

தமிழ்நாடு TAMILNADU

Justice R.S. Ramanathan

21 AUG 2018

BH 050597

Y. Bhanu

மே. திரு. ச. சிவசுப்பிரமணியன்  
உ.ம.ம.எண். 8812/ஆ.3/2007  
உயர்நீதி மன்ற வளாகம்  
சென்னை-104.

BEFORE THE HON'BLE SOLE ARBITRATOR

MR.JUSTICE R.S.RAMANATHAN

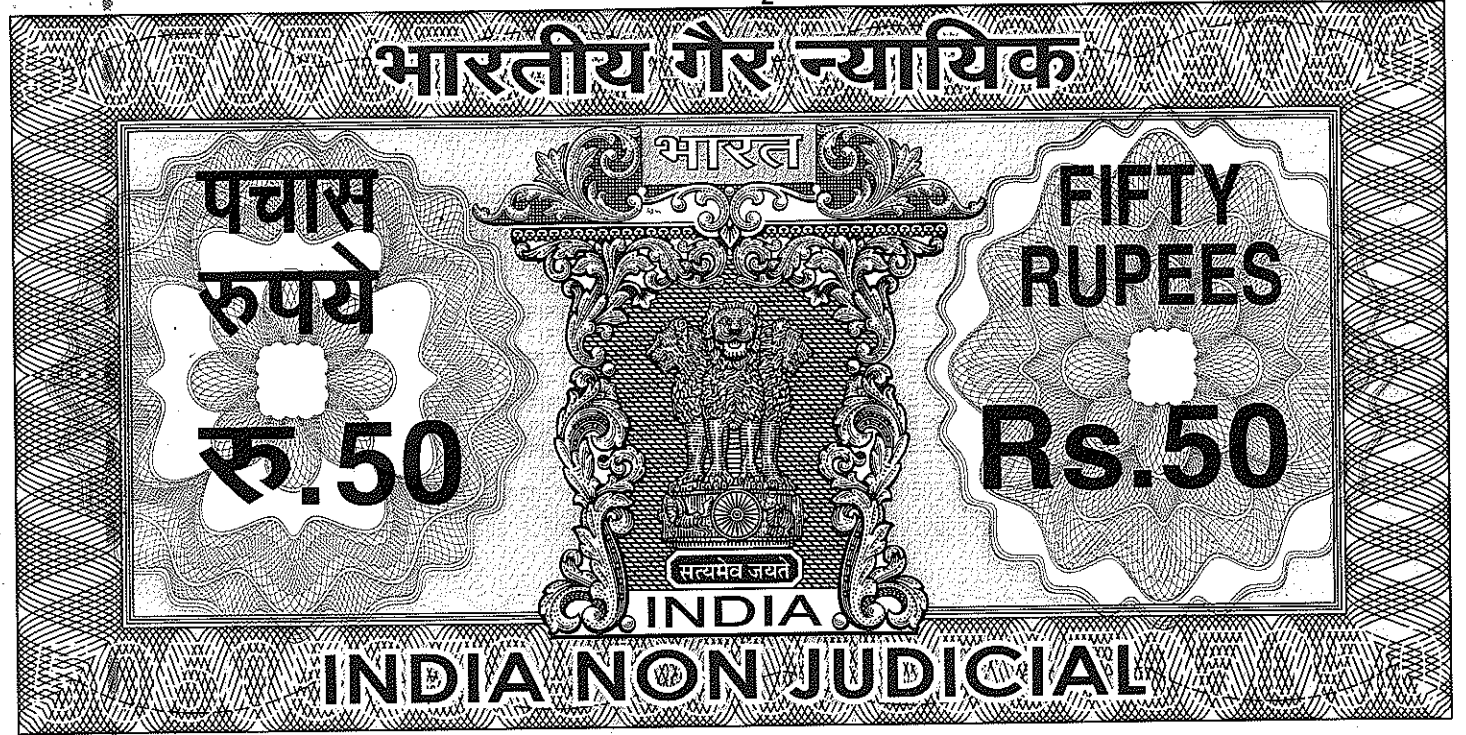
A F No. 11 of 2016

M/s.Staten Solar India Private Limited,  
A-3-13, Savitri Enclaves,  
Lahgarh, Zirakpur,  
Punjab,  
Represented by its Director Mr.Sandipan Bhanot.

... Claimant.

-Vs-

Ramanathan



தமிழ்நாடு தமில்நாடு TAMILNADU

21 AUG 2018

Justice R.S. Ramanaiah

AW 242089

Y. N. N. N.

முத்திரைத்தாள் விநியோகம்  
உரிமம் எண்: BB12/ஆ/3/2007  
உயர்நீதி மன்ற வளாகம்  
சென்னை-104

M.s.CCL Infrastructure Limited,  
No.1, Third Street, Muz Avenue,  
Mylapore, Chennai 600 004.

... Respondent.

#### AWARD

The above reference was made by the Hon'ble High Court in O.P.No.111 of 2015 by Order dated 11.12.2015, directing me to enter upon the reference and decide the disputes arising out of the contract agreement dated 10.06.2011. Accordingly, I entered into the reference and issued notices to the parties to appear before me and Mr.Chitraguptan, Learned Counsel appeared for the Claimant and M/s.S.S.Rajesh, Umamageshwar Ganesh, Usha Vijayan and P.Manorajan, Learned Counsels appeared for the Respondents. The reference having stood over before this Tribunal till date for consideration and after hearing the arguments of the Learned Counsel

Umamageshwar

appearing for both parties and after perusing the documents filed before me this Tribunal passes the following Award.

