

IN THE HIGH COURT OF SINDH, KARACHI

H.C.A.No.21 of 2016

Gujranwala Energy Limited

v/s.

Private Power & Infrastructure Board (PPIB) & others

**Before: Mr. Justice Sajjad Ali Shah, Chief Justice &
Mr. Justice Zulfiqar Ahmad Khan**

Date of Hearing : 06.05.2016.

Appellant : Through Mr. Khalid Javed Khan, Advocate

Respondents : Through Mr. Faisal Siddiqui, Advocate for the
Respondents No.1 & 2.

Through Mr. Ijaz Ahmed, Advocate for
Respondent No.4

J U D G M E N T

Zulfiqar Ahmad Khan, J.:- Being aggrieved by the order passed by the learned Single Judge in CMA No.5699/2009 in Suit No.795/2009, the instant appeal has been assailed.

Brief facts of the case are that the Appellant set up a company for the purposes of operation of electric power generation projects. The counsel for the Appellant contended that on account of shortfall of electricity in the country, Respondents No.1 & 2 formulated power policy to invite private sector for investing in and by setting up Independent Power Projects (IPPs) for the generation of electricity in the light of Power Policy, 2002 of the Government, the Appellant intended setting up of 200 MW power plant in Gujranwala and to take benefit of the said policy submitted application along with non-refundable fee of US\$100,000 to the Respondent No.1 for the purpose of processing and evaluation of the project proposed by the Appellant. Pursuant to such fulfilling of entry requirements PPIB issued a Letter of Support (LOS) in favour of the Appellant dated

15.09.2008. Per Article 5.2 (clause 48) of the Power Policy 2002, each bidder (including the Appellant) was required to provide a bid bond of US\$1,000 per Mega Watt at the time of submission of bid and having selected, successful bidder was required to provide a Performance Guarantee @US\$5,000 per MW (applied for) in favour of PPIB for a period of three months in excess of the validity of the LOS. The policy provided that the said Performance Guaranty was required to secure that the successful bidder fulfills his obligations to execute the Implementation Agreement (“IA”), Power Purchase Agreement (“PPA”) and other relevant agreements and to achieve financial closings within the time specified in the LOS. Pursuant to clause 49 of the said policy, LOS was intended to be issued to the successful bidders for a period ranging from 15 to 18 months, during which period, the sponsor was required to achieve financial closing for the project under terms specified in the LOS (the said term of financial closing has defined in the LOS to mean *the execution and delivery of the financing documents that together with equity, commitment, evidence sufficient financing for the construction, testing, completion and commissioning of the project*). As required by the said policy, the Appellant submitted a Bank Guaranty in the sum of US Dollars One Million issued by the Respondent No.4 (“the bank”). Having provided the said Bank Guaranty the said LOS was issued (on 15.09.2008), terms of which were duly agreed and accepted by the Appellant. Preface of the said LOS vide Article A(iv) provided that the said LOS has been issued to the Appellant having provided and delivered irrevocable, unconditional, on demand Bank Guaranty on the terms acceptable to PPIB. With regard to the Performance Guaranty (since the matter pertains primarily thereto),

the learned counsel for the Appellant walked us through the relevant portion of the LOS, which regulate matters related to the said Guarantee. Pursuant to paragraph 2 on the second page of LOS, the intent and purpose of Performance Guarantee are provided, which are reproduced as under:

“The Performance Guarantee shall secure the Sponsor’s (as defined in the LOS) and the Project Company’s obligations (i) to cause the execution of the Implementation Agreement (IA) and the Power Purchase Agreement (PPA) (together the Project Agreements) (ii) to achieve Financial Closing (as defined hereunder) not later than nine (9) months from the issuance date of this LOS under and in accordance with the terms of this LOS (iii) to achieve the commercial operations date no later than the 30th June, 2011 (“Commercial Operations Date”) under and in accordance with the terms of this LOS, and (iv) of the Project Company exercises the “Termination Option” (as defined hereunder) under and in accordance with the terms of this LOS.”

