



GAHC010267942023

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## **THE GAUHATI HIGH COURT**

**(THE HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)**

### **WRIT PETITION (C) NO. 6446/2023**

Jayanta Khaund, Class 1 [A] Contractor,  
Guwahati Diagnostic Centre Building, 2<sup>nd</sup>  
Floor, G.S. Road, Bhangagarh, Guwahati –  
781008.

**.....Petitioner**

**-VERSUS-**

1. The Assam Power Distribution Company Limited [APDCL] [A Successor Company of Assam State Electricity Board, represented by its Chairman, 1<sup>st</sup> Floor, Bijulee Bhawan, Paltanbazar, Guwahati – 781001.
2. The Managing Director, Assam Power Distribution Company Limited [APDCL], Bijulee Bhawan, Paltanbazar, Guwahati – 781001.
3. The Chief General Manager [PP&D], Assam Power Distribution Company Limited [APDCL], Bijulee Bhawan, Guwahati – 1.



4. The Chief General Manager [NRE], Assam Power Distribution Company Limited [APDCL], Bijulee Bhawan, Guwahati – 1.
5. The Senior Manager, Federal Bank Limited, Paltan Bazar Branch, Ramanand Tower, G.S. Road, Guwahati – 08.

.....**Respondents**

**Advocates :**

Petitioner	:	Mr. K.N. Choudhury, Senior Advocate Mr. J. Patowary, Advocate
Respondent nos. 1 – 4	:	Mr. I. Chowdhury, Senior Advocate Mr. K.P. Pathak, Standing Counsel, APDCL
Respondent no. 5	:	Mr. M. Sharma, Advocate
Date of Hearing	:	19.01.2024, 22.01.2024 & 23.01.2024
Date of Judgment & Order	:	24.01.2024

**BEFORE**  
**HON'BLE MR. JUSTICE MANISH CHOUDHURY**  
**JUDGMENT & ORDER [CAY]**

The petitioner has instituted the present writ petition under Article 226 of the Constitution of India seeking the following reliefs/directions :-

- [a] Certiorari shall not be issued to set aside and quash the impugned letter bearing No. APDCL/CGM[PP&D]/NRE-146/2019-20/787 dated 01.11.2023 issued by the CGM [NRE], APDCL [Annexure-10] whereby the bank guarantees of the petitioner is sought to be liquidated and

- [b] Certiorari shall not be issued to set aside and quash the impugned letter dated 04.11.2023 vide which it has been decided to encash the petitioner's bank guarantees despite extension of time granted and
- [c] Mandamus shall not be issued directing the respondent authorities comply with the extension of time granted vide letter No. APDCL/CGM[PP&D]/NRE-146/2019-20/789 dated 02.11.2023 [Annexure-12] and,
- [d] Mandamus directing the respondent authorities to refrain from invoking the Bank guarantees of the petitioner during the pendency of the present petition and, upon causes being shown be further pleased to make the Rule absolute and/or pass such other order[s] as Your Lordships may deem fit and proper to grant adequate relief to the petitioner

-AND-

Pending disposal of the Rule be further pleased to pass appropriate interim order[s] so as to give adequate interim relief to the petitioner by staying the operation of letter dated 01.11.2023 and 04.11.2023 and by further directing the authorities to maintain status quo in the matter and/or pass any other orders as Your Lordships may deem fit and proper.

2. When the writ petition was moved on 08.11.2023, the Court while issuing notice, had provided, as an ad-interim measure, that if the Bank Guarantees furnished by the petitioner had already expired on the dates indicated in a letter dated 29.01.2021 and the validity of the same had not been extended, then in that event, the same shall not be encashed without the leave of the Court. Seeking vacation/modification of the said Order dated 08.11.2023, the respondent Assam Power Distribution Company Limited ['the APDCL', for short] authorities have preferred an interlocutory application, which has been registered and numbered as I.A.[C] no. 3499/2023. In the course of the proceedings, the respondent APDCL authorities have preferred another interlocutory application seeking a direction to the petitioner and the respondent no. 5 in the writ petition, W.P.[C] no. 6446/2023, that is, Federal Bank Ltd. to extend the validity of the three Bank Guarantees or to provide adequate alternative security and the said interlocutory application has been registered and numbered as I.A.[C] no. 163/2024.



3. The parties have exchanged a number of pleadings and the learned counsel for the parties have submitted that the exchange of pleadings between the parties is complete.
4. In order to understand the nature of challenges made and to appreciate the issues raised and involved in the writ petition, a narration of facts in sequence, shorn of unnecessary details, appears necessary at this stage.
  - 4.1. The office of the Chief General Manager [PP&D], APDCL, Guwahati [the respondent no. 3] published a Request for Proposal [RFP] on 18.06.2020 to invite interested Bidders to participate in an online bidding process for procurement of power from Grid Connected Solar Photovoltaic [PV] Power Projects through Tariff Based Competitive Bidding Process for total 25 MW<sub>AC</sub> capacity for a number of Regions including Region-2 [hereinafter referred to as 'the Region-2 Project', for easy reference], in the State of Assam on 'Build-Own-Operate' basis. It was informed that the bidder would be selected through an Open Competitive Bidding process in accordance with the procedure set out in the Request for Selection [RFS] and it would be the responsibility of the Successful Bidder[s] to supply power to the Procurer as per the terms and conditions of the RFS Document. One of such Regions is Region-2, covering the districts of Goalpara, Bongaigaon, Barpeta, Nalbari, Kamrup – Metro & Kamrup – Rural. The petitioner herein was a Bidder for Region-2.
  - 4.2. As per the Bid Information Sheet contained in the RFS Document, the time-lines were set out as follows :- [i] 23.06.2020 : Date of issue of the RFS Document & the Draft Power Purchase Agreement; [ii] 13.07.2020 : Last date of receipt of Pre-Bid queries from the Bidders; [iii] 17.07.2020 : Pre-Bid Meeting; [iv] 19.08.2020 : Due date for online submission of 'Techno-Commercial Bid' and 'Price Bid' as per the RFS; [v] 20.08.2020 : Due date for hard copy submission of 'Techno-Commercial Bid' as per the RFS; and [vi] 22.08.2020 : Due date for 'Techno-Commercial Bid' opening [except 'Price Bid']. The date of Price Bid opening was to be intimated to the qualified bidders later on.



- 4.3. As per the RFP, the Bidding Document comprised of two volumes, that is, Volume-I : Request for Selection [RFS] and Volume-II : Power Purchase Agreement [PPA]. As per the Bidding Document, a Bidder was to submit Bid Security [EMD] for an amount of Rs. 6,72,000/- per MW<sub>AC</sub> and the validity of the Bid Security was to be of 180 days from the original Due date for online submission of 'Techno-Commercial Bid' and 'Price Bid' as per the RFS. It was further indicated that a Successful Bidder would be required to submit Performance Security/Contract Performance guarantee for an amount of Rs. 16,80,000/- per MW<sub>AC</sub>.
  
- 4.4. As per the Brief Scope mentioned therein, the Power Producer Companies/Solar Developers shall be responsible for development of Grid Connected Ground Mounted Solar Photovoltaic [PV] Projects to be implemented in the Regions including Region-2 [Goalpara, Bongaigaon, Barpeta, Nalbari, Kamrup – Metro & Kamrup – Rural], in the State of Assam on 'Build-Own-Operate' basis only for the procurement of Solar Power by the APDCL for a period of 25 years and the Ceiling Tariff was mentioned at Rs. 4.00 per unit. The bidding process was a single stage two envelopes bidding process, followed by the E-Reverse Auction Process, adopted by the APDCL for the award of the Projects to the Successful Bidder[s], as per the terms set out in the RFS Document. After selection of the Successful Bidder[s], Power Purchase Agreement[s] was/were to be signed between the Procurer, that is, the APDCL and the Successful Bidder[s]. The responsibility of the Successful Bidder[s] is to supply power to the Procurer as per the terms and conditions of the RFS Document and the Procurer would pay to the Seller the Quoted Fixed Tariff which has been arrived from single fixed tariff quoted by the Successful Bidder in the Price Bid followed by E-Reverse Auction, as per the terms and conditions of the Power Purchase Agreement [PPA].
  
- 4.5. The Solar Power Developer, as per the RFS Document and the Draft Power Purchase Agreement [PPA], would be responsible for design, financing, 'acquisition' or 'leasing' of land, detailed engineering, procurement, construction,



erection, testing, synchronizing, commissioning, operating and maintaining the Project[s] in accordance with the provisions of the Power Purchase Agreement [PPA] to be entered into between the Solar Power Developer/Successful Bidder and the APDCL, which is to be further vetted and concurred by the Assam Electricity Regulatory Commission [AERC].

5. In response to the RFS, the petitioner herein submitted his bid in respect of the Region-2 Project. On emergence of the petitioner as the Successful Bidder in respect of the Region-2 Project, a Letter of Award [LoA] bearing no. APDCL/CGM[PP&D]/NRE-146/2019-20/532 was issued on 04.01.2021 in favour of the petitioner informing him that Tariff quoted at Rs. 3.99 only per unit for development of 25 MW<sub>AC</sub> Grid Connected Solar Photovoltaic [PV] Project in Region-2 [Goalpara, Bongaigaon, Barpeta, Nalbari, Kamrup – Metro & Kamrup – Rural], as specified in the RFS had been accepted. It was further informed that the acceptance of the petitioner's offer would be subject to the following terms and conditions :-

- [a] In terms of RFS, Power Purchase Agreement [PPA] is to be signed within thirty [30] days from the date of issuance of this LOA. Copy of the PPA is enclosed herewith as Annexure-I.
- [b] In terms of RFS & PPA, Performance Bank Guarantee [PBG] for Rs. 16,80,000.00 [Indian Rupees Sixteen Lakh Eighty Thousand only] per MW aggregating to Rs. 4,20,00,000.00 [Rupees Four Crore twenty lakhs] only is to be submitted prior to signing of PPA. The Performance Security shall be furnished in the form of three [3] Bank Guarantees as mentioned below in favour of "Chief General Manager [Comm. & EE]", APDCL payable at Guwahati as per the format provided in Schedule 3 of PPA and having validity up to twenty two [22] months from the Date of Signing of PPA.
- [i] PBG for an amount of Rs. 84,00,000.00 [Rupees Eighty Four Lakhs] having validity up to twenty two [22] months from the Date of Signing of PPA

- [ii] PBG for an amount of Rs. 1,68,00,000.00 [Rupees One Crore Sixty Eight Lakhs] having validity up to twenty two [22] months from the Date of Signing of PPA
- [iii] PBG for an amount of Rs. 1,68,00,000.00 [Rupees One Crore Sixty Eight Lakhs] having validity up to twenty two [22] months from the Date of Signing of PPA.