I. The case of the Claimant in brief as follows:-

1. The Claimant had entered into Engineering, Procurement and Construction (hereinafter referred to as EPC) Contract dated 10.06.2011 with the Respondent for the purpose of constructing 5 Megawatt Power Solar Photovoltaic Plant at Tuticorin, Tamilnadu (hereinafter referred to as the Said Contract). As per the terms of the said Contract the Claimant had to complete the construction and commissioning of the Plant within 6 months from the date of the contract. The total contract value (price) fixed for the purpose of EPC of the said Solar Power Plant was Rs.54.00 Crores.
2. For the purpose of EPC of the said Solar Power Plant the Claimant had to purchase solar modules and other equipments/components. The Claimant had for this purpose identified M/s.Solar Frontier, a company registered in Tokyo, as a suitable supplier of Solar Modules and M/s.Power One, a company registered in USA, as a suitable supplier of Inverters.
3. For the purpose of purchasing equipments and components from M/s.Solar Frontier, a Tripartite Agreement dated 15.07.2011 was entered into between the Claimant, Respondent and M/s.Solar Frontier (hereinafter referred to as the Tripartite Agreement). As per the terms of the Tripartite Agreement, payments to M/s.Solar Frontier were to be paid by the Respondent on behalf of the Claimant. The total price of the modules, that had to be supplied by the Seller, M/s.Solar Frontier, in Dollars was fixed at 68,99,325 US\$ including sales tax, VAT and other taxes. As per the terms of the Tripartite Agreement the Claimant had to issue purchase order for the products so required with the desired delivery date to M/s.Solar Frontier.
4. The modules were to be delivered at Tuticorin Port. As per the terms of the Tripartite Agreement the total price to be paid in US\$ through irrevocable and

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confirmed letter of credit opened by the Respondent to the satisfaction of M/s.Solar Frontier. The Seller, namely M/s.Solar Frontier , had shipped its products to Tuticorin Port and the shipment reached the Tuticorin Port and the same was delivered to the Respondent after Custom Clearances and was used in constructing the 5 Megawatt Solar Power Plant.

5. For the purpose of purchasing equipments and components the Respondent has issued a Purchase Order dated 30.08.2011, bearing No.0020 directly on M/s.Power One for a value of US\$784,000/-. Similarly for the purchase of Solar Modules and Inverters, the Respondent had issued Purchase Order dated 29<sup>th</sup> August 2011 bearing No.0023 wherein the price for Solar Modules was specified as Rs.310,500,000/- and the price of Inverters was specified as Rs.36,000,000/-. These Purchase Orders were issued exclusively based on the Proforma Invoices received from the respective vendors. In respect of the Solar Modules, the said proforma invoices dated 02.08.2011 received from the Solar Frontier KK quoting the price as US \$ 6,899,325/- and for inverters, the said proforma invoices dated 26.08.2011 as received from Power One quoting the price as US\$ 784,000/-. The Claimant converted the said US dollars into INR at the respective exchange rate of Rs.45.004 per US dollar for the Solar Modules and Rs.45,918/- for the inverters, prevailing on the specific dates in the year 2011 which is equivalent to the above mentioned sum.
6. As per the terms of the said contract dated 10.06.2011 the Claimant had constructed Solar Power Plant and had conducted guarantee runs to the complete and fullest satisfaction of the Respondent. Further till this date the Respondent has not notified the Claimant about any defects in the working or the construction of the Solar Power Plant. The Claimant has performed to the fullest and complete satisfaction of the Respondent and there can be no doubt on this. Pursuant to the construction the Claimant was until recently operating and maintaining the solar plant.

S. Sumanaharan

7. As per the terms of the said Contract the Respondent had to pay 50% of the amounts specified in the invoice raised by the Claimant within 15 working days from the date of submission of such invoice and balance 50% was to be paid within 30 working days from the date of submission. The Respondent has been highly irregular in adhering to the aforementioned contractual stipulation despite the Claimant's repeated reminders vide letters/e-mails.
8. Pursuant to the Tripartite Agreement, another Agreement was also entered between the Claimant and Respondent on 15<sup>th</sup> July 2011 in continuation of the said Contract dated 10.06.2011. As per the terms of that Agreement the Respondent was obliged to effect payment to M/s.Solar Frontier by opening letters of credit in their favour for the purchase of modules and equipments/components for the Construction of the Solar Power Plant. It was all along the obligation of the Respondent to make payments by opening letters of credit in favour of M/s.Solar Frontier and M/s.Power One and not the obligation of the Claimant.
9. Out of the above said contract value of Rs.54.00 Crores, the Alternating Current (AC) part of the work was at the instance and request handed over by the Claimant to the Respondent. The value of this part of the work was Rs.4.20 Crores.
10. The split up of the contract value of Rs.54 Crores as agreed by the Claimant and the Respondent are as mentioned below:
  - a) Modules and Inverters - Rs.35.1 Crores.
  - b) AC Part - Rs.4.2 Crores.
  - c) Rest of supply and installation- Rs.14.7 Crores.

Out of the Rs.14.7 Crores payable directly to the Claimant, till date the Respondent has paid only a sum of Rs.10,88,99,910/- towards the execution of the works under the said Contract leaving a balance of Rs.38,100,089/- excluding the interest for delay in making payments. The last of such payments was made on 18.09.2013. Since the said Contract does not specify



the rate of interest for delayed payments coupled with the fact that the nature and performance of the works contemplated under the said Contract is commercial in nature, the Claimant would be entitled to charge interest @ 24% per annum on the amounts due and payable.

11. In these circumstances the Claimant was shocked to receive a letter from the Respondent dated 09.10.2013 Debit Note No: CCCL/STATEN/DN/002/2013-14 containing a debit note for a sum of Rs.3,72,47,644/-. It was also stated in the letter that the amount was debited because of the Dollar variation. This letter was sent by registered post and received by the Claimant on 15.10.2013. There was no prior discussion/intimation/mail from the Respondent in this regard.

12. Further, the details as provided for in the debit note stated that a sum of Rs.3,72,47,644/- was debited due to exchange variation arising out of payment made to foreign suppliers on imported components. It was also stated in the subsequent communications that the Claimant had agreed for the debit note on Rs.3,72,47,644/- which is false even to the knowledge of the Respondent. The Claimant responded vide e-mail dated 15<sup>th</sup> October 2013 expressing its liability and non-acceptance of the debit note and explained that the debit note was not in accordance with the said Contract and the discussions that the Claimant had with the Respondent. The debit note raised in terms of the said variation is therefore wholly unlawful and unsustainable.

