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

\+ CS(COMM) 836/2023

SOUTH EAST U P POWER TRANSMISSION COMPANY LIMITED .....Plaintiff

Through: Mr. Abhishek Nangia, Adv. Mr. Abhinav Mishra and Ms. Jagriti Dosi, Advs.

versus

IDBI BANK LIMITED & ANR. .....Defendants

Through: Mr. Varun Kumar Tikmani, Mr. Ramakant Rai and Mr. Shivam Sharan, Advs.

CORAM:
DR. JAGMINDER SINGH (DHJS) JOINT REGISTRAR (JUDICIAL)

O R D E R

% 10.03.2025

I.A. 23199/2023 (u/O 39 R 1 & 2 CPC)

1. Pleadings are already complete.

I.A. 7368/2024 (by applicant u/O 1 R 10 CPC for impleadment M/s Isolux Corsan India Engineering & Construction Private Limited through its liquidator)

2. Arguments heard.

3. Learned counsel for applicant submitted that the applicant is required to be impleaded in the present suit as a necessary as well as proper party. Learned counsel further submitted that dispute arise from the Retention Bank Guarantees issued by IDBI/respondent no. 2/defendant no. 1 on behalf of the applicant i.e. Isolux Corsan India during its insolvency in favor of respondent no. 1/SEUPPTCL/plaintiff.

4. In year 2011, plaintiff and Mainpuri Power Transmission Pvt. Ltd. entered into supply, service and civil works agreements each dated 10.02.2012 with ICI-C&C Mainpuri JV for the execution of the construction of 765 KV S/S Mainpuri to Baraline with 765/KV/400KV AIS at Mainpuri and Associated Schemes/Work on Build Own Operate and Transfer Basis (UP-BOOT Project). In furtherance of the aforesaid agreements plaintiff was to pay the applicant a sum of INR 496,36,37,542/-. Later in December, 2014 the UP-BOOT Agreements had undergone a series of changes through the execution of various Novation Agreements, whereby plaintiff became the final employer and applicant became the final EPC Contractor for the UP-BOOT Project. The Bank Guarantees (BGs) being subject matter of the captioned suit were issued in furtherance of the payment terms prescribed under the UP-BOOT Agreement. Total 7 BGs amounting to a total sum of INR 58.50 crores were issued by IDBI to the plaintiff on behalf of the applicant to secure the retention amount in case of any defect in the supply/work/service rendered by the applicant in terms of the UP-BOOT Agreements.

5. Learned counsel for applicant further submitted that plaintiff had procured a long term loan from PFC Ltd. (defendant no.2) by assigning the aforesaid BGs to secure its financial obligations vide Loan Agreement dated 28.02.2014, whereby a term loan facility of INR 3713.25 crores was granted by PFC to plaintiff. Thereafter Group 1 of UP-BOOT Project was successfully completed and the remaining portion of the said project remained incomplete and some parts of it were suspended on account of delays and defaults on the part of plaintiff. Upon initiation of corporate insolvency resolution process (CIRP) against the applicant, the above

mentioned BGs were fraudulently invoked by PFC against which IDBI had preferred a writ petition, however the said writ petition was dismissed. Thereafter, an LPA was preferred by IDBI but same was also disposed of permitting the parties to take recourse to other remedies available to them in law. Thereafter, the CS(COMM.) 660/2023 was filed by the IDBI against the plaintiff and PFC was training them from encashing/invoking any payments from the BGs in persons. During hearing of the said suit, applicant came to know about the captioned suit filed by plaintiff to maliciously invoke and encash the BGs.

6. Learned counsel for applicant further submitted that its impleadment is very much necessary in the present suit as the BGs in question were provided by IDBI Bank in favor of the plaintiff on behalf of the applicant. Outcome of the captioned suit will be having direct impact on the interest of the applicant in liquidation. Therefore, the captioned IA may be allowed. Learned counsel for applicant also relied upon the judgments i.e. ***"Mumbai International Airport Pvt. Ltd. vs. Regency Convention Centre and Hotels Pvt. Ltd. and Ors."*** [(2010) 7 SCC 417]; ***"Ramesh Hiranand Kundanmal vs. Municipal Corporation of Greater Bombay and Ors."*** [(1992) 2 SCC 524] and ***"Kranti Arora vs. DIGJAM Ltd."*** [2022 SCC OnLine Del 2023] in support of her arguments.

