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

Pronounced on : 17 September 2024

\+ ARB. A. (COMM.) 15/2024

DIRECTOR GENERAL PROJECT VARSHA .....Appellant

Through: Mr. K.K. Venugopal, Sr. Advocate with Ms. Aishwarya Bhati, ASG and Mr. Kapil Arora, Mr. P. Veer Misra, Ms. Palak Nagar, Ms. Kajal Arora, Mr. Siddhant Kohli, Mr. Kartik Sharma, Ms. Anuradha and Mr. Aryaman Vachher, Advocates.

versus

NAVAYUGA VAN OORD JV .....Respondent

Through: Mr. Saurav Agrawal, Mr. Shantanu Agarwal, Mr. Aadya Chawla, Mr. Harshit Malik, Mr. Manas Arora, Ms. Chandreyee Maitra, Ms. Sulekha Agarwal and Ms. Allaka, Advocates.

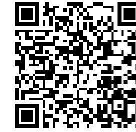
CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

JUDGMENT

% **17.09.2024**

1. Consequent on completion of hearing, this Court, on 12 September 2024, allowed the present appeal and set aside the impugned Order dated 10 January 2024 passed by the learned Arbitral Tribunal, presently *in seisin* of the disputes between the parties, for reasons to follow.

2. This judgment sets out the reasons for the decision.



3. In order to avoid prejudice to the parties, the order dated 12 September 2024 and the present judgment are being released together, on 17 September 2024.

The Dispute

4. Arbitral proceedings are presently ongoing between the respondent Navayuga-Van OORD JV as the claimant and the appellant Director General Project Varsha, of the Indian Navy, as the respondent. An application under Section 17[1] of the Arbitration and Conciliation Act, 1996[2] stands decided by the learned Arbitral Tribunal, comprising three learned arbitrators, by order dated 10 January 2024. This appeal, under Section 37(2)(b)[3] of the 1996 Act, assails the said order.

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[1] **17. Interim measures ordered by arbitral tribunal.—**

(1) A party may, during the arbitral proceedings, apply to the arbitral tribunal—

(*i*) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(*ii*) for an interim measure of protection in respect of any of the following matters, namely—

(*a*) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(*b*) securing the amount in dispute in the arbitration;

(*c*) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(*d*) interim injunction or the appointment of a receiver;

(*e*) such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient,

and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it.

(2) Subject to any orders passed in an appeal under Section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were an order of the court.

[2] "the 1996 Act", hereinafter

[3] (2) An appeal shall also lie to a court from an order of the arbitral tribunal—

(*a*) accepting the plea referred to in sub-section (2) or sub-section (3) of Section 16; or

(*b*) granting or refusing to grant an interim measure under Section 17

5. I have heard Mr. K.K. Venugopal, learned Senior Counsel for the appellant and Mr. Saurav Agrawal, learned counsel for the respondent, at length.

Facts

6. The appellant floated a tender, in November 2016, for construction of the outer Harbour Package at Project Varsha, South-West of Visakhapatnam, Andhra Pradesh. The respondent Joint Venture emerged as the successful bidder, and Letter of Acceptance was issued to the respondent by the appellant on 24 October 2017. This culminated in a contract dated 19 December 2017.

7. As required by the contract, the respondent issued, in favour of the appellant, two Performance Bank Guarantees[4] dated 18 November 2017 and 29 November 2017 for ₹ 292.54 crores and ₹ 74,16,97,410/– respectively, an Advance Bank Guarantee[5] dated 9 December 2017 for ₹ 188,82,87,026/– and four Retention Money Bank Guarantees[6] for ₹ 32 crores, 3.7 crores, 22.5 crores and 20 crores. The impugned order restrains the appellant from invoking these Bank Guarantees[7], for a total amount of ₹ 633,73,84,436/–.