13. The Claimant states that the said Contract read with the Agreement dated 15.07.2011 and Tripartite Agreement and the Purchase Orders issued by the Respondent, clearly stipulates that it is the obligation of the Respondent to make payment to M/s.Solar Frontier and M/s.Power One, in US\$. There is no clause in either of the aforementioned contracts regarding price variation. The modules were supplied by M/s.Solar Frontier during September 2011 and as per the terms of the Tripartite Agreement payments were to be made

*M. Sumanakumar*

by the Respondent during 2011. This increase in cost due to variation of the Dollar, as claimed by the Respondent, could have been avoided if the payments had been made in 2011 or if the Respondent had undertaken Foreign Exchange Hedging, a standard practice followed when undertaking a purchase in Foreign Exchange.

14. The Respondent having not made payments in 2011 and having not taken Foreign Exchange Hedging Cover, due to reasons best known to the Respondent, cannot now seek to fasten the liability on the Claimant. Further, the dollar variation was due to reasons beyond the control of the Claimant, although taking Foreign Exchange Hedging cover was definitely within the scope and control of the Respondent. The Respondent had failed miserably to initiate any steps to mitigate the loss and as such would be disentitled from making any claims from the Claimant.

15. In these circumstances the Respondent is bound to pay a sum of Rs.38,100,089/- to the Claimant towards the execution of the works under the said Contract and the debit note issued by the Respondent is unlawful and unsustainable. Further the Claimant even as a measure of goodwill and with a view to maintain cordial relations had offered to share the burden arising out of price variation to the extent of Rs.1.50 crores vide mail dated 25.05.2013. However, there was no response from the Respondent in this regard and therefore the Claimant had withdrawn its offer. The debit note surreptitiously raised by the Respondent is thus wholly unlawful and not maintainable. The Respondent had not replied to the mail of 15.10.2013 regarding non-acceptance to the debit note. Thereafter, the Claimant had several meetings with the Respondent's representatives but the debit note was neither withdrawn nor did the Respondent effect any payment.

16. As disputes regarding non-payment of Rs.38,100,089/- and the debit note had arisen, the Claimant was constrained to invoke Clause 14 of the said Contract. The Claimant had been repeatedly requesting the Respondent to arrange for a

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17. The Respondent had through its Counsel issued a belated reply after the expiry of 30 days vide letter dated 26.08.2014 denying all the allegations of the notice issued by the Claimant's Counsel and raised false and frivolous plea.

- a) For a sum of Rs.38,100,089/- along with interest at the rate of 24% per annum until the date of recovery;
- b) directing the Respondent to pay costs of the Petition to the Claimant; and
- c) pass such further or other orders as this Hon'ble Court may deem fit and proper in the circumstances of the case and thus render justice.

1. They are not liable to pay any sum whatsoever to the Claimant much less a sum of Rs.38,100,089/- as claimed in the Claim Statement. The Claimant has distorted all facts and has falsely made a claim as if this Respondent is liable to pay a sum of Rs. Rs.38,100,089/-. There is no question of any non-payment of any monies to the Claimant under the subject Agreement. All the money payable to the Claimant under the contract has been fully paid to the Claimant. The Claimant has suppressed all material facts and has initiated the above Arbitral Proceedings with unclean hands and with sole intent to extort monies from this Respondent. The very claim is vague, speculative and non est in law and is thus not sustainable in law and facts. The Claimant is trying to make unlawful gain out of his inability to obtain a Letter of Credit

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for importing certain Contractual Components / Equipments which were within the purview of the Claimant's scope of contract.

2. The Respondent states that a contract was awarded to the Claimant dated 10.06.2011 for Design, Manufacture, Supply, Erection, Testing and Commissioning of 5MW Grid Connected Solar Photovoltaic Power Plant with Associated Power Evacuation Arrangement on Turnkey Basis at Kombukaranatham Village, Tuticorin District, Tamilnadu, India. The said contract is a lump sum contract for a total contract value of Rs.54,00,00,000/- (Rupees Fifty Four Crores Only).
3. It would be pertinent to mention here that the Claimant had in fact requested for splitting fixed price of Rs.54 Crores into different heading for necessary tax requirements and as per Staten Solar requirements, the same was done without any change in the fixed price contract of Rs.54 Crores. As the order for the Power Invertors and Panels were finalised by the Staten Solar and as per agreement dated 10.06.2011, they had requested the Respondent to open the LC's as per the Proforma Invoice given to the Respondent. The Respondent had opened the same. There has been no change in the LC terms with respect to Proforma Invoice finalized by Staten Solar. Further to the same, Staten Solar vide letter dated 04.07.2011, had clearly indicated that all payments made to the manufacturer's of Solar Modules and Invertors, the same can be deducted from the total EPC contract as per agreement dated 10.06.2011. Nowhere, Staten Solar had made any request for undertaking Foreign Exchange Hedging for payment in foreign currencies to be paid to the suppliers and CCCL merely had followed Staten Solar directions and opened L.C so that the project can be completed.
4. At the time of award of the contract the Claimant had made false submission that they were pioneers in establishing Solar Power Generation Units and that they had both Technical Expertise and Financial Support and Back Ground to

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execute the contract of this Magnitude. After the signing of contract, to the utter shock and dismay of this Respondent, it was informed by the Claimant that they did not have enough financial back up from Banks and other Financial Institution to open a Letter of Credit to import certain equipments which are within their Scope of the Contract and thus requested the Respondent to open the Letter of Credit as may be required to import certain materials. As stated supra it was a lump sum contract that was awarded to the Claimant which includes supply of all materials by the Claimant as may be required under the contract for establishing a Solar Power Generation Unit. In addition to the fact that the Claimant did not have enough financial background and there was also no proper technical ability and back up to perform the contract, at all stages the Respondent had helped the Claimant to execute the project. Originally, as per the contract awarded, the Claimant is expected to procure and supply all materials. Since, they did not have the wherewithal and proper financial support the Respondent had agreed to facilitate the Claimant by opening Letters Credit for procuring Panels from Solar Frontier and Invertors from Power One. The Claimant has suppressed all these facts.