7. On the other hand, learned counsel for plaintiff/respondent no. 1 and learned counsel for respondent no. 2 opposed the application. Reply has been filed opposing the application. Learned counsel for plaintiff and defendant no. 2 submitted that the application moved by the applicant is not maintainable in view of Section 33(5) of the Insolvancy Act and Bankruptcy Code, 2016 as applicant had not taken the appropriate approval.

8. Learned counsel for the plaintiff further submitted that the applicant is neither necessary nor proper party in the present suit. The suit BGs were issued by IDBI/defendant no. 1 in favor of the plaintiff at the behest of the applicant. The suit BGs are irrevocable and unconditional in nature and form an independent contract between IDBI and the plaintiff. The entity at whose behest the said BGs have been issued becomes irrelevant as a party while deciding upon the question of invocation. In this suit the plaintiff had not claimed any relief against the applicant and therefore he cannot be compelled to fight against the applicant. As per facts of the case the applicant instructed IDBI Bank to issue irrevocable suit BGs for the purpose of executing the project and the project could not be executed on account of delay by the applicant itself. It is a settled law that no one can take advantage of its own wrong. The present application is nothing but a malafide attempt to take benefit of its delay in executing the project and claim its right over the suit BGs. The application moved by the applicant is without any merit and same may be dismissed. Learned counsel for plaintiff relied upon the case laws i.e. ***"Vidur Impex and Traders Private Limited vs. Tosh Apartment"*** (2012) 8 SCC 384; ***"Ansal Engineering Projects Ltd. vs. Tehri Hydro Development Corporation Ltd. and Anr."*** (1996) 5 SCC 450; ***"Hindustan Steel Works Construction Ltd. vs. Tarapore & Co. and Anr."*** (1996) 5 SCC 34; ***"SKS Power Generation (Chhattisgarh) Ltd. vs. Canara Bank"*** 2021 SCC OnLine Bom 1835; ***"Dwarikesh Sugar Industries Ltd. vs. Prem Heavy Engineering Works(P) Ltd."*** (1997) 6 SCC 450; ***"Standard Chartered Bank vs. Heavy Engineering Corporation Limited & Anr"*** (2020) 13 SCC 574; ***"Kranti Arora vs. Digjam Ltd."*** 2022 SCC OnLine Del

2023 and ***"Devendra Kumar vs. State of Uttaranchal and Ors."*** (2013) 9 SCC 363 in support of his arguments.

9. I have considered the submission of both parties and have gone through the contents of the application, reply, rejoinder, the relevant statutory provisions and case laws.

10. The facts of the present suit in brief are that the plaintiff i.e. SEUPPTCL filed this suit against IDBI Bank and PFCL seeking the relief of mandatory injunction against the defendant no. 1/IDBI Bank to encash the BGs in favor of the plaintiff and further seeking the relief of restraining PFC from claiming any right or interest upon the suit BGs. The plaintiff was incorporated as a Special Purpose Vehicle by Uttar Pradesh Power Transmission Company Ltd. for establishing 765 KV S/C Mainpuri Baraline with 765/400 KV AIS at Mainpuri and associated work (Project) on built, own, operate & maintain and transfer (BOOT) basis in the State of Uttar Pradesh. On 05.07.2011 the original parent company of the plaintiff was selected as the transmission service provider through a competitive bidding process carried out by UPPTCL. To develop the project a joint venture between the applicant company and C&C Construction Pvt. Ltd. entered into the Definitive Agreements (i.e. agreements for civil works, supply and service) with Mainpuri Power Transmission Pvt. Ltd. and the plaintiff. On 29.08.2012, MPTPL, the plaintiff and Mainpuri JV entered into an Agreement of Novation by which the rights and obligation of MPTPL under the Definitive Agreements were transferred and assigned to the plaintiff. On 25.02.2014, the plaintiff and Mainpuri JV agreed to amend the terms and conditions of the Definitive Agreement. The relevant terms as amended by the parties are as under:-

a) “Clause 8.2.1 was inserted whereby it was agreed that the plaintiff shall be entitled to assign such BGs to third party.

b) Payment terms were amended whereby the retention amount was bifurcated into two parts:

i. 5 % after 30 days from the issuance of TOC;

ii. Balance 5% after the expiry of the Defect Liability Period, however, such retention may be released by the plaintiff, if so acceptable to plaintiff’s lenders upon submission of the BGs by the Mainpuri JV for equivalent amount.

c) The completion date as envisaged under Article 8.4.1 were revised. The scope of work to be completed was divided into two groups and the date of completion was revised to 31.12.2014 [Group 1] and 31.08.2015 [Group 2].”