5.1. On receipt of the Letter of Award [LoA] dated 04.01.2021, the petitioner submitted 3 [three] nos. of Bank Guarantees to the respondent no. 3 vide his Letter bearing reference no. JK/NLP/APDCL/SOLAR PROJECT/Region-2/L-05 dated 29.01.2021 by describing the details of the three Bank Guarantees as follows :

Sl.	BG No.	Date of issue	Value of BG	Valid Upto	Issued by
1	IBG113029	25.01.2021	84,00,000.00	24.01.2023	Federal Bank Ltd. Jorhat Branch
2	IBG113031	25.01.2021	1,68,00,000.00	24.01.2023	
3	IBG113102	27.01.2021	1,68,00,000.00	26.01.2023	

- 5.2. The respondent no. 5, that is, Federal Bank, Jorhat Branch by its 3 [three] nos. of letters - Dated 25.01.2021, Dated 25.01.2021 & Dated 27.01.2021 – gave covering to the afore-mentioned three Bank Guarantees with the advise that the APDCL, in its own interest, could verify the genuineness of the Bank Guarantees by contacting Jorhat Branch of the Federal Bank. If IFSC of the APDCL's Bank would be provided to the Federal Bank, Jorhat Branch, a confirmation message regarding the issuance of the Bank Guarantees would be sent to the APDCL's Bank through SFMS.
- 5.3. On 15.02.2021, the petitioner vide his Letter bearing Reference no. JK/NLP/APDCL/SOLAR PROJECT/Region-2/L-06 of even date forwarded the sets of Power Purchase Agreements [PPAs], after subscribing his signatures.
- 5.4. On 28.12.2022, the APDCL through the respondent no. 4, that is, the Chief General Manager [NRE], APDCL, Guwahati issued a Show Cause Notice bearing no. APDCL/CGM/PP&D/NRE-146/2019-20/777 asking the petitioner to show cause



as to [i] why the contract shall not be terminated; [ii] why the petitioner should not be declared as a non-performer; [iii] why the petitioner should not be debarred for 3 [three] years from participating in any future bid of the APDCL; and [iv] why Security Deposit submitted against the Region-2 Project should not be encashed/invoked. Further reference of the Show Cause Notice would be made at a later stage of this Order.

- 5.5. On receipt of the Show Cause Notice, the petitioner submitted a Reply to the said Show Cause Notice vide Reference no. JK/NLP/APDCL/SOLAR PROJECT/Region-2/L-18 dated 05.01.2023 giving explanation from his side as to why the actions contemplated by the Show Cause Notice should not be taken.
6. It was thereafter the impugned Letter bearing no. APDCL/CGM[PP&D]/NRE-146/2019-20/787 dated 01.11.2023 [Annexure-10] came to be issued by the respondent no. 4. By addressing the Letter to the Senior Manager, Federal Bank Ltd. [the respondent no. 5], the respondent APDCL authorities informed that they had invoked the afore-mentioned three Bank Guarantees [IBG113029 dated 25.01.2021, IBG113031 dated 25.01.2021 and IBG113102 dated 27.01.2021] as the petitioner had failed to fulfill the terms and conditions of the contract and requested the respondent no. 5 Bank to encash the same and to transfer the proceeds therefrom in the bank account of the APDCL maintained at New Guwahati Branch of the State Bank of India. The original copies of the said three Bank Guarantees were also forwarded with the impugned Letter dated 01.11.2023. A copy of the said impugned Letter dated 01.11.2023 was also forwarded to the petitioner for his information.
- 6.1. On receipt of the copy of the impugned Letter dated 01.11.2023 addressed to him, the petitioner wrote a Letter bearing Reference no. JK/NLP/APDCL/SOLAR PROJECT/Region-2/L-19 on 02.11.2023 to the respondent no. 4 with the request to review the decision regarding invocation of the Bank Guarantees and not to revoke the Bank Guarantees for at least 1 [one] month from 02.11.2023.





- 6.2. On receipt of the said Letter bearing no. JK/NLP/APDCL/SOLAR PROJECT/Region-2/L-19 dated 02.11.2023 from the petitioner, the respondent no. 4 wrote to the respondent no. 5 a Letter bearing no. APDCL/CGM[PP&D]/NRE-146/2019-20/789 on 02.11.2023, referred to in Prayer no. C in the writ petition. By referring to the said Letter bearing no. JK/NLP/APDCL/SOLAR PROJECT/Region-2/L-19 dated 02.11.2023 of the petitioner wherein the petitioner made the request not to invoke the Bank Guarantees for at least 1 [one] month, the respondent no. 4 requested the respondent no. 5 to keep the three Bank Guarantees amounting to Rs. 4,20,00,000/- on hold for a period of 1 [one] month and until further order.
- 6.3. On 02.11.2023, the petitioner addressed a Letter bearing Reference no. JK/NLP/APDCL/SOLAR PROJECT/Region-2/L-20 to the Managing Director, APDCL [the respondent no. 2] with the request to foreclose the contract as areas of land for the proposed 25MW<sub>AC</sub> Solar Project in Region-2 could not be arranged. It was further requested to review the decision of the APDCL to invoke the three Bank Guarantees.
- 6.4. It was in the afore-said backdrop, the APDCL through the respondent no. 4 addressed its Letter bearing Reference no. APDCL/CGM[PP&D]/NRE-146/2019-20/790 to the respondent no. 5 on 06.11.2023. By the said Letter dated 06.11.2023, the respondent no. 4 by referring to his earlier Letter bearing Reference no. APDCL/CGM[PP&D]/NRE-146/2019-20/789 dated 02.11.2023 whereby the respondent no. 5 was requested to keep the three Bank Guarantees [IBG113029 dated 25.01.2021, IBG113031 dated 25.01.2021 and IBG113102 dated 27.01.2021] on hold, had informed the respondent no. 5 that his said Letter bearing Reference no. APDCL/CGM[PP&D]/NRE-146/2019-20/789 dated 02.11.2023 should be treated as cancelled and withdrawn. The respondent no. 5 was thereby requested to proceed as per the earlier instruction given in the Letter bearing Reference no. APDCL/CGM[PP&D]/NRE-146/2019-20/789 dated 02.11.2023. Meaning thereby, the respondent no. 4 by his Letter dated 06.11.2023 had sought invocation of the three Bank Guarantees with the further instruction to transfer the proceeds to the concerned bank account of the



respondent APDCL. Though in the writ petition the petitioner has made reference to and challenged a Letter dated 04.11.2023 stating that by the said Letter, the respondent APDCL authorities had invoked the Bank Guarantees but no copy of such Letter dated 04.11.2023, impugned as per the prayers made in the writ petition, has been brought on the records of the case. By an additional affidavit filed later, the petitioner has brought the Letter bearing no. APDCL/CGM[PP&D]/NRE-146/2019-20/790 dated 06.11.2023 on record.

7. Assailing mainly the action on the part of the respondent APDCL authorities to encash the afore-mentioned three Bank Guarantees [IBG113029 dated 25.01.2021, IBG113031 dated 25.01.2021 and IBG113102 dated 27.01.2021], the petitioner has instituted the present writ petition by seeking to invoke the extraordinary, discretionary and equitable jurisdiction under Article 226 of the Constitution of India of this Court for the reliefs/directions, mentioned above.
8. I have heard Mr. K.N. Choudhury, learned Senior Counsel assisted by Mr. J. Patowary, learned counsel for the petitioner; Mr. I. Chowdhury, learned Senior Counsel assisted by MR. K.P. Pathak, learned Standing Counsel, APDCL for the respondent nos. 1 – 4; and Mr. M. Sharma, learned counsel for the respondent no. 5 Bank.
9. Mr. K.N. Choudhury, learned Senior Counsel appearing for the petitioner has submitted that despite the petitioner's earnest endeavour to find around 500 Bighas of land for the Region-2 Project, the same could not be arranged in due time because of the restrictions in holding such large chunks of land by any individual/entity under the extant land laws. He has alleged arbitrariness on the part of the respondent APDCL authorities in seeking to invoke and encash the Bank Guarantees despite earlier agreeing to provide 1 [one] month time on 02.11.2023 in terms of the petitioner's request made on 02.11.2023. It is his submission that Clause 5.7.1 of the Power Purchase Agreement [PPA] has provided for extension of time on certain grounds in the event the Solar Power Developer is prevented from achieving the progress within the stipulated time



period. In the case in hand, the petitioner is affected by force majeure and as such, the agencies of the State ought to have come in aid of the petitioner in arrangement of required areas of land for the Project. He has, thus, contended that in such backdrop, the decision on the part of the respondent APDCL authorities to invoke and encash the Bank Guarantees by the impugned Letters – dated 01.11.2023 & dated 06.11.2023 – is clearly arbitrary and unjust. If in that manner the Bank Guarantees are invoked and encashed, the petitioner will suffer severe loss and the same would cause immense prejudice to the business of the petitioner. It has further been contended that in a Bank Guarantee, the validity period and the claim period have to be one and the same ordinarily, unless any agreement to the contrary. But in the three Bank Guarantees under reference, the respondent no. 5 Bank had unilaterally incorporated a condition therein, thereby, extending the claim period by 1 [one] year, beyond the validity period of the Bank Guarantees. The Bank Guarantees, as per Clause 4.4 of the Power Purchase Agreement [PPA], were required to be in the format provided in Schedule 3. As the incorporation of a claim period beyond the validity period in the Bank Guarantees was at the behest of the respondent no. 5 Bank, behind the back of the petitioner and without insistence from the respondent APDCL, the respondent APDCL cannot be permitted to take advantage from such extended claim period. In addition, a reference has been made to the provisions of Section 28 r/w Exception 3 thereof of the Indian Contract Act, 1872 [‘the Contract Act’, for short] to contend and to raise an issue of impermissibility regarding incorporation of such clause in the Bank Guarantees. As regards the law laid down in respect of Bank Guarantees, reference has been made to a decision of the Hon’ble Supreme Court of India, **U.P. State Sugar Corporation vs. Sumac International Limited**, reported in [1997] 1 SCC 568.

10. **Au contraire**, Mr. I. Chowdhury, learned Senior Counsel appearing for the respondent APDCL authorities has submitted that from the Bank Guarantees, it is evidently clear that the Bank Guarantees are irrevocable and unconditional ones. In view of Bank Guarantees of such nature, the ground taken by the petitioner as regards non-availability of required areas of land to establish the Project in



Region-2 is immaterial. He has contended that since a Bank Guarantee is an independent contract between the Guarantor Bank and the Beneficiary, that is, the respondent no. 5 Bank and the APDCL respectively in the case in hand, any such dispute, even if raised, by the petitioner at whose instance the respondent no. 5 Bank has provided the Bank Guarantees is of no consequence. It is not the case of the petitioner that there is either any fraud of an egregious nature or any irretrievable injustice would occur. In the absence of any such pleas, a writ petition to restrain invocation and encashment of such Bank Guarantees is not to be entertained. He has further contended that the Bank Guarantees have provided for a claim period different from the validity period. It is his submission that on a reading of the clause which incorporated an extended claim period in the Bank Guarantees, it is discernible that the same cannot be, by any stretch, relatable to the provisions of Section 28 and Exception 3 thereof of the Contract Act. It is his further contention that Exception 3 of Section 28 is in connection with legal proceedings and not with regard to any claim period. It has been submitted that it has been a consistent practice of the Banks to incorporate a claim period in a Bank Guarantee, beyond the validity period of the Bank Guarantee and there being no illegality, the petitioner who himself had submitted those Bank Guarantees to the APDCL authorities on 29.01.2021, is precluded from raising any issue with regard to such Clause regarding extended claim period, that too, belatedly by feigning ignorance. Mr. Pathak, learned Standing Counsel, APDCL has placed two decisions – *Himadri Chemicals Industries Limited vs. Coal Tar Refining Company*, reported in [2007] 8 SCC 110 and *Vinitec Electronics Private Limited vs. HCL Infosystems Limited*, reported in [2008] 1 SCC 544, to buttress the submissions.