5. The monies were directly paid to the banker as per the value of Letter of Credit based on the US Dollar Rates. The Claimant has by letter dated 04.07.2011 agreed that the Respondent shall open the Letter of Credit in the name of Solar Frontier for supply of the modules and power one for invertors and accessories and it was further confirmed by them that payments made to these manufacturers would then be deducted from the total EPC contract value as per the signed contract dated 10.06.2011. The fact of the said letter dated 04.07.2011, has been conveniently suppressed by the Claimant. The Claimant has neither in their claim statement nor in the List of Documents have disclosed the letter dated 04.07.2011. This itself clearly establishes and proves beyond doubt the malafide intent of the Claimant in making unjust and unlawful gain.

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6. The Respondent states that the Letter's of Credit was opened on US dollar and if any fluctuation in dollar rates will have a direct impact and binding on the Letters of Credit value. The Claimant has never advised or insisted to secure the dollar fluctuation. The money's on Letters of Credit were paid on the existing dollar value against the Indian Rupee. The contract given to the Claimant is a lump sum contract for a value of Rs.54,00,00,000/- that cannot be increased or decreased based on the US Dollar Fluctuations. The Fluctuations of US Dollar Value is a Global Phenomena and it is based on various Global Issues that the Value of US Dollars against Indian Rupee is determined. Every Exporter and Importer is bound by such Fluctuation of Foreign Exchange Value. The fact that the Respondent opened the Letter of Credit at the behest and request of the Claimant will only go to prove that any loss on my Currency Fluctuation cannot be mulcted upon this Respondent. If the Claimant had themselves opened the Letters of Credit they would have paid the differences, in value due to the variation in the US dollar against Indian Rupee. It is surprising to note that the Claimant is trying to adopt doubt standards by carrying forward the loss due to currency fluctuation to the Respondent's Account.
7. The Claimant had specifically advised and instructed the Respondent to pay the Cost of Materials as per the Letters of Credit to the bankers directly and pay the balance to them and it is not in dispute that the Respondent had paid a sum of Rs.38,82,47,644/- towards the materials procured and the balance has also been paid. The Respondent states that the Claimant wants to shy away with the liability due to increase in Dollar Value and mulct the same on the Respondent. The Respondent had opened the Letters of Credit only to facilitate the Claimant of their inability to open the Letter of Credit and for which this Respondent cannot be penalized or punished with such huge liability.

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11. This Respondent submits that this Respondent on payment of the Letter of Credit amounts to the Bankers had immediately raised a Debit Note on the Claimant to that effect. The Claimant was very well aware of the fact that the US currency was steeply increasing during the relevant point of time and the same would result on an extra cost on the equipments that were imported on the strength of the Letter of Credit opened by the Respondent. It is not a case that if the Claimant would have established the Letter of Credit they would not have incurred the difference in US Dollar value or that the US Dollar itself would not have escalated precipitously during the relevant point of time.
12. All the above facts have been conveniently suppressed by the Claimant, the Respondent had time and again made it very clear to the Claimant that they cannot be mulcted with such losses incurred due to the inability of the Claimant to open a Letter of Credit as per the terms of the Original Contract. In all the letters and even replies to the Legal Notices issued by the Claimant this Respondent has categorically established the losses suffered by the Respondent on account of US Currency Fluctuations and that they cannot be penalized for no fault of them.
13. The Respondent states that since there is no dispute subsisting between the parties, the question of initiating any Arbitration Proceeding as contemplated under the contract does not arise. Even assuming without conceding that there exist a dispute between the parties the procedure prescribed under the Arbitration Agreement has not been followed; under which circumstances the Claimant's so called request to refer the dispute to arbitration itself is not sustainable in law and facts.
14. The Respondent submits that the Respondent has suitably replied to the notice dated 15.07.2014 issued by the Claimant under Section 11, bringing to the kind notice of the Claimant the above facts and also reiterated that there exist no dispute for any reference to Arbitration.

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15. As stated supra the very claim of the Claimant is speculative in nature and it is non est in law. The Claimant with an intent to extort monies from the Respondent has embarked themselves in referring a non existing dispute to Arbitration. Since no money is due and payable to the Claimant, the question of payment of any interest on the alleged outstanding amounts does not arise. In fact the Claimant will have to pay a huge cost to the Respondent for unnecessarily dragging them into the present litigation for no fault of theirs. Therefore the claim may be dismissed with costs.

III. The Claimant filed the rejoinder to the counter statement filed by the Respondent:-

1. The Claimant states that it is completely false even to the knowledge of the Respondent to state that the Claimant is trying to make unlawful gain out of his inability to obtain a Letter of Credit for importing certain contractual components/equipments which were within the purview of the Claimant's scope of contract. It is the general modus operandi wherein the owner of the plant opens a Letter of Credit to secure the modules and inverters. Further the EPC contract entered with the Respondent clearly exhibits that the Respondent undisputedly had accepted to open the Letter of Credit on their own.
2. The Claimant nowhere had requested the Respondent to split up the amount under different heads for tax benefit. It is false and futile to state that the Respondent had acted upon the directions of the Claimant, the Respondent for covering up their inabilities and the shortage in funds are shifting the blame on the Claimant. Further, the Respondent has not filed any document to show that the Respondent has been acting on the advise of the Claimant.

