dated 30th July, 2012 cannot be granted also for the reason that the same would amount to the respondent no.2 continuing to assure the supply of coal to the appellant. Such assurance would necessarily have to be to the prejudice of supply of coal to some other, who may have immediate need therefor. The grant of interim relief to the appellant thus

affects not only the respondent no.2 but may affect other applicants for coal who are not before this Court and may ultimately affect the public at large who will be deprived of benefit of the other development projects dependent on coal – all for the reason of coal being reserved for the appellant whose rights are still to be adjudicated. The courts have now, besides the three elements of *prima facie* case, irreparable injury and balance of convenience, also added the element of public interest in the matter of grant of interim relief and interim relief can be denied if the grant thereof would be against the public interest. It is found to be so in the present case.

15. The Supreme Court in ***Ramniklal N. Bhutta Vs. State of Maharashtra*** (1997) 1 SCC 134 held that time has come where the Court should keep the larger public interest in mind while exercising their power of granting stay/injunction. The power under Article 226 is discretionary. It will be exercised only in furtherance of interest of justice and not merely on the making out of a legal point. The Courts have to weigh the public interest vis-à-vis the private interest while exercising the power under Article 226. Reference may also be made to ***Baitarani Gramiya Bank Vs. Pallab Kumar*** (2004) 9 SCC 100 reiterating that when public interest competes with private interest, the private interest will have to give way to public interest.

16. As far as the letter dated 10th September, 2012 is concerned, the same is addressed to the bank, invoking the bank guarantee and stay of encashment whereof has already been declined.

17. There is thus no merit in this appeal; the same is dismissed with costs of Rs.25,000/- payable by the appellant to each of the two respondents.

Dasti.

RAJIV SAHAI ENDLAW, J

CHIEF JUSTICE

NOVEMBER 30th ,2012
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