11. Mr. Sharma, learned counsel appearing for the respondent no. 5 Bank has submitted that there is no legal bar to have one validity period and a different claim period beyond such validity period, in a Bank Guarantee. He has submitted that in a Bank Guarantee, it is necessary to provide a claim period, slightly longer than the validity period of the guarantee. A longer claim period is necessitated for the reason that if the Principal Debtor commits a default on the last day of the



validity period, then the beneficiary can at the earliest invoke the same only on the next day. Referring to a circular being Circular no. 10349/CRD/IRMDC34/20-21 dated 17.06.2020, issued by the Credit Risk Division of the Federal Bank, he has submitted that thereby, a policy decision has been taken by the respondent no. 5 Bank to include one year claim period in all guarantees issued by the Bank. He has submitted that such extended claim period has consistently been incorporated in Bank Guarantees in view of circulars issued by Indian Banks Association [IBA]. As per practice prevalent in the banking sector, the claim period in a Bank Guarantee is a grace period awarded beyond the validity period of the Bank Guarantee to make a demand on the Guarantor Bank for a default, which occurred during the validity period of the Bank Guarantee. He has submitted that though it has been contended that the direction contained in the circulars issued by the IBA to have a claim period in the Bank Guarantee beyond the validity period is relatable to Exception 3 of Section 28 of the Contract Act but in the case in hand, it is the clause in issue in the three Bank Guarantees over which the parties have crossed swords, is to be read for the purpose of deciding the issue. He has referred to a decision of the Hon'ble Delhi High Court rendered, on 28.07.2021, in a writ petition, Writ Petition no. 7677/2019 [Larsen and Toubro Limited vs. Punjab National Bank and another], wherein the Exception 3 to Section 28 of the Contract Act came up for consideration. He has also referred to a decision of the Hon'ble Supreme Court of India in **Union of India and another vs. Indusind Bank Limited and another**, reported in [2016] 9 SCC 720.

12. Mr. Choudhury, learned Senior Counsel appearing for the petitioner in his reply submissions, has submitted that there was no instructions from the petitioner's side to incorporate any clause of non-obstante nature for any claim period other than the agreed validity period, in the Bank Guarantees, which is beyond the validity period of the Bank Guarantees. He has also contended that the petitioner was neither a party to the Bank Guarantees nor privy to the said clause at the time of issuance of the same. It has, thus, been sought to articulate that insertion of such clause amounts to committing fraud upon the petitioner and the same



would cause irretrievable loss and injury to the petitioner not only to the extent of the amount involved in the Bank Guarantees but much beyond.

13. I have given due consideration to the rival submissions advanced by the learned counsel for the parties.
  - 13.1. I have also gone through the materials brought on record by the parties through their pleadings which are in the forms of [i] the Writ Petition; [ii] an Additional Affidavit filed, on 07.11.2023, on behalf of the petitioner; [iii] an Affidavit filed, on 21.11.2023, on behalf of the petitioner; [iv] the Affidavit-in-Opposition filed, on 29.11.2023, on behalf of the respondent nos. 1 – 4; [v] an Additional Affidavit filed, on 10.01.2024, filed on behalf of the respondent nos. 1 – 4; [vi] a synopsis of written submissions on behalf of the respondent Bank along with a circular being Circular no. 10349/CRD/IRMDC34/20-21 dated 17.06.2020, issued by the Credit Risk Division of the Federal Bank; [vii] the Interlocutory Application, I.A.[C] no. 3499/2023 filed, on 29.11.2023, by the respondent APDCL as applicant seeking vacation/modification of the Order dated 08.11.2023; [viii] the Affidavit-in-Opposition filed, on 13.12.2023, on behalf of the petitioner as the opposite party in I.A.[C] no. 3499/2023; and [ix] the Interlocutory Application, I.A.[C] no. 163/2024 filed, on 18.01.2024, by the respondent APDCL as applicant.
14. As have been mentioned herein above, as per the Bidding Document including the RFS Document, the Successful Bidder/Solar Power Developer has *inter alia* been made responsible for 'acquisition' or 'leasing' of land, procurement, construction, erection, testing, synchronizing, commissioning, operating and maintaining the Region-2 Project on 'Build-Own-Operate' basis. As per Clause 1.5 : 'Site Identification and Land Acquisition' of the RFS Document, the Project land shall have to be arranged by the Successful Bidder/Solar Power Developer. At the time of submission of Bid, a bidder was required to provide evidence that the required Land for project development @ 2 Ha/MW<sub>AC</sub> was under clear possession of the bidder whereon the bidder would install the required capacity. For ready



reference, Clause 1.5 : 'Site Identification and Land Acquisition' of the RFS is quoted herein below :-

### **1.5. Site Identification and Land Acquisition**

The Project Land shall be arranged by the SPD in the region as mentioned in clause 1.1.1. At the time of submission of bid, the bidder would provide evidence that the required Land for project development @ 2 ha/MW is under clear possession of the bidder which the bidder wishes to install the required capacity.

In this regard the Bidder shall be required to furnish the following documentary evidence :-

1.5.1. Identification of 100% [hundred per cent] land at the time of bid submission. Within 12 months of the effective date of the PPA, submission of documents/Lease Agreement to establish possession/right to use 100% [hundred per cent] of the required land in the name of the SPD or its Affiliate. In case the land is in the name of Affiliate, the land should be transferred in the name of SPD prior to Scheduled Commissioning Date [SCD].

RFS for Procurement of 25 MW [AC] Solar Power from projects to be developed in Region – 3 through Competitive Bidding Process [Followed by E-Reverse Action]

In case of identification of 100% land at the time of submission of Bid, following documentary evidence has to be submitted by the bidder :

- [i] General Declarations and Undertaking [Appendix – X]
- [ii] Memorandum of Undertaking [Appendix – XI]

1.5.2. Wherever leasing of private land is involved, the lease should allow transfer of land to the lenders or Procurer, in case of default of the SPD.



- 1.5.3. Requisite documents from the concerned and competent revenue/registration authority for the acquisition/ownership/vesting of land in the name of SPD and in case private land converted for industrial use.

In case of non-availability of land with the bidder at the time of submission of Bid, an undertaking has to be submitted that the documentary evidence will be produced by the bidder of the availability of the land within 12 [twelve] months of signing of PPA. The undertaking can be provided in the **Appendix – IX**.

Note :

- a. Change in the location of land for setting up the project from one place to other location is not permitted after 12 months from the signing of PPA or at financial closure, whichever is earlier.
- b. The land for setting up the project should be free from all encumbrances.
- c. The land should neither have been proposed for other purposes & nor should have been mortgaged.

14.1. Clause 1.3 : 'Commissioning, Part Commissioning and Delay in Commissioning of the Project' of the RFS has mentioned about the period within which the concerned Project like the Region-2 Project is to be commissioned. For the purpose of easy reference, the contents of Clause 1.3 are also extracted herein below :-

### **1.3. Commissioning, Part Commissioning and Delay in Commissioning of the Projects**

#### **1.3.1. Commissioning**

The Successful Bidders shall be required to sign PPAs with APDCL which shall form the part of the Project Agreements.





The Projects shall be Commissioned within a maximum period of 18 [eighteen] Months [“Scheduled Commissioning Period”] from Date of Execution of PPA [as defined out in PPA], which is termed as the ‘Scheduled COD’.

Delay in Project Commissioning, beyond the date of Scheduled COD shall involve imposition of Delay Liquidated Damages on the Solar Power Developer, as detailed out in PPA. The Solar Power Developer shall be permitted to achieve the Project COD, even prior to the Scheduled COD; in such cases, APDCL shall purchase the generated energy at PPA Tariff only.

### 1.3.2. Part Commissioning

A Solar Power Developer can be allowed to achieve Part Commissioning of a Project awarded to it by commissioning a threshold capacity of 15 MW and can achieve further Part Commissioning in minimum steps of 5 MW till full Commissioning of the Project is achieved, subject to the acceptance by APDCL. However, the Scheduled COD shall not get altered due to Part Commissioning of the Project. Irrespective of dates of Part Commissioning, the PPA shall remain in force for the PPA Term only. The Solar Power Developer shall be permitted to achieve the Part Commissioning for the Project only prior to the Scheduled COD.

In cases of Part Commissioning, till Project COD, the purchase of such solar energy generation shall be settled by APDCL, as per the provisions mentioned in the PPA.

### 1.3.3. Early Commissioning

The SPD shall be permitted for full commissioning as well as part commissioning of the Project even prior to the SCD. In case of early part – commissioning, till SCD, APDCL may purchase generation RFS for Procurement of 25 MW [AC] Solar Power from projects to be developed in

Region – 3 through Competitive Bidding Process [Followed by E – Reverse Auction] till SCD, at 75% [seventy – five percent] of the PPA tariff. However, in case the entire capacity is commissioned prior to SCD, APDCL may purchase generation at PPA tariff.

#### 1.3.4. Delay in Commissioning

As per draft PPA,

Failure to achieve the Project COD on or before the Scheduled COD by the Bidder shall attract encashment and invocation of Performance Security followed by imposition of Delay Liquidated Damages, as mentioned below :-

Delay up to one [1] Month from SCOD	Twenty percent [20%] of the Performance Security
Delay of more than one [1] Month and up to two [2] Months from SCOD	Forty percent [40%] of the Performance Security
Delay of more than two [2] Months and up to three [3] Months from SCOD	Forty percent [40%] of the Performance Security

In case the achievement of Project COD is delayed beyond three [3] Months from the date of Scheduled COD; the tariff discovered after reverse auction shall be reduced at the rate of INR 0.15/kWh [0.5 Paisa per unit] per day of delay for the delay in such remaining capacity which is not commissioned subject to a maximum period of 30 days. 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 22 months from the Date of execution of PPA [as defined in the Draft PPA]; in case of further delay in achieving the Project COD beyond twenty-two [22] Months period from Execution Date [as defined in the Draft PPA] would amount to termination of PPA. The normative CUF of 19% [nineteen per cent] or committed CUF, whichever is lower shall be taken for the purpose of calculation of generation loss as well as reduced tariff.