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3. It is completely false and frivolous to state that the "Claimant informed that they do not have enough financial back up from banks and other financial institution to open a Letter of Credit to import certain equipments which are within their Scope of the Contract and thus requested the Respondent to open the Letter of Credit as may be required to import certain materials". The statement of the Respondent is false even to the knowledge of the Respondent. The same is set out without any supporting documents. Further the Respondent had appreciated the Claimant for their excellent work in the plant vide their letter dated 27.09.2013. Hence the Respondent for the sake of the proceedings are making false allegations against the Claimant. The Respondent to suppress their disability, are attempting to diminish the credibility of the Claimant.
4. The Claimant agreed by his letter dated 04.07.2011 that the Respondent shall open the Letters of Credit in the name of the manufacturers and the amount paid shall be deducted from the EPC contract value. The Claimant denies the suppression of the letter and it was the Respondent who was out of money at that juncture to secure the equipments by paying cash. It is the Respondent who decided to open a Letter of Credit directly on the manufacturers. Hence, the Claimant sent a letter dated 04.07.2011 to facilitate the Respondent to open the Letter of Credit as the Respondent was irregular in making the payments. The Respondent was into debts and was out of funds which were the sole reasons for the issue at hand. On the other hand the Respondent is tactfully misusing the letter dated 04.07.2011 to mislead this Hon'ble Forum.
5. The Claimant states that "the Claimant has never advised or insisted to secure the dollar fluctuation " is frivolous and absurd. The Respondent being one of the top most company in India cannot plead ignorance of the prevailing standard clauses in a contract. As stated it is the choice of the Respondent to directly open the Letter of Credit with the manufacturers,

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the same has been facilitated by the Claimant. The Claimant was only intimated about the opening of the Letter of Credit, the Claimant was unaware of the terms and conditions between the Respondent and the manufacturers. The Claimant requested the Respondent to open the LC on the Claimant, the Respondent refused to do so and they due to their financial constraint willingly opened the Letter of Credit directly on the manufacturers. It is the Respondent, now adopt double standards to shy away from the liability.

6. It is well within the knowledge of the Respondent that the Letter of Credit on the manufacturer was the idea of the Respondent. The Claimant had nowhere admitted that the full and final payment had been made by the Respondent to us. The Respondent is tactically misleading the forum without any supporting documents to substantiate their misleading.
7. It is a bare faced lie to state that the Respondent had opened the Letter of Credit to facilitate the Claimant. On the other hand the Respondent opened the Letter of Credit on the manufacturer for their own reasons. The Claimant requested the Respondent to open the Letter of Credit on the Claimant which will facilitate them to open the Letter of Credit on the manufacturers. It is a general practice in the industry which is well within the knowledge of the Respondent that the initial Letter of Credit has to be opened by the owner of the plaint. The Respondent is now attempting to interpret the said general practice in their favour to make unjust enrichment and shy away from the liability. The averments set out in the Para 12 on the Counter Statement are vehemently denied as false.
8. The Claimant was unaware of the understanding between the Respondent and the manufacturers. The Respondent being in the industry for more than a decade cannot plead that they are unaware of the Foreign Exchange Hedging, being a big company the Respondent should have made it clear

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with the manufacturers in their agreement. Further, the Respondent made payments very belatedly even took numerous time than stated in the Letter of Credit. The delay on the part of the Respondent due to their financial constraint shall not be carried forwarded to the Claimant. On the receipt of the debit note the Claimant had raised their non acceptance through their letters and mails. The terms and conditions in the letter of Credit between the Respondent and manufacturer is not the problem of the Claimant. The Letter of Credit has been opened through the Respondent's Bank and the internal understanding between them is not the concern of the Claimant.

IV. On the basis of the above pleadings the following issues were framed on 16.08.2016.

1. Whether the Claimant is entitled to a sum of Rs.38,100,089/- along with interest at the rate of 24% per annum.
2. Whether the debit note dated 9<sup>th</sup> October, 2013 raised by the Respondent is valid?
3. Who is to take responsibility for exchange variation/fluctuation with regards to payments to foreign suppliers as per the EPC contract entered into by the parties?
4. Whether the Claimant is entitled to any other reliefs?

V. On 24.08.2016 additional Issue No.5 was framed.

1. Whether the Claimant is entitled to make any claim when they have by letter dated 04.07.2011 instructed the Respondent to deduct the payments made to the manufactures from the total EPC Contract price as per the original contract dated 10.06.2011?

VI. On the side of the Claimant 11 Exhibits are marked and on the side of the Respondents 7 Exhibits are marked. No witnesses were examined by the Claimant and on the side of the Respondent one witness was examined.

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## VII. ISSUES 1 to 4

- i) In this case it is admitted that the Claimant entered into EPC contract dated 10.06.2011 with the Respondent for the purpose of constructing 5 Mega Watt Power Solar Photo Volatic Plant at Tuticorin and the total contract value fixed for the said contract was Rs.54 Crores. It is also admitted that a tripartite agreement dated 15.07.2011 was entered into between the Claimant, Respondent and M/s.Solar Frontier, who is to be referred as Seller in this Award, for purchasing equipments and components. The total price of the modules to be supplied by the Seller was fixed at 68,99,325 US \$ which includes sales taxes, vat and other taxes. As per the tripartite agreement the Claimant had to issue purchase orders for the products so required with a desired delivery date. It is also admitted that the Respondent issued a purchase order dated 30.08.2011 directly on M/s.Power One for the value of Rs.784,000 US \$ and similarly for the purchase of solar modules and inverters, purchase order dated 29.08.2011 for Rs.310,500,000/- and Rs.36,000,000/- were issued. These purchase orders were issued exclusively based on the proforma invoices received from the respective vendors. In respect of solar modules the Seller quoted the price at 68,99,325 US \$ and M/s.Power One quoted 784,000 US \$. It is also admitted that the total contract value of Rs.54 Crores was split up as detailed below:-

- a. Modules & Inverters - Rs.35.1 Cr
- b. AC Part - Rs.4.2 Cr
- c. Rest of supply and installation - Rs.14.7 Cr

- ii) It is also admitted that for the purpose of purchasing solar modules and inverters LC was opened by the Respondent and it is contended by the Claimant that at the request of the Respondent they asked the Respondent to open LC, as Respondent was not



having the finance necessary for purchasing the modules and inverters and it was the responsibility of the Respondent to supply these modules and inverters by buying from Seller and M/s.Power One. On the other hand, it is contended by the Respondent that they are not bound by the contract to open the LC and it is the duty of the Claimant to provide necessity finance for buying those equipments and as the Claimant was not having the necessary finance, they requested the Respondent by their letter dated 04.07.2011 to open LC and therefore they opened LC for the purchase of equipments. Whether the LC was opened by the Respondent as per the request of the Claimant or whether the Respondent opened the LC as per the terms of the contract can be considered in the later portion of this Award. But the fact remains that LC was opened by the Respondent for the purchase of equipment.