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[4] "PBGs" hereinafter
[5] "ABG" hereinafter
[6] "RBGs" hereinafter
[7] “BGs”, hereinafter

8. It is necessary, here, to reproduce the relevant recitals contained in the BGs furnished by the respondent:

> PBGs:
>
> "In consideration of office of the Director General, Project Varsha, IHQ MoD (Navy), New Delhi -110011 acting on behalf of the President of India (hereinafter referred as "the Employer") having entered into a contract No. DGV /0113/OHMW/01 dated 24.10.2017 for "Construction Of Outer Harbour for Project Varsha" (hereinafter referred to as the said Contract) with M/s. Navayuga-Van Oord JV, Plot No.379, Road No. 10, Jubilee Hills, Hyderabad-500033, hereinafter referred to as the "Contractor" for Works of the said Contract to the said Contractor and whereas the Contractor has undertaken to produce a bank guarantee for ten percent (10%) of total Contract value amounting to Rs.292,54,00,000/- (Rupees Two Hundred Ninety Two Crores and Fifty Four Lakhs only) to secure its obligations to the Employer.
>
> We the Union Bank of India, Industrial Finance Branch-Hyderabad, First floor, The Grand, Raj Bhavan Road, Somajiguda, Hyderabad - 500 082, Telangana, having our registered office at Union Bank Bhavan, 239, Vidhan Bhavan Marg, Narimanpoint, Mumbai - 400 021, hereby expressly, irrevocably and unreservedly undertake and guarantee as principal obligors on behalf of the Contractor that, in the event that the Employer declares to us that the Works have not been supplied according to the Contractual obligations under the aforementioned Contract, we will pay you, on demand and without demur, all and any sum up to a maximum of Rs.292,54,00,000/- (Rupees Two Hundred Ninety Two Crores and Fifty Four Lakhs only).
>
> l. Your written demands shall be conclusive evidence to us that such repayment is due under the terms of the said Contract. We undertake to effect payment upon receipt of such written demand."
>
> ABG
>
> "1. With reference to contract No.DGV/0113/0HMW/01 dated 24.10.2017 for "Construction of Outer Harbour for Project Varsha" concluded between the Director General, Project Varsha, IHQ MoD (Navy), New Delhi-110011 acting on behalf of the President of India, hereinafter referred to as "the Employer" and M/s.Navayuga-Van Oord JV, Plot No.379, Road No. 10, Jubilee Hills, Hyderabad-500033 hereinafter referred to as "the

Contractor" for the Works as detailed in the above Contract which is hereinafter referred to as "the Said Contract" and in consideration of the Employer having agreed to make an advance payment in accordance with the terms of the Said Contract to the said Contractor, we the Union Bank of India, Industrial Finance Branch - Hyderabad, First floor, The Grand, Raj Bhavan Road, Somajiguda, Hyderabad- 500 082, Telangana, having our registered office at Union Bank Bhavan, 239, Vidhan Bhavan Marg, Narimanpoint, Mumbai - 400 021, hereinafter called "the Bank" hereby irrevocably undertake and guarantee to you that if the Said Contractor would fail to deliver the Works in accordance with the terms of the Said Contract for any reason whatsoever or fail to perform the Said Contract in any respect or should whole or part of the said on account payments at any time become repayable to you for any reason whatsoever, *we shall, on demand and without demur* pay to you all and any sum up to a maximum of Rs.199,94,47,196/- (Rupees One Hundred Ninety Nine Crores Ninety Four Lakhs Forty Seven Thousand One Hundred Ninety Six only) paid as advance to the Said Contractor in accordance with the provisions contained in Clause 14.2 of the Said Contract.

2. *We further agree that the Employer shall be the sole judge as to whether the Contractor has failed to deliver the Works in accordance with the terms of the Said Contract or has failed to perform the Said Contract in any respect or the whole or part of the advance payment made to Contractor has become repayable to the Employer and to the extent and monetary consequences thereof by the Employer*.

3. We further hereby undertake to pay the amount due and payable under this Guarantee *without any demur merely on a demand from the Employer stating the amount claimed. Any such demand made on the Bank shall be conclusive and binding upon us as regards the amounts due and payable by us under this Guarantee and without demur*. However, our liability under this Guarantee shall be restricted to an amount not exceeding Rs.199,94,47,196/- (Rupees One Hundred Ninety Nine Crores Ninety Four Lakhs Forty Seven Thousand One Hundred Ninety Six only)."