15. In the writ petition, the petitioner has averred that as per the land laws of Assam, an individual cannot possess 500 Bighas of land and since the petitioner did not possess 500 Bighas of land at the time of submission of his bid, he had to submit an undertaking to make available the areas of land required for the Region-2 Project. The petitioner has stated that the petitioner made a request to the Assam Industrial Development Corporation [AIDC] Limited to allot 500 Bighas of land to him for the Project. But the AIDC Limited vide its Letter dated 02.11.2021 informed the petitioner to the effect that it did not have any such land for allotment in the districts of Goalpara, Bongaigaon, Barpeta, Nalbari, Kamrup – Metro and Kamrup – Rural. The petitioner was also informed by the AIDC Limited that the petitioner could apply for allotment of land at other locations of the AIDC Limited in Assam. The petitioner has further stated that vide his Letter dated 03.11.2021, the petitioner had informed the respondent no. 4 to the effect that though he had identified private patta lands but the land owners refused to sell those lands. By informing about the inability of the AIDC Limited to allot required areas of land for the Region-2 Project in the districts mentioned above, the petitioner through his Letter dated 03.11.2021 requested the respondent APDCL authorities either to arrange for the areas of land required for the Region-2 Project or to change the Region of the petitioner, that is, Region-2 so as to enable him to search for land for the Project at other locations. The petitioner has further averred that despite his sincere endeavour to find 500 Bighas of land for establishing the Project in Region-2, no positive result yielded. When the petitioner was served with the Show Cause Notice dated 28.12.2022, the petitioner once again brought the matter of non-availability of land in Region-2 in his Reply dated 05.01.2023. It was in such obtaining fact situation, the impugned Letter bearing no. APDCL/CGM[PP&D]/NRE-146/2019-20/787 dated 01.11.2023 was issued by the respondent no. 4 mentioning default on the part of the petitioner. The petitioner has challenged the decision taken by the respondent APDCL authorities to invoke the three Bank Guarantees in such manner as arbitrary and unjust. The petitioner has contended that when the extant Laws of the State do not allow an individual/entity to possess an area of 500 Bighas of land, it becomes the responsibility of the State agencies to come in aid of the



petitioner to provide such large areas like 500 Bighas of land to enable the petitioner to fulfill the prescription contained in Clause 1.5 of the RFS Document.

16. The matters regarding 'acquisition' or 'leasing' of land for the projects in various Regions including Region-2, have been delineated in the Bidding Document comprising of Volume-I : Request for Selection [RFS] and Volume-II : Power Purchase Agreement [PPA]. From Clause 1.5 of the RFS Document, it is clear that the responsibility to arrange for the areas of land required to construct and commission the Region-2 Project, that is, 25 MW<sub>AC</sub> Grid Connected Solar Photovoltaic Project on 'Build-Own-Operate' basis was entirely of the Successful Bidder/Solar Power Developer. As per the definition provided in the RFS, 'COD', with respect to the Project/unit shall mean the date on which the project/unit is commissioned [certified by RLDC/SLDC/DISCOM] and available for commercial operation and such date as specified in a written notice given at least 10 days in advance by the power producer to APDCL. As per Clause 1.3.4 : 'Delay in Commissioning', failure to achieve the Project COD on or before the scheduled COD by the bidder shall attract encashment and invocation of Performance Security followed by imposition of Delay Liquidated Damages. It was stipulated in Clause 7.1.4. of the RFP Document to the effect that if a bidder was declared as the Successful Bidder, then the Bid Security of such Successful Bidder was to be returned upon signing the Power Purchase Agreement [PPA] with the APDCL and submission of the Performance Security or Performance Guarantee or equivalent in the form of Bank Guarantees, in accordance with the timelines and provisions mentioned in the Project Power Purchase Agreement [PPA].
17. In the Show Cause Notice issued on 28.12.2022, it was reiterated that the Letter of Award [LoA] was issued for the Region-2 Project, that is, 25 MW<sub>AC</sub> Grid Connected Solar Photovoltaic Project on 04.01.2021. It was further brought to the notice of the petitioner that by its Order dated 09.11.2021, the Assam Electricity Regulatory Commission [AERC] had provisionally approved the Tariff @ Rs. 3.99 per unit for the Region-2 Project for a period of 5 [five] years subject to the conditions that [i] the possession of land by the Successful Bidder/Solar Power



Developer should be completed within 3 [three] months from the date of the Order; and [ii] the APDCL shall monitor fortnightly and documentary evidence of possession of land shall be submitted to the AERC within the period allowed, else the approval shall stand cancelled. The Show Cause Notice had further mentioned that despite repeated reminders and despite elapse of more than 23 [twenty three] months from the date of acceptance of the Letter of Award [LoA] the petitioner was not able to submit any documentary evidence in respect of the petitioner's possession of land for the Region-2 Project. The petitioner was informed that such situation had given rise a situation for the APDCL to take necessary action against the petitioner by way of termination of the contract by declaring him as a non-performer and also by invoking the Bank Guarantees amounting to Rs. 4,20,00,000/- furnished towards Performance Security. The petitioner was thereby, asked to show cause by 31.12.2022 as to [i] why the contract shall not be terminated; [ii] why the petitioner should not be declared as non-performer; [iii] why the petitioner should not be debarred for 3 [three] years from participating in any future bid of the APDCL; and [iv] why Security Deposit submitted against the Region-2 Project should not be encashed/invoked. The petitioner in his Reply to the Show Cause Notice submitted on 05.01.2023, mentioned about non availability of land and also about escalation of costs, in the meantime.

18. The matters regarding Performance Security, Appropriation of Performance Security and Release of Performance Security are also specifically set forth in Clause 4.4[a] : 'Performance Security', Clause 4.4[b] : 'Appropriation of Performance Security' and Clause 4.4[c] : 'Release of Performance Security' in the following manner :-

#### 4.4. Performance Security

- [a] For due and punctual performance of its obligations under this Agreement, relating to the Project, the Solar Power Developer has delivered to APDCL, simultaneously with the execution of this Agreement, an irrevocable and unconditional bank guarantees from a scheduled bank acceptable to APDCL for an amount of INR

42000000.00 [Rupees Four Crore and Twenty Lakh only] [“Performance Security”], calculated as INR 16,80,000/- [Indian Rupees Sixteen Lakh Eighty Thousand only] per MW basis. The Performance Security is furnished to APDCL in the form of three [3] Bank Guarantees in favor of “Chief General Manager [Comm. & EE]” of APDCL as per the format provided in Schedule 3 and having validity up to twenty two [22] months from the Date of Signing of PPA. The details of the bank guarantees furnished towards the Performance Security are given below

:

- [i] Bank Guarantee No. IBG113029 dated 25.01.2021 for an amount of INR 84,00,000.00 [Rupees Eighty Four Lakh] [This amount shall be equivalent to 20% of total Performance Security]
- [ii] Bank Guarantee No. IBG113031 dated 25.01.2021 for an amount of INR 1,68,00,000.00 [Rupees One Crore Sixty Eight Lakh only] This amount shall be equivalent to 40% of total Performance Security]
- [iii] Bank Guarantee No. IBG113102 dated 27.01.2021 for an amount of INR 1,68,00,000.00 [Rupees One Crore Sixty Eight Lakh only] [This amount shall be equivalent to 40% of total Performance Security]

[b] Appropriation of Performance Security

Upon occurrence of a Solar Power Developer Default or failure to meet the Conditions Precedent by the Solar Power Developer, APDCL shall, without prejudice to its other rights and remedies hereunder or in law, shall be entitled to encash and appropriate the relevant amounts from the Performance Security as Damages for such Solar Power Developer Default or Conditions Precedent. Upon such encashment and appropriation from the Performance Security, the Solar Power Developer shall, within 30 [thirty] days thereof, replenish, in case of partial appropriation, to its original level the Performance Security, and in case of appropriation of the entire Performance Security provide a fresh Performance Security, as the case may be, and the Solar Power Developer shall, within the time so granted, replenish or furnish fresh Performance Security as aforesaid failing which APDCL shall be entitled



to terminate this Agreement in accordance with Article 16. Any penalty paid so, shall be returned to the SPD without any interest on achievement of successful commissioning within the SCD.

[c] Release of Performance Security

Subject to other provisions of this Agreement, APDCL shall release the Performance Security, if any after eighteen [18] from the Scheduled Commissioning Date.

The release of the Performance Security shall be without prejudice to other rights of APDCL under this Agreement.

19. From the above Clauses in the Power Purchase Agreement [PPA], also found similarly mentioned in the RFS document and the Draft Power Purchase Agreement [PPA], it is clear that the Bank Guarantees are to be submitted in the format provided in Schedule 3 and such Bank Guarantees should have validity upto 22 [twenty-two] months from the date of signing of the Power Purchase Agreement [PPA]. Discretion has been vested to the APDCL to encash and appropriate the relevant amounts from such Performance Security as Damages upon occurrence of Default on the part of the Successful Bidder/Solar Power Developer or in the event of failure to meet the Conditions Precedents by the Successful Bidder/Solar Power Developer, without prejudice to the APDCL's other rights and remedies under or in law.
20. The law regarding Bank Guarantee/Letter of Credit are well settled by a series of judgments of the Hon'ble Supreme Court of India and of this Court. In order to appreciate the law regarding the nature of Bank Guarantees, their invocation and in what situations the Court can pass an order of injunction/stay restraining encashment of a Bank Guarantee/Letter of Credit, the following decisions of the Hon'ble Supreme Court of India can be referred to.
  - 20.1. In **U.P. State Sugar Corporation vs. Sumac International Limited**, reported in [1997] 1 SCC 568, it has been observed as under :-

12. The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country. The two grounds are not necessarily connected, though both may co-exist in some cases. In the case of *U.P. Cooperative Federation Ltd. vs. Singh Consultants and Engineers [P] Ltd.*, [1988] 1 SCC 174, which was the case of a works contract where the performance guarantee given under the contract was sought to be invoked, this Court, after referring extensively to English and Indian cases on the subject, said that the guarantee must be honoured in accordance with its terms. The bank which gives the guarantee is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contractual obligation or not, nor with the question whether the supplier is in default or not. The bank must pay according to the tenor of its guarantee on demand without proof or condition. There are only two exceptions to this rule. The first exception is a case when there is a clear fraud of which the bank has notice. The fraud must



be of an egregious nature such as to vitiate the entire underlying transaction. Explaining the kind of fraud that may absolve a bank from honouring its guarantee, this Court in the above case quoted with approval the observations of *Sir John Donaldson, M.R. in Bolivinter Oil SA vs. Chase Manhattan Bank NA, [1984] 1 AllER 351* :

“The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear both as to the fact of fraud and as to the bank’s knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank’s credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it charged”.

This Court set aside an injunction granted by the High Court to restrain the realisation of the bank guarantee.

13. The same question came up for consideration before this Court in *Svenska Handelsbanken vs. M/s. Indian Charge Chrome & Others, [1994] 1 SCC 502*. This Court once again reiterated that a confirmed bank guarantee/irrevocable letter of credit cannot be interfered with unless there is established fraud or irretrievable injustice involved in the case. Irretrievable injury has to be of the nature noticed in the case of *Itek Corporation vs. The First National Bank of Boston etc., 566 Fed Supp 1210*. On the question of fraud this Court confirmed the observations made in the case of *U.P. Cooperative Federation Ltd. [supra]* and stated that the fraud must be that of the beneficiary, and not the fraud of anyone else.

- 20.2. In *Himadri Chemicals Industries Limited vs. Coal Tar Refining Company*, reported in [2007] 8 SCC 110, it has been observed as under :-

10. The law relating to grant or refusal to grant injunction in the matter of invocation of a bank guarantee or a letter of credit is now well settled by a plethora of decisions not only of this Court but also of the different High Courts in India. In *U.P. State Sugar Corporation vs. Sumac International Ltd.*, [1997] 1 SCC 568, this court considered its various earlier decisions. In this decision, the principle that has been laid down clearly on the enforcement of a Bank guarantee or a letter of credit is that in respect of a bank guarantee or a letter of credit which is sought to be encashed by a beneficiary, the bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. Accordingly this Court held that the courts should be slow in granting an order of injunction to restrain the realization of such a bank guarantee. It has also been held by this Court in that decision that the existence of any dispute between the parties to the contract is not a ground to restrain the enforcement of bank guarantees or letters of credit. However this Court made two exceptions for grant of an order of injunction to restrain the enforcement of a bank guarantee or a letter of credit : [i] Fraud committed in the notice of the bank which would vitiate the very foundation of guarantee; and [ii] injustice of the kind which would make it impossible for the guarantor to reimburse himself.
  