- iii) It is also admitted that the Seller supplied the solar modules and inverters to the Claimant and the Claimant installed the equipments and run the plant to the satisfaction of the Respondents.
- iv) The dispute arose when the Respondent issued a debit note dated 09.10.2013 for Rs.3,72,47,644/- . It is the case of the Claimant that out of Rs.14.7 Crores payable directly to the Claimant, the Respondent paid only Rs.10,88,99,910/ leaving a balance of Rs.38,100,089/- excluding the interest. The present arbitral dispute is raised by the Claimant for realising the said sum of Rs.38,100,089/- along with interest at the rate of 24% per annum and other reliefs.
- v) It is contended by the Learned Counsel for the Claimant that the total price of the contract was fixed at Rs.54 Crores and when the

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contract was entered into, the US \$ rate was Rs.45.004 when fixed for solar modules and Rs.45.918 when fixed for inverters and keeping these rates in mind the value of Rs.54 Crores was arrived at and by reason of the negligence of the Respondent in not taking foreign exchange hedging cover and by the belated payment made by the Respondent, the Respondent had to pay more money in terms of Indian currency and therefore the Respondent cannot pass on that liability to the Claimant by issuing the Debit Note and the Claimant is not liable to pay such amount and the Respondent is also not entitled to deduct the said amount from the amount payable to the Claimant and therefore the Claimant is entitled to the sum of Rs.38,100,089/-. On the other hand it is contended by the Learned Counsel for the Respondent that they were not asked to take foreign exchange hedging cover by the Claimant when the LC was opened and LC was opened only as per the request of the Claimant vide their letter dated 04.07.2011 and as per the terms of the contract also the Respondent was not liable to open LC and it was the duty of the Claimant to provide necessary finance for the purchase of materials. It is also argued by the Learned Counsel for the Respondent that as per the bilateral agreement dated 15.07.2011 the Claimant has requested the Respondent to open and establish letters of credit directly in favour of the Seller for the purchase of equipment and components for the power plant though it was the obligation of the Claimant to open such letters of credit. He also contended that as per the terms of the tripartite agreement the total price shall be paid in US dollars by irrevocable and confirmed letter of credit to be established by the buyer namely the Claimant or the end customer namely the Respondent on behalf of the buyer to the satisfaction of the Seller. The letter dated 04.07.2011 issued by the Claimant would also make it clear that the LC was opened at the request of the Claimant. Therefore the Learned Counsel for the

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Respondent contended that the LC was opened by the Respondent at the request of the Claimant and there was no request for taking foreign exchange hedging cover and even if foreign exchange hedging cover were taken, the Respondent would have paid more amount in dollars and admittedly the Respondent had paid the agreed amount in US dollars and due to price fluctuation the Respondent paid more money in Indian value and that was the reason for issuing Debit Note and Respondent cannot be mulcted with that amount and the Claimant has to bear the difference and cannot claim that amount.

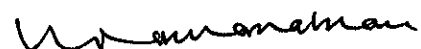
- vi) After hearing the arguments of both the Learned Counsels it is seen that the Respondent made the payment to the Seller in US dollars and the Respondent did not make any excess amount than agreed to the Seller in US dollars and by reason of the dollar rupee price fluctuation, additional sum of Rs.38,100,089/- was paid by the Respondent while making payment in US dollar to the Seller and that amount was debited by the Respondent towards the amount payable to the Claimant.
- vii) Therefore to decide this issue we will have to find out who was responsible for opening the LC, whether the LC was opened at the instance of the Claimant as contended by the Respondent or the Respondent was bound by the Contract to open the LC. It is seen from the agreement dated 15.07.2011 Exhibit C3, the Claimant is referred as the EPC contractor. It is seen from Ex C3, that in terms of EPC contract (Ex C2), the EPC contractor (Claimant) has to buy equipment and components for the Power Plant and identified M/s.Solar Frontier (Seller). It is stated in Exhibit C3, that the EPC contractor has requested CCCL to open and establish Letters of Credit directly in favour of the Seller for the purchase of the

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equipment and components for the power plant, though it is the obligation of the EPC Contractor to open such Letters of Credit. It is further seen from the said agreement that the Respondent for and behalf of the EPC Contractor agreed to establish Letter of Credits directly in favour of the Seller and apart from establishment of LC in favour of the Seller all other responsibilities, liabilities and other obligations of the EPC Contractor towards the Seller shall be borne by the EPC Contractor and the Respondent shall not be lodged with any such responsibilities, liabilities and other obligations and to that extent the EPC contractor shall indemnify and hold harmless the Respondent from any and against all losses, damages and liabilities, cost and expenses arising from, claimed by the Seller or occurring as a result of any breach by the EPC Contractor. As per the tripartite agreement Exhibit C2, the Claimant is referred to as buyer and Respondent is referred to as End Customer and the total price should be paid in US dollars by irrevocable and confirmed letter of credit to be established by the buyer or the End customer on behalf of the buyer. The letter dated 04.07.2011 Exhibit R2 would also make it clear that the Claimant requested the Respondent to open the LC. Therefore, it cannot be contended that the Claimant has not requested the Respondent to open the LC and it is the duty of the Respondent to open the LC as per the terms of the contract. Therefore, having held that the LC was opened by the Respondent at the request of the Claimant, the next question that arises for consideration is who is responsible for the excess payment made in Indian currency and whether the Respondent was negligent in not taking foreign exchange hedging cover and whether there was any delay in the payment towards Seller as per the terms of LC.