Also of relevance is the following paragraph, which relates to ‘financial close’ as set in the said LOS, which is also reproduced hereunder:

“The Project Company shall achieve Financial Closing no later than 15th June, 2009 (“Financial Closing Date”) failing which PPIB shall be entitled to encash the Performance Guarantee in the full amount thereof without any notice to or demand on the Sponsor / the Project Company. In addition to any other consequences set out in this LOS, if PPIB acting in its sole discretion determines that any delay by the Project Company in achieving the Financial Closing Date is due to events beyond the reasonable control of the Sponsor/the Project Company and that Financial Closing can be achieved shortly, PPIB shall be entitled acting on an application in writing made to it by the Project Company at least thirty (30) days before the Financial Closing Date to grant in writing to the Sponsor/Project Company a onetime extension of up to a maximum period of three (3) months beyond the Financial Closing Date (such extended date being hereinafter referred to as the “Extended Financial Closing Date”). This approval by PPIB is subject to the fulfillment of the

following actions being taken by the Sponsor/Project Company to the satisfaction of PPIB (i) the maximum amount in which the Performance Guarantee can be encashed is doubled till three (3) months beyond the Extended Financial Closing Date; provided however that upon achieving Financial Closing by the Extended Financial Closing Date the Performance Guarantee may be renewed to its original amount of US Dollars One Million only (US\$ 1,000,000) and (ii) a report is submitted by the Sponsor/Project Company to PPIB of the proposed additional actions it will seek to undertake to achieve any proposed Extended Financial Closing Date. If such extension is allowed the Project Company shall further submit monthly reports that set out in adequate detail the additional actions made by the Project Company to achieve the Extended Financial Closing Date and the progress achieved in that regard.”

As it could be noted from the foregoing paragraphs, the very intent of providing a Performance Guarantee, in a nutshell, was to ensure that a successful bidder comes to arranging all financial facilities available to it either directly or through other equity commitment providers within a period of 15th June, 2009 (i.e. within nine months from the date of LOS). Since the country was in terrible need of electricity, the very intent of prescribing compliant and hammering on to the date of financing close was to ensure that only those bidders surface out from the initial process, who carry the required financial means of setting up the Private Power Projects, which in total were eleven (11) at that point of time. While it could be noted from the foregoing that great emphasis has been provided in the policy and LOS that the financial closing be made no later than 15th June, 2009, the LOS still did provided a mechanism of extending the said period of financing close to a further term of three months, if additional Performance Guarantee of US Dollars One Million was provided to the satisfaction of the PPIB. This again, as one can witness, shows that only those companies which have

ensured availability of sufficient funds or financial commitments, should surface out of the process and no out-lookers are allowed to chock the process.

Having the LOS issued on 15.09.2008 on account of the Bank Guarantee of US\$ One Million provided on 31.07.2008, the Appellant wrote a detailed letter to the Respondent on 14.05.2009 (i.e. just before 30 days from the intending financial closing falling on 15th June, 2009), wherein in that four-page letter (accompanying additional four pages of proposed amendments in IA/PPA), the Appellant sought a number of amendments in the usual terms provided to it along with other contenders, who by that time were already in the advanced stages of project implementation. The said letter (as annexed on page No.265) reached the office of Respondent No.1 on 15.05.2009 at 11:50 a.m. However, notwithstanding receipt of the said letter addressed to the Managing Director/Chief Operating Officer, the Respondent No.1 already pressed for time vide its letter dated 16.05.2009, wrote to the Appellant as under:

No.1(102) PPIB-1031/09/PRJ

16th May, 2009

Mian Tanveer Ahmed
Chief Executive Officer
Gujranwala Energy Limited
58, Main Gulberg,
Lahore.

Subject: 200 MW East-Track Power Project at Gujranwala by Gujranwala Energy Limited

Dear Sir,

PPIB issued Letter of Support (LOS) dated September 15, 2008 in favour of M/s. Gujranwala Energy Limited (GEL) the 'Project Company' for establishment of a 200 MW Thermal Power Plant to be located at Gujranwala (Punjab) under the GOP's fast track initiative, upon submission of the Performance Guarantee (PG) dated July 31, 2008.