11. Except under these circumstances, the courts should not readily issue injunction to restrain the realization of a bank guarantee or a letter of credit. So far as the first exception is concerned, i.e. of fraud, one has to satisfy the court that the fraud in connection with the bank guarantee or letter of credit would vitiate the very foundation of such a bank guarantee or letter of credit. So far as the second exception is concerned, this court has held in that decision that it relates to cases where allowing encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. While dealing with the case of fraud, this court in the case of *U.P. Coop. Federation Ltd. vs. Singh Consultants and Engineers [P] Ltd.*, [1988] 1 SCC 174, held as follows : [SCC p. 197, para 53]

The fraud must be of an egregious nature such as to vitiate the entire underlying transaction.



[Emphasis supplied]

While coming to a conclusion as to what constitutes fraud, this court in the above case quoted [at SCC p. 197, para 54] with approval the observations of Sir John Donaldson, M.R. in *Bolivinter Oil SA vs. Chase Manhattan Bank*, [1984] 1 All ER 351 [CA], at p. 352g-h, which is as follows :

The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear both as to the fact of fraud and as to the bank's knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank's Credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it discharged.

[Emphasis supplied]

12. In *Svenska Handelsbanken vs. Indian Charge Chrome*, [1994] 1 SCC 502, it has also been held that a confirmed bank guarantee/irrevocable letter of credit cannot be interfered with unless there is established fraud or irretrievable injustice involved in the case. In fact, on the question of fraud, this decision approved the observations made by this court in the case of *U.P. Coop. Federation Ltd vs. Singh Consultants and Engineers [P] Ltd.*, [1988] 1 SCC 174.

\* \* \* \* \*

14. From the discussions made hereinabove relating to the principles for grant or refusal to grant of injunction to restrain enforcement of a Bank Guarantee or a Letter of Credit, we find that the following principles should be noted in the matter of injunction to restrain the encashment of a Bank Guarantee or a Letter of Credit :-

- [i] While dealing with an application for injunction in the course of commercial dealings, and when an unconditional bank guarantee or letter of credit is given or accepted, the beneficiary is entitled to realize such a bank guarantee or a letter of credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.
- [ii] The bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.
- [iii] The Courts should be slow in granting an order of injunction to restrain the realization of a bank guarantee or a letter of credit.
- [iv] Since a bank guarantee or a letter of credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of bank guarantees or letters of credit.
- [v] Fraud of an egregious nature which would vitiate the very foundation of such a bank guarantee or letter of credit and the beneficiary seeks to take advantage of the situation.
- [vi] Allowing encashment of an unconditional bank guarantee or a letter of credit would result in irretrievable harm or injustice to one of the parties concerned.

20.3. The following observations are made in **Vinitec Electronics Private Limited vs. HCL Infosystems Limited**, reported in [2008] 1 SCC 544 :

- 2. The dispute between the parties relates to invocation of the bank guarantee furnished by the appellant to the respondent.

\* \* \* \* \*

- 12. It is equally well settled in law that bank guarantee is an independent contract between bank and the beneficiary thereof. The bank is always obliged to honour its guarantee as long as it is an unconditional and irrevocable one. The dispute between the beneficiary and the party at whose instance the bank has given the guarantee is immaterial and of no consequence. In *BSES Limited*



[Now Reliance Energy Ltd.] vs. Fenner India Limited and another, [2006] 2 SCC 728, this court held :

“10. There are, however, two exceptions to this Rule. The first is when there is a clear fraud of which the Bank has notice and a fraud of the beneficiary from which it seeks to benefit. The fraud must be of an egregious nature as to vitiate the entire underlying transaction. The second exception to the general rule of non-intervention is 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. The general rule and its exceptions has been reiterated in so many judgments of this court, that in *U.P. State Sugar Corporation. vs. Sumac International Ltd.*, [1997] 1 SCC 568 [hereinafter *U.P. State Sugar Corporation*], this Court, correctly declared that the law was ‘settled’.

\* \* \* \* \*

14. In *Mahatama Gandhi Sahakra Sakkare Karkhane vs. National Heavy Engg. Coop. Ltd and another*, [2007] 6 SCC 417, this Court observed [SCC p. 471 b-d] :-

“If the bank guarantee furnished is an unconditional and irrevocable one, it is not open to the bank to raise any objection whatsoever to pay 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 between the parties has not been fulfilled. Such a course is impermissible. The seller cannot raise the dispute of whatsoever nature and prevent the purchaser from enforcing the bank guarantee by way of injunction except on the ground of fraud and irretrievable injury.

What is relevant are the terms incorporated in the guarantee executed by the bank. On careful analysis of the terms and conditions of the guarantee in the present case, it is found that the guarantee is an unconditional one. The respondent, therefore, cannot be allowed to raise



any dispute and prevent the appellant from encashing the bank guarantee. The mere fact that the bank guarantee refers to the principal 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.”

[Emphasis Supplied]

21. It has been set forth in Clause 4.4 : 'Performance Security' of the Draft Power Purchase Agreement [PPA] that the Successful Bidder had to furnish the Performance Security in the form of three Bank Guarantees in favour of the APDCL as per the format provided in Schedule 3 thereof. Since the format provided in Schedule 3 is also of import in the *lis*, the format in Schedule 3 is extracted hereinbelow in its entirety :-

### **SCHEDULE 3**

#### **PERFORMANCE SECURITY**

[PROFORMA OF BANK GUARANTEE]

THIS DEED OF GUARANTEE executed on this the \_\_\_\_\_ day of \_\_\_\_\_ at \_\_\_\_\_ by \_\_\_\_\_ [Name of the Bank] having its Head / Registered office at \_\_\_\_\_ hereinafter referred to as “the Guarantor” which expression shall unless it be repugnant to the subject or context thereof include successors and assigns;

In favour of \_\_\_\_\_, a Company Incorporated under the Indian Companies Act, 1956 having its registered office at \_\_\_\_\_ [hereinafter referred to as “APDCL”, which expression shall, unless it be repugnant to the context or meaning thereof, include its administrators, successors, and assigns];

WHEREAS

A. By the Power Purchase Agreement [the "Agreement"] being entered into between APDCL and \_\_\_\_\_, a company incorporated under the provisions of the Companies At, 1956/, having its registered office/permanent



address at \_\_\_\_\_ [hereinafter referred as “Solar Power Developer”], has been granted the right to development of \_\_\_\_\_ MW Solar PV Power Plant an hereinafter referred to as the Project.

- B. In terms of Article 4.4 of the Agreement, the Solar Power Developer is required to furnish to APDCL, an unconditional and irrevocable bank guarantee for an amount of INR \_\_\_\_\_/- [Rupees \_\_\_\_\_ Only] as security for due and punctual performance/discharge of its obligations under the Agreement.

At the request of the Solar Power Developer, the Guarantor has agreed to provide guarantee, being these presents guaranteeing the due and punctual performance/discharge by the Company of its obligations under the Agreement relating to the Project.

NOW THEREFORE THIS DEED WITNESSETH AS FOLLOWS:

Capitalized terms used herein but not defined shall have the meaning assigned to them respectively in the Agreement.

1. The Guarantor hereby irrevocably guarantees the due and punctual performance by M/s. \_\_\_\_\_ of all its obligations relating to the Project under the Agreement.
2. The Guarantor as primary obligator shall, without demur, pay to APDCL sums not exceeding in aggregate INR \_\_\_\_\_/- [Rupees \_\_\_\_\_ Only), within one working day of receipt of a written demand thereof from APDCL stating that the Solar Power Developer has failed to meet its performance obligations under the Agreement. The Guarantor shall not go into the veracity of any breach or failure on the part of the Solar Power Developer or validity of demand so made by APDCL and shall pay the amount specified in the demand notwithstanding any direction to the contrary given or any dispute whatsoever raised by the Solar Power Developer or any other Person. The Guarantor's obligations hereunder shall subsist until all such demands are duly met and discharged in accordance with the provisions hereof. In order to



give effect to this Guarantee, APDCL shall be entitled to treat the Guarantor as the principal debtor. The obligations of the Guarantor shall not be affected by any variations in the terms and conditions of the Agreement or other documents or by the extension of time for performance granted to the Company or postponement/non exercise/ delayed exercise of any of its rights by APDCL or any Indulgence shown by APDCL to the Solar Power Developer and the Guarantor shall not be relieved from its obligations under this Guarantee on account of any such variation, extension, postponement, non-exercise, delayed exercise of any of its rights by APDCL or any indulgence shown by APDCL provided nothing contained herein shall enlarge the Guarantor's obligation hereunder.

3. This Guarantee shall be irrevocable and shall remain in full force and effect for a period of twenty-two [22] months from the date of signing of PPA unless discharged /released earlier by APDCL on accordance with the provisions of the Agreement. The Guarantor's liability in aggregate is limited to a sum of INR \_\_\_\_\_/- (Rupees \_\_\_\_\_ Only).
4. This Guarantee shall not be affected by any change in the constitution or winding up of the Solar Power Developer/the Guarantor or any absorption, merger or amalgamation of the Solar Power Developer/the Guarantor with any other Person.

The Guarantor has power to issue this guarantee and discharge the obligations contemplated herein, and the undersigned Is duly authorized to execute this Guarantee pursuant to the power granted under\_\_\_\_\_.

IN WITNESS WHEREOF THE GUARANTOR HAS SET ITS HANDS  
HEREUNTO ON THE DAY, MONTH AND YEAR FIRST HEREINABOVE  
WRITTEN

SIGNED AND DELIVERED

by \_\_\_\_\_ Bank





by the hand of Shri \_\_\_\_\_ its \_\_\_\_\_ and

Authorised official.

22. As is stated above, it was on 29.01.2021 the petitioner submitted the three nos. of Bank Guarantees for amounts, indicated in paragraph 5.1 above, to the respondent APDCL in the format provided in Schedule 3. As the contestation of the parties is with regard to the said three Bank Guarantees, which are similarly worded, save and except a difference in the validity period, it is also apposite to extract the contents of one of such Bank Guarantees hereinbelow :-

### **SCHEDULE 3**

#### **PERFORMANCE SECURITY**

#### **[PROFORMA OF BANK GUARANTEE]**

THIS DEED OF GUARANTEE executed on this the 25<sup>th</sup> day of January, 2021 at Jorhat by The Federal Bank Ltd., M.G. Road, Jorhat-785001 of India having its Head / Registered office at Aluva, Kerala. Hereinafter referred to as “the Guarantor” which expression shall unless it be repugnant to the subject or context thereof include successors and assigns;

In favour of Assam Power Distribution Company Limited a Company Incorporated under the Indian Companies Act, 1956 having its registered office at \_\_\_\_\_ [hereinafter referred to as “APDCL”, which expression shall, unless it be repugnant to the context or meaning thereof, include its administrators, successors, and assigns];

#### **WHEREAS**

- A. By the Power Purchase Agreement [the "Agreement"] being entered into between APDCL and Jayanta Khaund a company incorporated under the provisions of the Companies At, 1956/, having its registered office/permanent address at K.B. Road, North Lakhimpur, Assam [hereinafter referred as



“Solar Power Developer”, has been granted the right to development of MW Solar PV Power Plant an hereinafter referred to as the Project.