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viii) To appreciate the above, we will have to see the terms of the agreements as well as the provisions of law. As stated supra, as per the terms of tripartite agreement, the total price shall be paid in US dollars by irrevocable and confirmed Letter of Credit to be established by the buyer namely the Claimant or the End customer namely the Respondent on behalf of the buyer. As per the bilateral agreement between the parties the EPC contractor namely the Claimant has requested the Respondent to open and establish Letters of Credit directly in favour of the Seller for the purchase of equipment and components for the power plant, though it is the obligation of the EPC contractor to open such Letters of Credit. The letter dated 04.07.2011 issued by the Claimant also confirms the request by the Claimant to the Respondent to open Letters of Credit. Therefore, it has been held in the earlier para of this Award that Letter of Credit was taken by the Respondent at the request of the Claimant. It is not in dispute that the contract money for the purchase of equipments was to be paid in US dollars and it is also admitted that the Respondent paid the sum as agreed in US dollars and they have not paid any excess amount to the Seller in US dollars. According to the Claimant, the Respondent failed to take foreign exchange hedging cover and also delayed the payments and by reason of the delayed payments the value of Indian money against dollars had fallen through, which resulted in excess payment in Indian currency. On the other hand, the Respondent contended that there was no request by the Claimant to take foreign exchange hedging cover and the payments were made on due dates as per the tripartite agreement and as per Letters of Credit. Though each party is blaming the other for the foreign exchange hedging cover, no materials were provided by both parties about the consequence of not taking foreign exchange hedging cover or in what manner the foreign exchange hedging cover would have



saved the dollar fluctuation. Though it is concluded by the Learned Counsel for the Claimant that as per the Standard Practice followed when undertaking a purchase in Foreign Exchange, to take Foreign Exchange Hedging Cover, no materials have been furnished by the Claimant. Therefore, I am not giving any finding that by reason of not taking foreign exchange cover the Respondent paid more money in Indian currency or the Respondent ought to have taken foreign exchange cover while taking LC. Further the Claimant also did not file any materials to prove that they specifically instructed the Respondent to take foreign exchange hedging cover.

- ix) Therefore, we will have to see whether there was delay in the payment by Respondent to the Seller which resulted in paying more money in Indian Currency. For this we will have to see the provisions of tripartite agreement. In the tripartite agreement under Column 8 payment it is stated clearly as follows:-

" 90% of the total price shall be paid no later than 75 days after the date of Bill of Lading on board for each shipment in US dollars.

10% of the total price shall be paid no later than 15 days after the issuing date of Bank Guarantee".

It is the case of the Claimant that the Respondent made payments after 75 days after the date of Bill of Lading on board in respect of the 90% of the total price and paid after 15 days after the issuing date of Bank Guarantee in respect of the 10% of total purchase alone. As per the tripartite agreement the Respondent has got 75 days time to pay 90% of the purchase amount from the date of Bill of Lading on Board and has got 15 days after the issuing date of Bank Guarantee in respect of the 10% of the total price amount. It may be if the Respondent paid the amount immediately after the

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Bill of Lading without waiting for 75 days the Respondent would not have paid more money in Indian Currency or paid that amount within a reasonable time within a period of 75 days. But the issue is whether the Respondent can be held liable for delayed payment and waited till the last date and as a result of that the amount paid in Indian Currency was more than it could have been, had the payment been made earlier. In other words, it was contended by the Claimant that by reason of the payment at the last date, the Respondent had paid higher Indian value towards dollar resulting excess payment in Indian Currency and therefore the Claimant is not liable to pay excess.

- x) Letter of Credit is taken by a party who guarantees payment to the Seller towards the purchase money. It has already been held that Letter of Credit was taken by the Respondent at the request and on behalf of the Claimant. Therefore, the Claimant is the Principal Debtor and the Seller is the Creditor and the Respondent is the Surety in this transaction as the Respondent stood guarantee for the payment payable by the Claimant. Under Section 145 of the Indian Contract Act there is an implied promise by the Principal Debtor to indemnify the Surety and the surety is entitled to recover from the Principal Debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully. Under Section 140 of the Indian Contract Act where a guaranteed debt has **become due**, the surety upon payment is invested with all the rights with the creditor had against the principal debtor. Therefore, as per Section 140 of the Indian Contract Act, when payment was made on **due date**, the surety is invested with all the rights as the creditor had against the principal debtor. As stated supra, the Respondent has got 75 days time to make the payment from the date of Bill of Lading on board in respect of 90% of the total price

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and 15 days time from the date of bank guarantee in respect of 10% of the total price. Therefore, 90% of the total price becomes payable on the 75<sup>th</sup> day from the date of Bill of Lading. In other words, the payment becomes **due** on the 75<sup>th</sup> day after the Bill of Lading on board. As a matter of fact it is seen from the Respondent's typed set of papers, the Bill of Lading documents are marked as Ex.R4 and they are found at Pages from 19 to 21. It is seen from Page 19 that Bill of Lading was dated 28.12.2011 and payment was made on 23.02.2012 and the time taken was 57 days. At Page 20 the Bill of Lading was dated 24.11.2011 and the payment was made on 04.01.2012 and the time taken was 41 days. At Page 21 the Bill of Lading was dated 17.09.2011 and the payment was made on 12.11.2011 and the time taken was 56 days. Therefore, it is clear from the above Bill of Lading Exhibits, within a period of 75 days amount was paid and there was no delay on the part of the Respondent. Further, it is not the case of the Claimant that payments were made beyond the period of 75 days and therefore, the Respondent paid more money in Indian Currency. As stated supra, the specific case of the Claimant is that the Respondent failed to take foreign hedging at the time of opening letter of credit and by reason of that the Respondent had paid more money in Indian currency. I have already held that no materials were placed before me by the Claimant that they had asked the Respondent to take foreign exchange hedging.