(Emphasis supplied)

<u>RBGs</u>

"1. In consideration of Director General, Project Varsha, IHQ MoD (Navy), New Delhi-110011 acting on behalf of the President of India (hereinafter referred as "the Employer" which expression shall, unless repugnant to the context or meaning thereof, include its successors, administrators and assignees) having awarded to

M/s. Navayuga-Van Oord JV, having its Office at Plot No.379, Road No.10, Jubilee Hills, Hyderabad - 500 033 (hereinafter referred as "the contractors" which expression shall, unless repugnant to the context or meaning thereof, include its successors, administrators and executors), vide Contract No-DGV/0113/OHMW/01 dated 24.10.2017 amounting to Rs. 3635,35,85,389/- for the works know as "Construction of Inner/Outer Harbour" for Project Varsha (hereinafter referred to as "the Contract").

2. We, Union Bank of India, Industrial Finance Branch – Hyderabad, First floor, The Grand, Raj Bhavan Road, Somajiguda, Hyderabad - 500 082, Telangana, have been informed by the Contractor that pursuant to provisions in Conditions of the aforesaid Contract, Retention Money is to be deduced at the rate Ten (10) percent from each Interim Payment Certificate, subject to a maximum of Ten (10) percent of the Accepted Contract Amount. However, no deduction for the Retention Money shall be made from the Interim Payment Certificates provided the Contractor submits an unconditional Bank Guarantee (the "RMBG") for an amount equal to the Retention Money to be withheld on the anticipated certified amount for the following quarter, pursuant to Sub-Clause 14.3 of Contract conditions.

3. At the request of the Contractor, we, the undersigned Union Bank of India, Industrial Finance Branch - Hyderabad, First floor, The Grand, Raj Bhavan Road, Somajiguda, Hyderabad - 500 082, Telangana, having our registered office at Union Bank Bhavan, 239, Vidhan Bhavan Marg, Narimanpoint, Mumbai-400 021, (hereinafter referred to as "the Bank") which expression shall, unless repugnant to the context or meaning thereof, include its successors, administrators, executors, representatives and assignees, do hereby irrevocably undertake to pay you, the Beneficiary/Employer, *without any demur, reservations, recourse, contest or protest and/ or without referring to any other sources including the Contractor, merely on a written demand from the Employer stating that the claimed amount is due by way of breach by the said Contractor of any of the terms or conditions contained in the aforesaid Contract or by reason of the Contractor's failure to perform the said Contract*, any sum or sums not exceeding Rs. 32,00,00,000/- (Rupees Thirty Two Crore only) (the "guaranteed amount" or "Guarantee") [10% of the anticipated certified amounts for the · following Quarter]. Any and all monies, but not exceeding Rs.32,00,00,000/- (Rupees Thirty Two Crore only) [Ten (10) percent of the Accepted Contract Amount] at any time up to 01 Sep 2023 (End of the Defect, Notification Period] any such demand made by the Employer on the Bank shall be conclusive and binding no withstanding any difference between the Employer and the

> Contractor or any dispute pending before any Court, Tribunal, Arbitrator or any other Authority. We hereby agree that the Guarantee herein contained shall be irrevocable and shall continue to be enforceable till the Employer discharge this Guarantee."
>
> (Emphasis supplied)

9. Disputes arose between the appellant and the respondent. On the premise that it anticipated coercive action by the appellant, the respondent approached this Court by means of OMP (I) (Comm) 208/2022[8], seeking two reliefs. The first was that an independent agency be appointed to work out an effective way forward and to enable expeditious completion of the contractual works, during which period the appellant be restrained from taking coercive steps against respondent. The second was a restraint against the appellant invoking or encashing the BGs furnished by the respondent during the pendency of the arbitral proceedings.

10. A learned Single Judge of this Court disposed of OMP (I) (Comm) 208/2022 by judgment dated 30 June 2022, which concluded, in para 36, thus:

> "36. It was conceded on behalf of the respondent that the petitioner is continuing to work on the site even after April, 2022 and no express letter indicating termination of Contract has been served upon the petitioner. An ambivalent situation prevails wherein the respondent though has served Notice of Correction and the Delay Damages Notice, but has yet not served any Notice of termination or has notified the petitioner to stop the work at site after April, 2022. Therefore, as held in the cases of ***Hindustan Construction Limited***[9] that though invocation of Bank Guarantee cannot be prohibited or injuncted, it is held to be a fit case where the respondent is directed to give a prior Notice of 15 days

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[8] **Navayunga-Van OORD JV v UOI**

[9] This appears to be a compendious reference to orders dated 30 May 2014 and 12 February 2015 passed in OMP 536/2014 **(Hindustan Construction Co Ltd v NHPC Ltd)** and order dated 28 May 2015 passed in FAO (OS) 131/2015 **(NHPC Ltd v Hindustan Construction Co Ltd).**

> expressing his intention to revoke the Bank Guarantee before revocation of Bank Guarantees."