- B. In terms of Article 4.4 of the Agreement, the Solar Power Developer is required to furnish to APDCL, an unconditional and irrevocable bank guarantee for an amount of INR 84,00,000/- [Rupees Eighty Four Lakhs Only] as security for due and punctual performance/discharge of its obligations under the Agreement.

At the request of the Solar Power Developer, the Guarantor has agreed to provide guarantee, being these presents guaranteeing the due and punctual performance/discharge by the Company of its obligations under the Agreement relating to the Project.

NOW THEREFORE THIS DEED WITNESSETH AS FOLLOWS:

Capitalized terms used herein but not defined shall have the meaning assigned to them respectively in the Agreement.

1. The Guarantor hereby irrevocably guarantees the due and punctual performance by Jayanta Khound of all its obligations relating to the Project under the Agreement.
2. The Guarantor as primary obligator shall, without demur, pay to APDCL sums not exceeding in aggregate INR 84,00,000/- [Rupees Eighty Four Lakhs Only), within one working day of receipt of a written demand thereof from APDCL stating that the Solar Power Developer has failed to meet its performance obligations under the Agreement. The Guarantor shall not go into the veracity of any breach or failure on the part of the Solar Power Developer or validity of demand so made by APDCL and shall pay the amount specified in the demand notwithstanding any direction to the contrary given or any dispute whatsoever raised by the Solar Power Developer or any other Person. The Guarantor's obligations hereunder shall subsist until all such demands are duly met and discharged in accordance with the provisions hereof. In order to give effect to this Guarantee, APDCL shall be entitled to



treat the Guarantor as the principal debtor. The obligations of the Guarantor shall not be affected by any variations in the terms and conditions of the Agreement or other documents or by the extension of time for performance granted to the Company or postponement/non exercise/delayed exercise of any of its rights by APDCL or any Indulgence shown by APDCL to the Solar Power Developer and the Guarantor shall not be relieved from its obligations under this Guarantee on account of any such variation, extension, postponement, non-exercise, delayed exercise of any of its rights by APDCL or any indulgence shown by APDCL provided nothing contained herein shall enlarge the Guarantor's obligation hereunder.

3. This Guarantee shall be irrevocable and shall remain in full force and effect for a period of twenty two [22] months from the date of signing of PPA unless discharged/released earlier by APDCL on accordance with the provisions of the Agreement. The Guarantor's liability in aggregate is limited to a sum of INR 84,00,000/- (Rupees Eighty Four Lakhs Only).
4. This Guarantee shall not be affected by any change in the constitution or winding up of the Solar Power Developer/the Guarantor or any absorption, merger or amalgamation of the Solar Power Developer/the Guarantor with any other Person.

The Guarantor has power to issue this guarantee and discharge the obligations contemplated herein, and the undersigned is duly authorized to execute this Guarantee pursuant to the power granted under APDCL.

**Notwithstanding anything to the contrary contained herein –**

- [i] Our Liability under this Guarantee shall not exceed Rs. 84,00,000/- [Rupees Eighty Four Lakhs Only].**
- [ii] This Bank Guarantee shall be valid upto 24.01.2023.**
- [iii] We are liable to pay the guarantee amount only and only if we receive from you at our address stated below, a written claim or demand no later than 1 Year from the said expiry, failing which all your rights under this guarantee shall extinguish and we shall stand completely discharged.**



[Emphasis supplied in bold]

Address for service of Claim/Demand :

The Federal Bank Limited

Operations Department Trade Finance Division,  
Fed Serv, 4<sup>th</sup> Floor, Thapasya Building, Infopark,  
Kakkanad, Ernakulam, Kerala, India – 682042

IN WITNESS WHEREOF THE GUARANTOR HAS SET ITS HANDS  
HEREUNTO ON THE DAY, MONTH AND YEAR FIRST HEREINABOVE  
WRITTEN

SIGNED AND DELIVERED

By \_\_\_\_\_ Bank

By the hand of Shri \_\_\_\_\_ its \_\_\_\_\_ and

Sd/- Illegible

Authorised Official.

Signature and Seal.

23. At this stage, it is apposite to find out about the nature of the three Bank Guarantees submitted by the petitioner. Each of the Bank Guarantees mention that in terms of Article 4.4 of the Agreement [that is, the Power Purchase Agreement (PPA)], the Solar Power Developer is required to furnish to the APDCL, an unconditional and irrevocable Bank Guarantees for a definite amount as security for due and punctual performance/discharge of its obligations under the Agreement. The Bank Guarantees also mention that the respondent Bank has agreed to provide the Bank Guarantees at the request of the Solar Power Developer, that is, the petitioner. Thus, the respondent Bank has irrevocably guaranteed due and punctual performance by the petitioner of all its obligations relating to the Project under the Agreement. The respondent Bank as the primary obligator has stated that it shall, without demur, pay to the APDCL the amounts not exceeding in aggregate mentioned in each of the three Bank Guarantees,



within one working day of receipt of a written demand thereof from the APDCL stating that the Solar Power Developer, that is, the petitioner has failed to meet its performance obligations under the Agreement. The Bank Guarantees further mention that the respondent Bank as the Guarantor shall not go into the veracity of any breach or failure on the part of the Solar Power Developer, that is, the petitioner or validity of demand so made by the APDCL and shall pay the amount specified in the demand, notwithstanding any direction to the contrary given or any dispute whatsoever raised by the Solar Power Developer, that is, the petitioner or any other person. The Bank Guarantees also mention that the Bank's obligations as Guarantor under the Bank Guarantees shall subsist until all such demands are duly made and discharged in accordance with the provisions of the Bank Guarantees and in order to give effect to the Bank Guarantees, the APDCL shall be entitled to treat the Guarantor Bank as the Principal Debtor. The Bank Guarantees stipulate that they shall remain in full force and effect for the period of 22 [twenty-two] months from the date of signing of the Power Purchase Agreement [PPA]. The Bank Guarantees though mention about Clause 4.4 of the Power Purchase Agreement [PPA] the same does not go to change the nature of the Bank Guarantees from unconditional and irrevocable Bank Guarantees to conditional ones as mere mention of Clause 4.4 of the Power Purchase Agreement [PPA] in the Preamble of the Bank Guarantees does not control the operative parts of the Bank Guarantees. It is clear from the Bank Guarantees that the APDCL is the best judge to decide as to whether the Solar Power Developer, that is, the petitioner has failed to meet its performance obligations or not. In the event of receipt of a written demand from the APDCL mentioning that the APDCL wants to invoke and encash the Bank Guarantees due to failure on the part of the Solar Power Developer, that is, the petitioner to meet its performance obligations, the Guarantor Bank is not required to go into the veracity of such demand made by the APDCL. Meaning thereby, it is not open for the Guarantor Bank to enquire as to whether there is due performance of or there is failure to perform the obligations under the Principal Agreement, that is, the Power Purchase Agreement [PPA] on the part of the petitioner. As per the Bank Guarantees, the Guarantor Bank on receipt of a written demand for encashment of the Bank Guarantees from



the APDCL, shall have to pay the amounts specified in the demand without any demur. It has been clearly stipulated in the Bank Guarantees that any dispute between the APDCL and the Solar Power Developer, that is, the petitioner at whose instance the Guarantor Bank has given the Bank Guarantees, is immaterial and is of no consequence. Having gone through the terms and conditions of the three Bank Guarantees, by keeping the principles enunciated in the decisions cited above, this Court is of the unhesitant view that the three Bank Guarantees are unconditional and irrevocable in nature. The petitioner has stated that the petitioner had signed the Power Purchase Agreement [PPA] on 15.02.2021.

24. On perusal of the three Bank Guarantees, all similarly worded and one of which has been extracted hereinabove, it is also noticed that the Bank Guarantees have two different time-periods/dates. One is the validity period [Expiry Date] indicating the date till which the particular Bank Guarantee would remain valid and the other is the claim period which indicates a period beyond the validity period of the Bank Guarantee to make a written claim or demand to the Bank against a default. For example, the Bank Guarantee bearing no. IBG113029 dated 25.01.2021 for a guarantee amount of Rs. 84,00,000/- has mentioned that the Bank Guarantee shall be valid upto 24.01.2023 and the Bank shall be liable to pay the guarantee amount only and only if the Bank receives from the beneficiary [the APDCL], a written claim or demand no later than 1 [one] year from the expiry date, meaning thereby, the claim period would be upto 24.01.2024. If such validity period of the Bank Guarantee upto 24.01.2023 and the claim period upto 24.01.2024 are found to be sustainable then the claim or demand made by the APDCL to the respondent no. 5 Bank on 01.11.2023 by the impugned Letter bearing no. APDCL/CGM[PP&D]/NRE-146/2019-20/787 dated 01.11.2023 and/or on 06.11.2023 by the impugned Letter bearing no. APDCL/CGM[PP&D]/NRE-146/2019-20/790 dated 06.11.2023 would, in turn, have to be regarded as a written claim or demand made within time.
25. The learned counsel for all the parties are in general agreement that a Standard Bank Guarantee would usually contain the three terms :- [a] Expiry Period/Validity

Period; [b] Claim Period; and [c] Enforcement Period. They are also in consensus ad item to the expositions provided to the said three terms in **Larsen and Toubro Limited** [supra] in the following manner :-

[a] Expiry Period/Validity Period : A bank guarantee would prescribe a specific date by which a bank guarantee would expire. This is a time determined by the Principal Debtor and the Creditor. The right to invoke the bank guarantee is only for a default of the Principal Debtor which occurs during the validity period of the bank guarantee.

[b] Claim Period : This is a time period contractually agreed between the Creditor and the Principal Debtor which provides a grace period beyond the validity period to make a demand on the bank for a default which has occurred during the validity period. A claim period may or may not exist in the bank guarantee. The guarantor again has no role to play.

[c] Enforcement Period : The enforcement period is a time period within which the Creditor can enforce his accrued rights pursuant to a demand made by him within the validity period or the claim period before a competent court of law.

26. Section 126 of the Indian Contract Act, 1872 has provided for the definitions of 'Contract of Guarantee', 'Surety', 'Principal Debtor' and 'Creditor'. As per Section 126, a 'Contract of Guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'Surety'; the person in respect of whose default the guarantee is given is called 'Surety'; the person in respect of whose default the guarantee is given is called the 'Principal Debtor', and the person to whom the guarantee is given is called the 'Creditor'. A guarantee may be either oral or written.

27. As submissions have been advanced in reference to Section 28 of the Indian Contract Act, 1872, it appears necessary to find out the provisions contained in

the original Section 28 and in the subsequent amendments. Originally, Section 28 read as under :-

**28. Agreements in restraint of legal proceeding, void. –**

Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

After an amendment given into effect from 08.01.1997, Section 28 was in the following form :-

28. **Agreements in restraint of legal proceeding, void.** - Every agreement
- [a] by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, or
  - [b] which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to that extent.