- xi) Therefore, when the payment was made on the **due date** the Respondent, the surety is invested with all the rights of the creditor as against the principal debtor as per Section 140 and the Respondent, the surety is also entitled to recover from the principal debtor, the Claimant whatever sum he has rightly paid under the guarantee. In this case, the amount has been rightfully paid as per

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the tripartite agreement on the due date and had the amount been paid after the due date the Respondent cannot claim the excess mount by reason of foreign exchange fluctuation. As the money was paid on due date as per the agreement, whatever be the equivalent Indian currency towards dollar on the date of payment, the Respondent is entitled to be indemnified by the Claimant and I therefore hold that the Respondent is entitled to issue the Debit Note.

- xii) It is contended by the Learned Counsel for the Claimant that the Respondent is duty bound to take foreign exchange hedging cover and had it been taken that would have saved the dollar fluctuation. Though I have already held in the earlier paras that I am not deciding the \_\_\_ relating to Foreign Hedging issue, for completion sake I am willing to conclude the above contention. To consider that argument we will have to see the character of the parties. I have held that by taking Letter of Credit the Respondent becomes the Surety and the Claimant becomes the Judgment Debtor and the Seller becomes the Creditor. A surety is not bound to take such precaution like an agent. Under Section 211 of the Indian Contract Act, an agent is bound to conduct the business of his principal according to the directions given by the principal or in the absence of such directions, according to the customs which prevails in doing business of the same kind at the place where the agent conducts such business. If the agent acts otherwise he has to make good the loss sustained by the principle. In this case, the Respondent cannot be termed as an agent. It is seen from the contract, tripartite agreement and agreement between the Claimant and the Respondent namely Ex C1, C2 to C3 that the Claimant awarded the contract to the Respondent for carrying out certain things and the Claimant has to provide the materials namely

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modules and inverters which are to be imported. I have already given a finding that at the request of the Claimant, the Respondent opened the Letter of Credit and as per the contract the Claimant ought to have opened the Letter of Credit and supplied the materials namely modules and inverters. Therefore, the Respondent has only obliged the Claimant in opening the Letter of Credit and having opened the L.C. the Respondent cannot be considered as the agent of the Claimant. Therefore, looking from any angle the Respondent cannot be considered as agent of the Claimant and by opening Letter of Credit he only guarantees the payment to the Seller and therefore the Respondent acted as a surety and by making payment to Seller he is entitled to claim the payment from the Claimant.

- VIII. I further hold the debit note dated 09.10.2013 raised by the Respondent is valid and to Issue No.2 is answered in favour of the Respondent. I have already held that the Claimant did not prove that they had requested the Respondent to take up the foreign exchange fluctuation cover and the EPC contract also did not provide for the same. Hence, Issue No.3 is answered against the Claimant and in favour of the Respondent. Consequent to the finding given in respect of Issue No.2 in favour of the Respondent, Issue No.1, is answered against the Claimant by holding that the Claimant is not entitled to a sum of Rs.38,100,089/- with interest from the Respondent. As a surety the Respondent is entitled to get indemnity from the principal debtor in respect of the amount rightfully paid by the surety vide Section 140 of the Indian Contract Act. Further, by letter dated 04.07.2011, the Claimant permitted the Respondent to deduct the payments made to the seller from the total EPC contract price. I have already held that the payments were made on due dates and therefore the Respondent is entitled to deduct the said payment from the total EPC contract price and therefore the Claimant is not entitled to make any claim against the

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Respondent and answer Issue No.5 is against the Claimant. In the result I hold that the Claimant is not entitled to claim any amount from the Respondent and the claim by the Claimant is rejected. Having regard to the facts of the case I direct the parties to bear their respective costs and expenses.

Dated at Chennai on this the 04<sup>th</sup> day of October 2018.

  
**MR. JUSTICE R.S. RAMANATHAN (RETD)**  
**SOLE ARBITRATOR**

WITNESS ON THE SIDE OF THE CLAIMANT:

Nil

WITNESS ON THE SIDE OF THE RESPONDENT:

Mr.E.Viswanathan

LIST OF EXHIBITS ON THE SIDE OF THE CLAIMANT:

Exhibits	Date	Description of the Document
C-1	10.06.2011	Contract between Claimant and Respondent.
C-2	15.07.2011	Tripartite Agreement between the Claimant, Respondent and M/s.Solar Frontier.
C-3	15.07.2011	Agreement between the Claimant, Respondent.
C-4	09.10.2013	Letter along with Debit Note issued by Respondent.
C-5	15.10.2013	E-mail issued by Claimant to Respondent.
C-6	April - May 2014	E-mails - discussions between Claimant and Respondent.
C-7	15.07.2014	Claimant's Counsel's Notice to the Respondent nominating Arbitrator.
C-8	26.08.2014	Respondent's Reply to the Claimant's Counsel's Notice.
C-9	06.11.2014	Petition in O.P.No.111 of 2015.

C-10	April 2015	Counter Affidavit filed by the Respondent in O.P.No.111 of 2015
C-11	11.12.2015	Order in O.P.No.111 of 2015

LIST OF EXHIBITS ON THE SIDE OF THE RESPONDENT:

Exhibits	Date	Description of the Document
R-1	10.08.2011	Letter sent by Claimant to Respondent.
R-2	04.07.2011	Letter sent by Claimant to Respondent.
R-3	29.09.2011 and 17.11.2011	Letters of Credit.
R-4	26.11.2011	Bill of Lading.
R-5	28.10.2011	Bank Statements.
R-6	15.07.2011	Tripartite Agreement.
R-7	15.07.2011	Bilateral Agreement.

Dated at Chennai on this the 04<sup>th</sup> day of October 2018.

  
**MR. JUSTICE R.S. RAMANATHAN (RETD)**  
**SOLE ARBITRATOR**