11. The respondent challenged the aforesaid judgment dated 30 June 2022, of the learned Single Judge, before a Division Bench of this Court by way of FAO (OS) (Comm) 175/2022[10]. The Arbitral Tribunal, which has come to pass the impugned Order, was constituted in the meanwhile on 2 January 2023.

12. The respondent filed an application before the learned Arbitral Tribunal under Section 17 of the 1996 Act seeking, *inter alia*, restraint against the appellant invoking or encashing the BGs. In that view of the matter, the Division Bench of this Court disposed of FAO (OS) (Comm) 175/2022, on 16 March 2023, in the following terms:

> "In view of the foregoing, the present appeal is dismissed as not pressed, and the interim order dated 18.07.2022, passed by this Court, in the instant appeal, is hereby vacated.
>
> Needless to state that the appellant is at liberty to prosecute the aforesaid application under Section 17 of the Arbitration and Conciliation Act, 1996, before the Arbitral Tribunal, in accordance with law.
>
> The appeal as aforestated, is dismissed as not pressed, and disposed of accordingly. Pending applications also stand disposed of."

13. By the presently impugned Order dated 10 January 2024, the learned Arbitral Tribunal has allowed the respondent's application and has restrained the appellant from invoking any of the BGs, pending disposal of the proceedings by the learned Arbitral Tribunal.

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[10] **Navayunga-Van OORD JV v UOI**

14. The appellant is in statutory appeal before this Court, under Section 37(2)(b) of the 1996 Act.

Reasoning of the learned Arbitral Tribunal

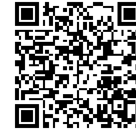
15. Paras 61 to 112 of the impugned order set out the reasoning of the learned Arbitral Tribunal in arriving at its conclusion.

16. In paras 63 to 72, the learned Arbitral Tribunal has set out the law relating to injunctions against invocation of BGs and has referred, *inter alia*, to the judgments of the Supreme Court in ***Ansal Engineering Projects Ltd v Tehri Hydro Development Corporation Ltd***[11], ***Standard Chartered Bank v Heavy Engineering Corporation Ltd***[12], ***Himadri Chemicals Industries Ltd v Coal Tar Refining Co***[13], ***Vinitec Electronics Pvt Ltd v HCL Infosystems Ltd***[14] and ***Gujarat Maritime Board v Larsen and Toubro Infrastructure Development Projects Ltd***[15].

17. Thereafter, in paras 73 and 74, the impugned order delineates the precise issue arising for consideration thus:

> "73. On the contrary, at present, what needs to be determined is only whether the Tribunal shall be justified in granting stay of the invocation of the 7 (seven) BGs in question furnished in favour of the Respondent by the Bank at the Claimant's behest. This consequently, requires a two-fold examination. Firstly, it needs to be ascertained whether or not the 7 (seven) BGs in question are in essence unconditional and if not, whether the Respondent validly invoked the said BGs by and through the means of the BG

[11] **(1996) 5 SCC 450**
[12] **(2020) 13 SCC 574**
[13] **(2007) 8 SCC 110**
[14] **(2008) 1 SCC 544**
[15] **(2016) 10 SCC 46**



> Invocation Letters dated 06 July 2022 duly in accord with the prescribed conditions. Secondly, whether any of the exceptions of egregious fraud or special equities prima facie come into play to support the Claimant's prayer for stay of invocation of the subject BGs.
>
> 74. Be it noted, learned Senior Counsel for the Claimant has not pressed the contention of fraud as a ground to seek an injunction on the invocation of the BGs. The Tribunal, therefore, need not delve into the same. However, the main thrust of the arguments advanced on behalf of the Claimant is that the invocation of the BGs in question not being in accordance with the terms thereof, is bad in law. The second plank of the Claimant's contention is that special equities exist in favour of the Claimant as irreparable harm and injury will be caused to it if the invocation and encashment of the BGs is not restrained."