**Exception 1.— Saving of contract to refer to arbitration dispute that may arise.**

This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

**Exception 2.— Saving of contract to refer questions that have already arisen.**

Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.



28. The Law Commission in its Report submitted in the year, 1984 recommended changes in Section 28 and the same led to an amendment in Section 28 with insertion of Exception 3 therein in the year, 2012. The Statement of Objects and Reasons of the Amendment Acts read as under :-

#### The Statement of Objects and Reasons

1. The Law Commission of India has recommended in its 97<sup>th</sup> Report that Section 28 of the Indian Contract Act, 1872 may be amended so that the anomalous situation created by the existing section may be rectified. It has been held by the courts that the said Section 28 shall invalidate only a clause in any agreement which restricts any party thereto from enforcing his rights absolutely or which limits the time within which he may enforce his rights absolutely or which limits the time within which he may enforce his rights. The courts have, however, held that this section shall not come into operation when the contractual term spells out an extinction of the right of a party to sue or spells out the discharge of a party from all liability in respect of the claim. What is thus hit by Section 28 is an agreement relinquishing the remedy only i.e. where the time-limit specified in the agreement is assumed to exist between remedy and right and this distinction is the basis of the present position under which a clause barring a remedy is void, but a clause extinguishing the rights is valid. This approach may be sound in theory but, in practice, it causes serious hardship and might even be abused.
2. It is felt that Section 28 of the India Contract Act, 1872 should be amended as it harms the interests of the consumer dealing with big corporations and causes serious hardship to those who are economically disadvantaged.
3. The Bill seeks to achieve the above objects.

- 28.1. Subsequent to insertion of Exception 3 in Section 28 by the Banking Laws [Amendment] Act, 2012, Section 28 in the present form reads as under :-

**28. Agreements in restraint of legal proceedings, void.**— Every agreement,—  
[a] by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the

ordinary tribunals, or which limits the time within which he may thus enforce his rights; or

[b] which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to the extent.

**Exception 1.— Saving of contract to refer to arbitration dispute that may arise.**

This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

**Exception 2.— Saving of contract to refer questions that have already arisen.**

Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.

**Exception 3.— Saving of a guarantee agreement of a bank or a financial institution.**

This section shall not render illegal a contract in writing by which any bank or financial institution stipulate a term in a guarantee or any agreement making a provision for guarantee for extinguishment of the rights or discharge of any party thereto from any liability under or in respect of such guarantee or agreement on the expiry of a specified period which is not less than one year from the date of occurring or non-occurring of a specified event for extinguishment or discharge of such party from the said liability.

29. On reading of the heading of Section 28, 'Agreements in restraint of legal proceedings, void' and the substantive parts of Section 28 contained in Clause [a] and Clause [b] thereof with Exception 3 together, it is discernible that since the heading and the substantive parts of the provisions contained in Section 28 state that agreements which *inter alia* contain a clause indicating a time limit thereby restricting a party to enforce his rights under such contract within the time limit, is void to that extent, Exception 3 is, thus, to be read in the same context in respect of a Bank Guarantee which is also a contract in writing. Exception 3 has provided

that substantive provision of Section 28 shall not render illegal a contract in writing by which a bank stipulates a term in a guarantee or any agreement making a provision for guarantee for extinguishment of the rights or by which any party thereto is discharged from any liability under or in respect of such guarantee or agreement on the expiry of a specified period, which is not less than 1 [one] year from the date of occurring or non-occurring of a specified event for extinguishment or discharge of such party from the said liability.

30. In **Larsen and Toubro Limited** [supra], the writ petitioner was M/s Larsen and Toubro Limited. Stating that it was one of the largest construction companies in India, the writ petition was instituted arraigning the Guarantor Bank, Punjab National Bank as party-respondent no. 1, M/s Indian Banks Association as party-respondent no. 2 and the Reserve Bank of India [RBI] as party-respondent no. 3. It was contended that the petitioner had a number of contracts with Government bodies and Public Sector Undertakings and to participate in the bidding processes/ to execute contract-works awarded to it, it required to submit bid securities/ performance securities in the form of Bank Guarantees. On the basis of circulars issued by the respondent no. 2 which is an association of banks, the respondent no. 1 Bank by its communications, impugned therein, insisted that the Bank Guarantees should have a claim period of twelve months and any claim period lesser than twelve months, would effectively increase the claim period in respect of the Bank Guarantees to three years under the Limitation Act, 1963. The respondent no. 3, the RBI in its counter affidavit filed therein had taken a stand that Bank Guarantees were structured according to the terms of the agreements and the terms were decided mutually between the parties, that is, the Surety, the Principal Debtor and the Creditor. It was further clarified that the RBI had not prescribed any terms to be incorporated in the Bank Guarantees and the terms of the Bank Guarantees to be issued by the Guarantor Banks were decided in terms of the respective policy of the concerned banks and on the basis of the contractual arrangements between the parties. In so far as the advises contained in the circulars of the party-respondent no. 2 therein, that is, the Indian Banks Association [IBA] were concerned, it was found out that the IBA had advised that

if the banks would issue Bank Guarantees with a claim period of less than one year then such Bank Guarantees would not have the benefit of Exception 3 to Section 28 and would stand exposed to the period of limitation under the Limitation Act, 1963. The IBA had, thus, advised the banks to issue every Bank Guarantee with a minimum claim period of one year beyond the validity period of the Bank Guarantee. It is pertinent to mention that the limitation period prescribed under the Limitation Act, 1963 is thirty years where the claimant is the Government and the period is three years in respect of others. The learned Single Judge of the Hon'ble Delhi High Court after considering the history of the amendments carried out in Section 28 of the Contract Act, 1872, has held that Exception 3 to Section 28 of the Contract Act, 1872 is with regard to the rights of a Creditor to enforce his rights under a Bank Guarantee after happening of a specified event and Exception 3 does not deal with the claim period within which the Creditor is entitled to lodge his claim with the bank/guarantor. It has been held that the respondent Bank and the IBA erred in interpreting the scope of Exception 3 to Section 28. It has been further held that there is no mandatory requirement that the claim period for a Bank Guarantee has to be for minimum twelve months.

31. The issues involved in **Indusind Bank Limited** [supra], were with regard to Bank Guarantees which were required to be kept valid upto six months with a provision for claims for an additional three months. The Bank Guarantees involved therein had clauses as follows :- [i] '... Unless a demand or claim under this guarantee is made against us within three months from the above date [i.e. on or before 30.04.1997], all your rights under the said guarantee will be forfeited and we shall be relieved and discharged from all liabilities hereunder'; and [ii] '... Provided however, unless a demand or claim under this guarantee is made on us in writing within 3 months from the date of expiry of this guarantee in respect of export of XXXXX, we shall be discharged from all liability under this guarantee thereafter'. In that context, the Hon'ble Supreme Court has held that neither of the clauses has purportedly limited the time within which rights are to be enforced. It has been observed that none of the aforesaid clauses purports to curtail the period of limitation within which a suit can be brought to enforce the Bank Guarantees.

32. Assertion of right under a contract in the form of a claim or demand is different from enforcing it in a Court of law by way of any legal proceedings. On a plain reading of the recitals in the three Bank Guarantees involved herein, as extracted in bold letters in paragraph 22 above, as regards the validity period/expiry date and the claim period, it does not go to indicate that it has dealt with any matter relating to enforcement of right to claim by way of Legal proceedings in a court of law. It has only dealt with assertion of claim of the guaranteed amount within a year beyond the validity period of the Bank Guarantees. To be more precise, it emerges, on a plain reading, that though Bank Guarantees bearing no. IBG113029 dated 25.01.2021 would be valid only upto 24.01.2023, the beneficiary/Creditor [the APDCL] would have the advantage of a claim period of 1 [one] year beyond the validity period upto 24.01.2023, that is, upto 24.01.2024 to make a claim or demand, in writing, to the Guarantor Bank to invoke and encash the said Bank Guarantee. Similarly, the Bank Guarantee bearing no. IBG113031 dated 25.01.2021 for a guarantee amount of Rs. 1,68,00,000/- has its expiry date as 24.01.2023 and a claim period of 1 [one] year beyond 24.01.2023. The third Bank Guarantee bearing no. IBG113102 dated 27.01.2021 for a guarantee amount of Rs. 1,68,00,000/- has its expiry date as 26.01.2023 and a claim period of 1 [one] year beyond 26.01.2023. The manner of making such claim for the amounts under the Bank Guarantees is governed by the agreements itself i.e. the three Bank Guarantees which have stipulated that a claim or demand in writing is to be received by the respondent no. 5 Bank from the beneficiary, APDCL within 1 [one] year from the respective expiry date. It is not disputed by the respondent no. 5 Bank that it did not receive the impugned Letter dated 01.11.2023 and the impugned Letter dated 06.11.2023 from the APDCL containing the claim to invoke the Bank Guarantees and the request to transfer the amounts thereof to the bank account of the APDCL after encashment. Considered from that angle, it is found that the claim for invocation and encashment of the three Bank Guarantees was made within the respective claim period, though it was beyond the validity period of the Bank Guarantees.



33. Prior to the policy decision taken by the respondent Federal Bank, as contained in Circular no. 10349/CRD/IRMDC34/20-21 dated 17.06.2020, claim period of one year was not mandatorily insisted by the Federal Bank while issuing guarantees. As per the Circular dated 17.06.2020 [supra], the Federal Bank had taken a policy decision to include one year claim period in all guarantees issued by the Bank. Consequent to such inclusion of one year claim period, norms pertaining to release of securities and collection of Bank Guarantee [BG] Commission were also set forth as follows :- [i] Bank shall not release the cash margin and securities charged to the BG until Bank is discharged from the liability i.e. till the expiry of claim period; and [ii] BG Commission shall be collected for the additional period of one year i.e. till the expiry of the claim period.
34. It needs iteration at this juncture, even at the cost of repetition, that the respondent APDCL authorities by the Bidding Document comprising of the RFS Document and the Draft Power Purchase Agreement [PPA], had sought for the Bank Guarantees in terms of Schedule 3, extracted hereinabove, from the Successful Bidder/Solar Power Developer, that is, the petitioner. It was set forth that such Bank Guarantees in the format provided in Schedule 3 should be unconditional and irrevocable for due performance of the obligations required on the part of the petitioner in terms of the Power Purchase Agreement [PPA]. After having emerged as the Successful Bidder for the Region-2 Project the petitioner was to obtain the Performance Security in the form of unconditional and irrevocable Bank Guarantees strictly in terms of Clause 4.4 of the Power Purchase Agreement [PPA] for amounts indicated therein. The respondent no. 5 Bank had issued the three Bank Guarantees with their covering letters, addressed to the APDCL. As per the three covering letters of the respondent no. 5 Bank – dated 25.01.2021, dated 25.01.2021 & dated 27.01.2021 – it was informed to the APDCL that the Bank was enclosing the Bank Guarantees in favour of the APDCL on behalf of the petitioner. Requesting for acknowledgment of receipt of the three Bank Guarantees, the APDCL authorities were advised to verify the genuineness of the Bank Guarantees. From the Letter bearing Ref. no. : JK/NLP/APDCL/SOLAR PROJECT/Region-2/L-05 dated 29.01.2021 of the petitioner, addressed to the



respondent no. 3, it is evident that the petitioner with the said Letter had submitted the original copies of the three Bank Guarantees and the respondent no. 3 had acknowledged the receipt thereof under seal and signature on 30.01.2021. It is, thus, not open for the petitioner to say that he was not aware of the contents of the three Bank Guarantees or was not aware that the Bank Guarantees were not strictly in terms of the format provided in Schedule 3. It is also not open for the petitioner to take a plea, after instituting the writ petition, to contend that the petitioner was not aware of the condition incorporated in the three Bank Guarantees as regards the claim period of one year, beyond the validity period of the Bank Guarantees. The petitioner has himself annexed the copies of the Bank Guarantees as annexures in the writ petition and the said fact belies any contention raised on behalf of the petitioner that the petitioner was not aware of the condition incorporated in the Bank Guarantees regarding the claim period during the period from 25.01.2021/27.01.2021 [the dates of issuance of the three Bank Guarantees] and/or from 29.01.2021 [the date on which the petitioner submitted the original copies of the three Bank Guarantees] till 06.11.2023 [the date of institution of the writ petition annexing copies of the three Bank Guarantees and the copies of the covering letters of the respondent no. 5 Bank as Annexure – 4-Colly].