11. It is further mentioned in the plaint that on 28.02.2014 plaintiff entered into a Term Loan Agreement with PFC i.e. defendant no. 2 for availing a loan of Rs. 3713.25 crores for the implementation of the project. On 01.12.2024 the definitive agreements were amended by which Isolux Engineering replaced Mainpuri, JV as a party in the definitive agreement and all the obligations under the Definitive Agreements were transferred in favour of Isolux Engineering. During the period December, 2014 to October, 2015, at the request of Isolux Engineering (applicant), the IDBI Bank issued seven unconditional and irrevocable BGs for a total amount of Rs. 58,50,00,000/- in favor of plaintiff. In furtherance of Loan Agreement under which plaintiff had borrowed from the PFC, plaintiff assigned the suit BGs to PFC to which IDBI Bank accepted and acknowledge the assignment.

Thereafter, there was a delay in completion of project because the applicant could not perform its obligation under the definitive agreements, which led to a default by the plaintiff in repaying the loan facility to PFC. Then on 10.10.2018 PFC issued a default notice to the plaintiff recalling the loan facility and calling upon the plaintiff to make payment of Rs. 2636.12 crores availed under the loan agreement and on 15.10.2018 PFC also invoke the suit BGs and called upon IDBI Bank to deposit the BG amount in the designated bank account of the plaintiff. IDBI Bank issued reply to the notice and file writ petition before this Hon'ble Court seeking quashing of PFC Notice. Hon'ble Court passed an interlocutory order on 30.11.2018 directing the parties to maintain status qua the suit BGs. Thereafter on 11.04.2011 PFC initiated proceedings under the Insolvancy Act and Bankruptcy Code, 2016 against the plaintiff before the NCLT Allahabad and resultantly CIRP commenced against the plaintiff. In the plaintiff CIRP, Resurgent Power Ventures Pvt. Ltd. (Resolution Applicant), a Singapore based company submitted a resolution plan, which was approved by the plaintiff's committee of creditors on 14.03.2022. The resolution plan was thereafter approved by the NCLT Allahabad on 15.06.2022 and said approval attained finality. The said resolution plan expressly extinguished all the claims, demands, liabilities and obligations owed or payable to any of its creditors including PFC. On 10.09.2022, resolution applicant, plaintiff, PFC and one of the subsidiary namely NRSS XXXVI Transmission Ltd. entered into an Assignment Agreement by which PFC assigned to NRSS XXXVI Transmission Ltd. all its rights, title, benefits and interest in the financing document. Thereafter, nothing remained due for payable by the plaintiff to PFC. Further PFC had assigned all its rights and interest in the suit BGs to plaintiff subsidiary NRSS XXXVI Transmission Ltd., PFC was not left with any right whatsoever qua the suit BGs. Despite having no right, PFC illegally demanded encashment of suit BGs from IDBI Bank on 13.06.2023.

12. It is further mentioned in the plaint that on 21.06.2023 and 26.06.2023 plaintiff issued an invocation notice to IDBI Bank invoking the suit BGs and calling upon to make payment of Rs. 58,50,00,000/-. But IDBI Bank did not respond. Meanwhile, appeal filed by IDBI Bank against the order dated 12.05.2023 dismissed by the Hon'ble Court. Thereafter again plaintiff issued invocation notices to the IDBI Bank to which the bank responded that he had filed his suit before this Hon'ble Court in respect of the suit BGs and thereafter, in further reply to other notice by the plaintiff, the IDBI Bank claim that suit BGs have been expired and therefore cannot be encashed. However, the suit BGs could not have expired in view of the interlocutory order dated 30.11.2018 passed by this Hon'ble Court in IDBI Bank writ petition. In the aforesaid circumstances, the plaintiff had filed the present suit.