18. From paras 75 to 97, the learned Arbitral Tribunal addresses the first aspect of whether the invocation letter dated 6 July 2022 was in terms of the concerned BGs.

19. For this purpose, the learned Arbitral Tribunal first refers to the decision of the Supreme Court in ***Hindustan Construction Company Ltd v State of Bihar***[16] and the judgment of a learned Single Judge of this Court in ***Basic Tele Services Ltd v UOI***[17], which was upheld by the Division Bench in ***UOI v Basic Tele Services Ltd***[18]. The impugned Order extracts the clauses of the various BGs. Having done so, the learned Arbitral Tribunal proceeds, in paras 87 to 98, to examine whether the letter of invocation dated 6 July 2022 was in conformity with the requirements of the BGs. In this regard, the learned Arbitral Tribunal holds in paras 92, 93 and 95 to 98 as under:

> "92. Simultaneously, however, on a plain reading of the terms of the respective BGs, it is also quite clear that the payment under:

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[16] **(1999) 8 SCC 436**
[17] **2009 (112) DRJ 688 (Del),** hereinafter **"Basic Tele Services-I"**
[18] **2012 SCC Online Del 4499,** hereinafter **"Basic Tele Services-II"**

(i) the 2 (two) PBGs is provisional to a situation or event whereby the Respondent/Employer makes an explicit declaration that the works have not been supplied by the Claimant/Contractor in accordance with the Contractual obligations;

(ii) the ABG is premised on circumstances where either the Claimant/Contractor has failed to deliver the works in accordance with the terms of the subject Contract or has failed to perform the subject Contract in any respect or when the whole or part of the advance payments become repayable to the Respondent/Employer;

(iii) the 4 (four) RMBGs is qualified to a situation whereby the Respondent/Employer again makes an explicit declaration that the Claimant/Contractor has committed a breach of the subject Contract and that the amount claimed under the RMBGs has become due by reason of breach by the Claimant/Contractor.

93. There are, therefore, pre-requisite stipulations expressly embedded in the 7 (seven) BGs specifying the foundational circumstances and consequent declarational requirements to be made by the Respondent that resultantly govern the Respondent's entitlement to invoke and get the BGs en-cashed in the first place. *The Tribunal may hasten to state that the aforesaid foundational circumstances are imperative for invoking the BGs in question and form the basis for invocation expressly stated in the BGs itself, but the same are conspicuously absent in the BG Invocation letters dated 06 July 2022. The Respondent/beneficiary, while striving to invoke the BGs in question, has even failed to assert in the said Invocation letters that the foundational circumstances have arisen, which, thus, makes such invocation invalid in law*.

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95. In the present case, it is manifest that the BG Invocation letters dated 06 July 2022, all of which are similarly worded, invoke the BGs in question on the assertion that the "Notice for Termination of contract has been issued" to the Claimant and there has been a "breach of contractual terms and conditions". It is, however, clear that *the said BG Invocation letters nowhere even aver that the demand against the:*

(i) 2 (two) PBGs is being made due to non-supply of works by the Claimant in accordance with the Contractual obligations;

> *(ii) ABG is being made due to the Claimant's failure to perform/deliver the works in accordance with the terms of the subject Contract or that the whole or part of the advance payments have become repayable to the Respondent;*
>
> *(iii) 4 (four) RMBGs is being made due to the Claimant's breach of the subject Contract and, resultantly, the amount claimed under the RMBGs has become due consequent to such breach.*

96. *The Tribunal, therefore, is of the considered view that the wording of the BG Invocation Letters dated 06 July 2022 is not in accord with the requirements of the 7 (seven) BGs in question.* That being the case, the invocation of the BGs is not in accordance with the terms thereof and is, accordingly, untenable in law.

97. In addition to the above, *de hors* the wording of the BG Invocation Letters dated 06 July 2022, it needs to be accentuated that *the said Invocation Letters contain an identical paragraph in the form of paragraph 4, which quotes a distorted portion of the clause contained in the 4 (four) RMBGs, despite the fact that the 2 (two) PBGs and the ABG nowhere contain such a similarly worded clause.* Besides, *the fact remains that the Respondent also has placed on record subsequent letter dated 13 July 2022 with respect to one of the PBGs issued by the State Bank of India.*

98. These two aforesaid facets, on a combined appreciation of all facts and circumstances, reinforce and substantiate the Tribunal's finding that the invocation of the 7 (seven) BGs in question by the Respondent is not in accordance with the terms thereof and is, accordingly, unsustainable in law."