35. Assuming, *arguendo*, firstly, that the beneficiary/creditor of the Bank Guarantees, that is, the APDCL required the Bank Guarantees only in the format provided in Schedule – 3 and it had not sought incorporation of any clause regarding claim period of one year beyond the validity period of the Bank Guarantees; secondly, that the Principal Debtor/the petitioner had no role in incorporation of the clause regarding such claim period in the Bank Guarantees; and thirdly, that the respondent no. 5 Bank, that is, the Guarantor Bank had incorporated the claim period unilaterally in the Bank Guarantees in terms of its policy decision contained in Circular no. 10349/CRD/IRMDC34/2020-21 dated 17.06.2020; the issue which has fallen for consideration is whether in the fact situation obtaining in the case, more particularly, in view of the conduct of the petitioner right from the date of issuance of the three Bank Guarantees i.e. 25.01.2021/27.01.2021 to the date of



issuance of the impugned Letter bearing no. APDCL/CGM[PP&D]/NRE-146/2019-20/787 dated 01.11.2023 and/or the impugned Letter bearing no. APDCL/CGM[PP&D]/NRE-146/2019-20/790 dated 06.11.2023 whereby the APDCL had sought to invoke the Bank Guarantees, the petitioner as the Principal Debtor can be granted the reliefs/directions sought for in this writ petition. It is pertinent to note that even after the impugned Letter bearing no. APDCL/CGM[PP&D]/NRE-146/2019-20/787 dated 01.11.2023 did not raise any issue/protest as regards the claim period of 1 [one] year in the Bank Guarantees beyond the respective validity period of the Bank Guarantees. In such background, this Court has to examine as to whether such conduct of the petitioner would act to his detriment in getting the reliefs he has sought for. Such aspect is required to be examined on the basis of the doctrine of acquiescence. The said aspect is to be considered by taking note of the proposition that if one party to an agreement adds any additional term in the agreement without the consent of the other party to the agreement then such unilateral addition is not ordinarily binding on the other party.

36. As per the **Oxford Dictionary of English**, 3<sup>rd</sup> Edition, 'acquiesce' means 'to accept something reluctantly but without protest' and 'acquiescence' means 'the reluctant acceptance of something without protest'. In the **Black's Law Dictionary**, 9<sup>th</sup> Edition, the meaning ascribed to 'acquiesce' is 'to accept tacitly or passively; to give implied consent to [an act]' and to 'acquiescence' is 'a person's tacit or passive acceptance; implied consent to an act'.
- 36.1. It has been observed in the decision of the Hon'ble Supreme Court of India titled **U.P. Jal Nigam and another vs. Jaswant Singh and another**, reported in [2006] 11 SCC 464, acquiescence does not mean standing by while the violation of a right is in progress, but assent after the violation has been completed and the person has become aware of it. It is unjust to give such a person a remedy where, by his conduct, he has done that which might fairly be regarded as equivalent to a waiver of it; or where by his conduct and neglect, though not waiving the remedy, he has put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted.



- 36.2. The doctrine of acquiescence has come to be considered by the Hon'ble Supreme Court of India in **Union of India and others vs. N. Murugesan and others**, reported in [2022] 2 SCC 25. It has been held that acquiescence would mean a tacit or passive acceptance. It is implied and reluctant consent to an act. In other words, such an action would qualify a passive assent. Thus, when acquiescence takes place, it presupposes knowledge against a particular act. From the knowledge comes passive acceptance, therefore instead of taking any action against any alleged refusal to perform the original contract, despite adequate knowledge of its terms, and instead being allowed to continue by consciously ignoring it and thereafter proceeding further, acquiescence does takes place. As a consequence, it reintroduces a new implied agreement between the parties. Once such a situation arises, it is not open to the party that acquiesced itself to insist upon the compliance of the original terms. Hence, what is essential, is the conduct of the parties.
- 36.3. In **Chairman, State Bank of India and another vs. M.J. James**, reported in [2022] 2 SCC 301, the Hon'ble Supreme Court has observed that doctrine of acquiescence is an equitable doctrine which applies when a party having a right stands by and sees another dealing in a manner inconsistent with that right, while the act is in progress and after violation is completed, which conduct reflects his assent or accord. He cannot afterwards complain. In literal sense, the term acquiescence means silent assent, tacit consent, concurrence, or acceptance, which denotes conduct that is evidence of an intention of a party to abandon an equitable right and also to denote conduct from which another party will be justified in inferring such an intention. Acquiescence can be either direct with full knowledge and express approbation, or indirect where a person having the right to set aside the action stands by and sees another dealing in a manner inconsistent with that right and in spite of the infringement takes no action mirroring acceptance.
37. When the fact situation obtaining in the case is examined qua the doctrine of acquiescence, it is noticeable that the petitioner as per the terms and conditions



of the RFP/RFS Document, Draft Power Purchase Agreement and Clause 4.4 thereof the Letter of Award [LoA] dated 04.01.2021, was required to submit Performance Security in the form of Bank Guarantees, as provided in Schedule 3. The three Bank Guarantees in question were issued by the respondent no. 5 Bank at the instance and request of the petitioner in favour of the APDCL as the beneficiary/creditor on the dates - 25.01.2021, 25.01.2021 & 27.01.2021. The respondent no. 5 Bank had handed over the Bank Guarantees to the petitioner with their covering letters on those dates. In the said Bank Guarantees, the clause regarding claim period which was not in Schedule 3, stood incorporated, purportedly unilaterally by the respondent no. 5 Bank on the basis of the policy decision contained in the Circular dated 17.06.2020. The petitioner had every opportunity to know about incorporation of the clause regarding extended claim period in the three Bank Guarantees, beyond the respective validity period, but without making any protest or raising any issue in respect of such incorporation of the clause regarding extended claim period beyond the required validity period of 22 months the petitioner proceeded to hand over the original copies of the three Bank Guarantees to the APDCL by his Letter bearing reference no. JK/NLP/APDCL/SOLAR PROJECT/Region-2/L-05 dated 29.01.2021 to the respondent no. 3. The matter rested in the said position until 01.11.2023 when the APDCL by the impugned Letter bearing no. APDCL/CGM[PP&D]/NRE-146/2019-20/787 of even date, addressed to the respondent no. 5 Bank, sought invocation of the Bank Guarantees. The incorporation of the clause regarding claim period of 1 [one] year beyond the validity periods of the Bank Guarantees was not at the behest of the respondent APDCL but having received the Bank Guarantees with such claim periods the APDCL appeared to have accepted the same. During the entire period from 25.01.2021/27.01.2021/29.01.2021 to 01.11.2023/02.11.2023/06.11.2023, the petitioner despite having adequate knowledge about incorporation of the clause regarding the claim period in the Bank Guarantees, had remained silent. From the fact that the petitioner has annexed the copies of the Bank Guarantees along with the covering letters of the bank in the writ petition it clearly emerges that the petitioner had the knowledge about the claim periods all along for a period of more than 30 months and in such



situation, it is not possible to draw any other inference. When despite having adequate knowledge of the clause regarding the claim periods in the Bank Guarantees and when instead of making any protest or raising any issue as regards such incorporation, the petitioner has been found to have allowed the matter to continue which demonstrates a situation of passive acceptance and assent. As a result of inaction on the part of the petitioner during the entire aforementioned period the other parties involved with the Bank Guarantees appeared to have proceeded accordingly. As the petitioner did not insist for the Bank Guarantees as was originally conceived in the format provided in Schedule 3 for such prolonged period and continued without making any protest or raising any issue with regard to the claim period, this Court finds that the clause incorporated in the Bank Guarantees regarding the claim period was with implied consent of the petitioner with the operation of the doctrine of acquiescence. The doctrine of acquiescence is clearly applicable in the case in hand as the petitioner having a right stood by, without making any protest or raising any issue regarding the claim period, and allowed the other parties dealing with the Bank Guarantees in a manner which was purportedly inconsistent with the Bank Guarantees originally conceived of, it is not open for the petitioner at this stage to make any complaint. In the present case, it is found that it is the Bank Guarantees with clauses incorporating the claim period of one year, beyond the validity period in the respective Bank Guarantee, which have replaced the format provided in Schedule 3 originally contemplated and conceived of and as a result, it is to be held that the parties involved herein are bound by such claim period.

38. As the petitioner has not raised the issues of fraud or irretrievable loss or injustice, this Court finds it unnecessary to advert to on those issues. In any view of the matter, there are no pleadings in the writ petition as regards commission of fraud of egregious nature or irretrievable loss or injustice. It is trite to say that a decision is an authority for what it decides and not what can logically be deduced therefrom and even a slight distinction in fact or an additional or different fact may make a lot of difference in the decision making process. An act of protest anterior to invocation of a bank guarantee is different from an act of protest made



subsequent to invocation of a bank guarantee. Thus, the fact situation obtaining in the case of *Larsen and Toubro Limited* [supra] are not found similar to the case in hand.

39. In view of the discussion made, the findings arrived at as above and the reasons assigned therein, this Court is of the considered view that the petitioner has not made out a case on merits for the reliefs/directions sought for in the writ petition within the extraordinary, discretionary and equitable jurisdiction under Article 226 of the Constitution of India. Consequently, the writ petition fails. As it merits dismissal, it is accordingly ordered. The interim order passed earlier stands recalled. It is, therefore, held that the Letter bearing no. APDCL/CGM[PP&D]/NRE-146/2019-20/787 dated 01.11.2023 and the Letter bearing no. APDCL/CGM[PP&D]/NRE-146/2019-20/790 dated 06.11.2023, addressed to the respondent no. 5 Bank, invoking the three Bank Guarantees [IBG113029 dated 25.01.2021, IBG113031 dated 25.01.2021 and IBG113102 dated 27.01.2021] are found to be valid as they are within the claim periods mentioned in those three Bank Guarantees. As such, the respondent no. 5 Bank has to proceed in terms of the said Bank Guarantees for honouring them. There shall, however, be no order as to cost.

**JUDGE**

**Comparing Assistant**