2. As per the provisions of LOS, the Sponsors and the Project Company are obligated to cause the execution of Implementation Agreement (IA). Power Purchase Agreement (PPA) in order to achieve Financial Closing by the deadline of June 15, 2009 "the Financial Closing Date" failing which PPIB shall be entitled to encash the PG (in full amount thereof without any notice to or demand on the Sponsor or the Project Company).

3. As the Financial Closing Date for GEL is very near, you are requested to update PPIB on achieving the project activities including, but not limited to, execution of EPC and O & M Contracts, signing of Project Agreements (IA, PPA, FSA), finalization of Project Funding Agreements with Lender(s) and achieving the Financial Close.

4. You are advised to expedite the pace of project activities and requested to provide us a comprehensive schedule / timeline indicating major milestones up to the enquired commercial operations date (COD).

Best regards,

Yours sincerely,

(N.A Zuberi)
Executive Director

While these two letters seemingly cross each other on the way, the Appellant fearing that on account of its failure to achieve financial closing before the stipulated deadline of 15 June, 2009 may end up having its Performance Guarantee of US Dollars One Million encashed approached this Court via Civil Suit No.795/2009 and obtained an interim injunction against en-cashing of the said Performance Guarantee vide the orders passed by this Court dated 30.05.2009. However, the instant injunction application was finally heard on 22.07.2015, wherein the learned Single Judge passed orders refusing the earlier interim injunction granted.

The learned counsel for the Appellant submitted that the cause of having failed to achieve the financial close in the stipulated time provided in the LOS was not solely attributable to the Appellant, but rather it was also on account of Respondent No.1 which failed to provide the necessary assistance as committed by it under paragraph 25 of the Power Policy, 2002, which stated that PPIB will assist

sponsors in obtaining permission from government agencies, carry out negotiations on the implementation agreement on IA, assist the power purchaser, fuel supplier and provide assistance and negotiations with provincial authorities with regards execution and administration of PPA, FSA, GSA etc. Counsel contended that no such assistance was provided to the Appellant therefore, the financial closing deadline falling on 15th June, 2009 was not achieved. Notwithstanding therewith, the counsel admitted that while there was a provision in LOS for making a request for extension of financial close deadline, the Appellant never applied to extend the said deadline, however, the Appellant never asked for extension in the date of commencement of commercial operations falling on 30th June, 2011. The learned counsel also contended that the learned Single Judge failed to distinguish the instant guarantee from a typical Performance Guarantee, which are issued in similar cases to secure payment of mobilization advance to an intended contractor for the purpose of keeping a tap on the money advanced to a contractor. The counsel further contended that there was no loss caused to the Respondent on account of Appellant's failure to achieve financial closing since the Appellant was one of the many bidders, who were contending to set up the IPPs, therefore, the intending act of the Respondent of en-cashing the Performance Guarantee is against the principle of equity.

Learned counsel for Respondent No.1 on the other hand contended that the terms, conditions and the playing level-field that was offered to the Appellant, was so identically offered to eleven (11) other IPPs, who after taking benefit of the incentives provided in the

Power Policy, achieved financial close as well as they set up IPPs under the same terms and conditions offered to the instant Appellant. Learned counsel drew Court's attention to paragraph 4 on the first page of LOS, which provides that the Appellant was required to ensure that the Performance Guarantee remains valid and in full force until 31 October, 2011 and shall be en-cashable by PPIB in accordance with terms laid down in the LOS. Pursuant to LOS, the Appellant gave an unconditional and irrevocable right to PPIB to encash the Performance Guarantee in full and to hold such cash as security for the obligations of the Appellant. LOS provides the following text:

“.....the Sponsor and the Project Company hereby irrevocably and unconditionally agree that in the event of any determination by a court of competent jurisdiction that the Performance Guarantee has been encashed by the PPIB when no encashment is permitted hereunder, the Sponsor's and the Project Company's sole and exclusive remedy shall be the return of the proceeds of such encashment and the Sponsor and the Project Company shall have no other claim against the Government of Pakistan, the PPIB or any other agency or instrumentality or component thereof on any grounds whatsoever for any act or omission of the GOP or the PPIB hereunder or in relation hereto and the Sponsor and the Project Company hereby waive, to the fullest extent permissible by law, any such claim.”