(Emphasis supplied)

20. Thus, the learned Arbitral Tribunal has found the letter dated 6 July 2022 addressed by the appellant to the concerned Banks seeking to invoke the BGs not to be in conformity with the requirements of the BGs themselves.

21. The impugned Order proceeds, thereafter, to examine the aspect of "special equities". There can be no dispute that, even where the

letter of invocation is in terms of the Bank Guarantee, its invocation may be injuncted, where there exist "special equities" justifying such injunction.

22. For this purpose, the learned Arbitral Tribunal first observes that, in ***Ansal Engineering Projects***, the Supreme Court has held interference with the enforcement of unconditional BGs to be justified where egregious fraud or special equities are found to exist. The learned Arbitral Tribunal proceeds to rely on the judgment of this Bench in ***CRSC Research and Design Institute Group Company Ltd v Dedicated Freight Corridor Corporation of India Ltd***[19] as well as the judgment of the Division Bench of this Court in the appeal preferred thereagainst in ***CRSC Research and Design Institute Group Company Ltd v. Dedicated Freight Corridor Corporation of India Ltd***[20].

23. In para 103, the impugned Order notes that while in ***BSES Ltd v Fenner India Ltd***[21], the Supreme Court held irretrievable injury and irretrievable injustice as species of the "special equities" genus, in some other cases they were held to be distinct and different. The learned Arbitral Tribunal thereafter refers in paras 104 and 105 to the decision of this Court in ***Hindustan Construction Co. Ltd v National Hydro Electric Power Corporation Ltd***[22], and ***Hitachi Energy India Ltd v Sterlite Power Transmission Ltd***[23].

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[19] **2020 SCC Online Del 2100**
[20] **MANU/DE/1803/2020, 2020 SCC OnLine Del 1526**
[21] **(2006) 2 SCC 728**
[22] **MANU/DE/1625/2020**
[23] **(2023) 2 Arb.LR 311**

24. Having thus cited judicial authorities on the point, the learned Arbitral Tribunal proceeds, in paras 106 to 112, to hold that the consideration of special equities would also justify injunctive invocation of the BGs provided by the respondent as, if they were invoked, the respondent would be subjected to irreversible financial prejudice. These paragraphs merit reproduction thus:

> "106. The test of special equity or irrevocable injustice is a matter of assessment by the concerned adjudicatory body on the particular facts presented to it while seeking stay of invocation. *The injury or injustice must be irrevocable, irremediable and irreversible.* The party seeking an order for restraint must be able to demonstrate that the invocation and consequent payment by the bank to the intended beneficiary would set the party back *irreversibly in monetary terms, which it may not be able to recover in the foreseeable future.*
>
> 107. Primarily, therefore, whether or not special equities exist depend on the facts and circumstances of each case and *in the case at hand, the facts and circumstances of the case cumulatively demonstrate special equities in favour of the Claimant/Applicant*, for the Tribunal is of the considered view that financial burden of almost Rs. 633 crores ought not to be imposed upon the Claimant/Applicant by allowing the Respondent to encash the BGs in question. *The special equity also stands satisfied by reason of the Claimant facing an immediate and huge financial distress if the payment is made by the concerned Banks, for it is not the mandate of the law that encashment of a BG be permitted at the drop of a hat with eyes shut and with a obscured vision ignoring the totality of the facts and circumstances. Since irretrievable injustice is likely to ensue to the Claimant*, invocation of the BGs in question certainly deserves to be restrained.
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> 108. This finding of the Tribunal gets further bolstered by the Claimant's Letter dated 11.07.2022 to the Respondent in reply to the BG Invocation Letters containing a previous *ante-litem motam* statement whereby the Claimant highlighted to the Respondent that it has incurred huge expenditure for executing the construction under the subject Contract and invocation of the BGs in question shall cause immense prejudice. The relevant part of the Claimant's said Letter dated 11.07.2022 is reproduced below:
>
>> "Thus, as on the date, the Employer is in possession of bank guarantees, i.e., CPBGs ABGs and RMBG, from the

Contractor for a total value of Rs. 633,73,84,4361-. If such invocation· of the above stated Bank Guarantees occurs, then the same is likely to cause immense prejudice to the Contractor.