13. Apart from merit, learned counsel for plaintiff objected on the maintainability of the present application as the applicant had not taken the approval in view of the Section 33(5) of the Insolvency and Bankruptcy Code, 2016. In this regard, learned counsel for applicant submitted that the applicant was allowed to defend all the litigations mentioned in the list Annexure C-2 annexed with IA no. 405/2021 in CP(IB) no. 97/CHD/HRY/2018, by the order of Hon'ble NCLT dated 28.04.2022. I have perused the order dated 28.04.2022 as well as Annexure C-2. Perusal of Annexure C-2 reveals that it is a detail list of pending litigations filed

by/against the applicant. It is not disputed that the suit BGs in the pending litigations are the same as of the present suit BGs. Therefore, in view of the order of Hon'ble NCLT, it cannot be said that applicant is having no locus to file the present application in the present matter.

14. As per facts of the plaint, it transpires that in furtherance of execution of the project assigned to the plaintiff, plaintiff entered into Loan Agreement with PFC i.e. defendant no. 2 and accordingly loan was sanctioned. Thereafter at the request of applicant the IDBI Bank issued seven unconditional and irrevocable suit BGs in favor of the plaintiff. Thereafter the plaintiff assigned the suit BGs to PFC/defendant no. 2 and the same was accepted and acknowledge by the IDBI Bank i.e. defendant no. 1. Thereafter, non performing of the obligation in the given time limit, the PFC issued default notice to plaintiff recalling the loan facility and further invoked the suit BGs and called upon IDBI Bank to deposit the suit BGs amount in the designated bank account of the plaintiff. The IDBI Bank filed the writ petition in which status quo order was passed and resultantly suit BGs were not encashed and amount was not remitted by IDBI Bank into the designated account of the plaintiff.

15. All the facts mentioned in the plaint and further mentioned in the application as well reply and documents annexed with them reveals that the dispute is mainly between plaintiff and both defendants. Prima facie there is no role to play by the applicant regarding the subject matter and prayer of the present suit.

16. It has been held by Hon'ble High Court of Bombay in ***"SKS Power Generations Chhattisgarh vs. Canara Bank"*** 2021 SCC OnLine Bom 1835 as under:-

"30. The application for intervention or impleadment at the instance of the liquidator of the principal debtor is wholly unsustainable." It was also observed in paragraph 29 of the aforeasaid judgment that, "A bank guarantee is an independent contract. In enforcing a guarantee the principal debtor is never a necessary party. The beneficiary of a guarantee may, at his auction, join both the principal debtor and the guarantor or may choose proceed only against the guarantor or only against the principal debtor."

17. Regarding necessary or proper party it has been held by Hon'ble Supreme Court of India in "***Vidur Impex and Traders Pvt. Ltd. and Ors. vs. Tosh Apartments Pvt. Ltd. and Ors".*** (2012) 8 SCC 384 as under:-

> *"A necessary party is one whose presence is absolutely necessary and without whose presence the issue cannot effectually and completely be adjudicated upon and decided between the parties. A proper party is one whose presence would be necessary to effectually and completely adjudicate upon the disputes."*

18. In view of the aforesaid discussion, it is concluded that in the present suit the dispute mentioned by the plaintiff and the reliefs sought through the prayer clause is between the plaintiff and defendants. There is nothing to show that for adjudication upon the suit presence of applicant is necessary or the matter cannot be adjudicated completely and effectually without impleading the applicant. **Hence, the captioned IA stands dismissed being without any merit and disposed of.**

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19. Hard copy of documents has been filed on behalf of plaintiff and defendant no. 2. Learned counsel for defendant no. 1 submitted that he will file the hard copies within 10 days. Let the same be filed as last opportunity. Defendant no. 1 will also return the signed joint document schedule to the plaintiff positively within 10 days.

20. Put up for completion of process of filing of Joint Document Schedule in terms of **Rule7A of Chapter VII of The Delhi High Court (Original Side) Rules, 2018** physically by plaintiff after getting it signed from defendants, admission / denial of documents and marking of Exhibits in accordance with law on 26.05.2025.

Documents, if e-filed be filed physically by parties so as to mark the Exhibits.

DR. JAGMINDER SINGH (DHJS)
JOINT REGISTRAR (JUDICIAL)

MARCH 10, 2025/NG

Click here to check corrigendum, if any