Learned counsel for Respondent No.1 submitted that the very intent of the Appellant to reach to the Court seeking an injunctive relief against the encashment of the Performance Guarantee before the term of the intended financial close even having reached is evident of the fact that the Appellant could not have obtained the required finance for the purposes of entering into full implementation of setting up an IPP. Notwithstanding therewith, despite the lapse of more than seven years while 11 different IPPs are already in full operation, the Appellant could not gather the required

financial strength and from time to time approached to novate its rights/obligations (in the LOS) to certain new financiers and having put those financiers in the picture the Appellant intended to leave the scene. The learned counsel contended that even hypothetically the Appellant be allowed to re-enter the scene, now the reality has changed significantly in the last seven years and no company could be granted the privilege provided to them after lapse of over seven years and the government policies and the playing field for the new entrants has substantially been altered. If at all, the Appellant or any third party (about to be introduced them to novate their rights and obligation in LOS) are serious they could always approach government and Respondent No.1 as a new entrant and take benefit of the levelled-field available now for the new entrants. The learned Counsel walked us through the relevant provisions of LOS submitting that the Appellant willfully irrevocably agreed to the terms of LOS, which very clearly state the mechanism in which the date of financial close could be extended. Notwithstanding therewith they did not even wait for the date of such close (nor applied for the extension thereof) and approached the Court against the encashment of the Performance Guarantee, which was a condition precedent for the Appellant to be issued the instant LOS.

Heard the counsel for the parties and perused the material on record. While we are of the view that learned counsel for the Appellant has exponentially inflated the issue, to us it is the simple case of performance of an agreement. The very condition precedent for the issuance of LOS was to provide a Performance Guarantee in the standard text in favour of PPIB, and the very purpose to us of

such a Performance Guarantee was to ensure that the parties coming forward to set up IPPs must muster up the required financial strength within the period stipulated from the date of issuance of LOS. In the instant case, it appears to us that the Appellant did not have required financial soundness, but took a ride to sail through the process of setting an IPP. The very purpose a detailed letter was written by the Appellant to the Respondent No.1 seeking a number of amendments in the standard terms and condition is reflection of Appellant's inability to sail through the process encapsulated by the power policy. The purpose for which a Performance Guarantee was required to be provided in favour of the Respondent No.1 is very clearly laid down on page 13, the policy without any discrimination required all players to provide a Performance Guarantee of US\$5,000 per MW for a period of three months excess to the validity of the LOS and pursuant to the LOS it is very clearly stated that the project company must have achieved the financial close on the stipulated date on 15th June, 2009 and if fails to do so, the agreement very clearly provided that PPIB shall have no impediment in encashing the performance guarantee in the full amount thereof without any notice to or demand on the sponsor of the project company. Notwithstanding therewith, if there was a possibility that financial close was not to be achieved on the stipulated date, the contract entered into between the parties through LOS specifically provided that a further extension of three months could have been provided to the Appellant upon them having provided additional Performance Guarantee, therefore, the very intent and bonafide of the Respondent is evident that they seriously wish that financial close to be achieved by the intending participants either within first

period or within the extended date because what at stake is the alarming misery of the people at large, who are desperate to have been provided with electricity to improve standard of their lives, so in the instant case, incumbents who merely are visiting the process by anchoring into the mechanism by making a small investment of US Dollars One Million, seemingly have been trying to fish third party into the net have no place in the system and cannot be allowed trafficking of opportunities provided by the power policy.

For the reasons emanating from the aforesaid discussion, we are very clear in our mind that the Appellant has not made any case in their favour for us to interfere with the orders passed by the learned Single Judge, where he rightly dismissed the injunction application against encashment of the above referred Performance Guarantee in the sum of US Dollars One Million. The instant appeal is, therefore, dismissed and these are the reasons for short order announced in the Court on 06.05.2016.

Judge

Chief Justice