4. It is stated that the Contractor has incurred huge expenditures for executing the construction under the contract, despite the Employer's wilful default of its payment obligation”

109. *Clearly, special equities emerge in favour of the Claimant as its financial position shall definitely become precarious and it will be left crippled, financially speaking,* if the Respondent is permitted to realize the huge amounts covered under the 7 (seven) BGs in question furnished by the Claimant and a situation would arise in which restitution of the Claimant would become near impossible. In this context, it is profitable to allude to the decision of the Madras High Court in ***National Federation of Farmers Procurement Processing and Retailing Cooperatives of India Limited v NLC India Ltd***[24]., wherein it has been held thus:

"71. The applicant/petitioner has pleaded irretrievable injury in the affidavit filed in support of this application as they have pleaded that if the bank guarantee for the huge sum, if invoked, they will be put to irreparable injury. The first respondent has also not disclosed in their counter affidavits, the details of the losses suffered by them on account of their alleged claim that the applicant/petitioner had submitted a fabricated document for the purpose of satisfying the tender conditions. The value of the contract if awarded to any bidder will be a huge one and the bank guarantee amount to be given along with the tender documents by any bidder is also for a huge sum of Rs.21,88,12,0001/- for 200 MW. Even though, the applicant / petitioner need not be put on notice by the first respondent before invoking the bank guarantee, this Court is of the considered view that being a huge sum and that too when the contract has not been awarded to the applicant/ petitioner, the invocation of the bank guarantee, even before the adjudication of the arbitral proceedings, will certainly cause the applicant, irretrievable harm / injustice. The Doctrine of proportionality, which is a special equity exception for granting injunction from invoking the bank guarantee also comes into play as the first respondent may not have suffered a huge loss equivalent to the value of the bank guarantee which is for a sum of Rs.21,88,12,000/-.

[24] MANU/TN/5108/2023

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> 74. For the foregoing reasons, since the applicant / petitioner has satisfied that irretrievable injustice will be caused to them and has also satisfied the special equities exception of proportionality for the grant of an order of injunction from invocation of bank guarantee, this Court is inclined to allow this application by granting an order of injunction against the first respondent from invocation of the bank guarantee as prayed for in this application"

110. Yet again, in the case of ***Chennai Metro Rail Limited v Transtonnelstroy-Afcons (JV) and Others***[25], the Madras High Court duly noted that likely irretrievable damage may entail on the Contractor - the Respondent therein if the beneficiary / Employer is allowed to en-cash the huge amounts involved in the BG. The relevant observations in this regard are as follows:

> "27. xxxx
> In case, the Appellant is allowed to encash the Bank Guarantee for Rs.117.5 Crores and later on it is found by the Arbitral Tribunal that no money is due by the respondents to the Appellant or a much lesser money is due by the respondents when compared to the Bank Guarantee value, the respondents will find it difficult to recover the unjust enrichment made by the Appellant as the amount involved is a huge sum. A balancing act will have to be done in this case as admittedly the Appellant has not crystallized its losses and there is no break-up details given by it for its alleged losses and there is also no prima-facie evidence to show that the respondents owe the Appellant the Bank Guarantee value. In the case on hand, the Arbitral Tribunal has rightly applied the test of balance of convenience and has granted the order of injunction restraining the Appellant from invoking the Bank Guarantee and at the same time protected the interest of the Appellant too by directing the respondents to keep the Bank Guarantee alive till the disposal of the Arbitration."

111. Therefore, in the considered opinion of the Tribunal, in the instant Arbitration matter, the two exceptions against the invocation of BGs stand satisfied, namely, the Respondent's BG Invocation Letters dated 06 July 2022 are not in terms of the BGs in question and special equity exists in favour of the Claimant/Applicant.

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[25] **2021 SCC OnLine Mad 5637**

> 112. Lastly, it is worthwhile to mention that the Tribunal has also duly noted the other authorities relied upon by the learned Senior Counsel for the Respondent to bolster the Respondent's case. However, it needs to be stated that the said decisions relate to the general position of law and deal with facts which are not applicable to the present case. As a result, the Tribunal is firmly of the view that the said judgments are distinguishable on facts and do not come to the aid of the Respondent."
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> (Emphasis supplied)

Rival Contentions

Submissions of Mr. K.K. Venugopal for the appellant

25. Arguing for the appellant, Mr. Venugopal submits that the appellant was constrained to terminate the contract as the respondent had defaulted in ensuring proper and timely performance of the contract. Having thus justifiably terminated the contract, Mr. Venugopal submits that the appellant had equally justifiably invoked the BGs furnished by the respondent.

26. Mr. Venugopal submits that the decision of the learned Arbitral Tribunal is in the teeth of the law relating to injunction against invocation of unconditional BGs. He submits that the only circumstances in which invocation of an unconditional Bank Guarantee can be stayed is where there exist special equities, egregious fraud or irretrievable injustice. Where a BG is conditional, invocation may additionally be stayed where the invocation of the BG is not in terms of the BG itself.

27. Mr. Venugopal submits that the learned Arbitral Tribunal is in serious error in holding that the letters dated 6 July 2022, issued by the appellant to the Banks whereby BGs provided by the respondent were invoked, was not issued in terms of the BGs themselves. He has taken me through the said letters and submits that the most serious error in the impugned Order, which stands reflected in para 87 thereof, is that, while reproducing the paragraphs of the letters of invocation, the opening paragraphs 1 and 2 have been omitted. This, submits Mr. Venugopal, is a serious lapse on the part of the learned Arbitral Tribunal inasmuch as, in para 1 of the letters dated 6 July 2022, the appellant had also referred to the notice dated 6 July 2022 whereby the contract between the appellant and the respondent was terminated. This notice of termination, he submits, set out, in detail, the various defaults committed by the respondent and how, on that basis, the appellant had become entitled not only to terminate the agreement but also to invoke the BGs and recover the amounts guaranteed thereunder. If this notice of termination were taken into consideration, Mr. Venugopal submits that it could never be said that the letters of invocation, simultaneously issued on 6 July 2022, did not contain the requisite recitals as envisaged in the BGs. Mr. Venugopal has taken me in detail through the notice of termination of the contract dated 6 July 2022.

28. Thus, submits Mr. Venugopal, the learned Arbitral Tribunal was in serious error in holding that the letters dated 6 July 2022, whereby the BGs furnished by the respondent were invoked were not issued in terms of the Bank Guarantee themselves.

29. Adverting next to the finding that injunction of invocation of the BGs was justified on the ground of special equities, Mr. Venugopal submits that the only ground on which the learned Arbitral Tribunal held in favour of the respondent on the aspect of special equities is that, were the amounts covered by the BGs to be recovered by the appellant, the respondent would be submitted to serious and irretrievable financial prejudice and would not be able to recover the amount so realized even if the respondent were to ultimately succeed in arbitration. He submits that, besides being factually incorrect, there is no basis for this finding, which is entirely presumptive in nature. There is no empirical data, submits Mr. Venugopal, on the basis of which the finding that the invocation of BGs would result in serious financial prejudice to the respondent, could be supported.

30. On facts, Mr. Venugopal submits that, as the appellant is a wing of the Indian Navy, there is no question of the respondent being unable to reap the benefit of any arbitral award, in the event that the award goes in its favour. He further submits that the respondent is engaged in several large contracts of considerable amounts and cannot therefore be said to be in any kind of precarious financial position, as would result in irretrievable prejudice to it, were the BGs to be invoked.

31. The reliance by the learned Arbitral Tribunal on the principle of special equities is also therefore, he submits, misguided.

32. These being the only grounds on which the impugned Order has come to be passed, Mr. Venugopal submits that the Order deserves to be set aside.

Submissions of Mr. Agrawal, learned counsel for the respondent

33. Arguing for the respondent, Mr. Agrawal has sought to contend that the finding, in the impugned Order, that special equities exist, as would justify a restraint on invocation of the BGs provided by the respondent, is justified on facts. He submits that, owing to intervening circumstances beyond the control of the respondent, including the COVID-19 pandemic, it had become impossible to complete the project within the originally envisaged contractual period of 42 months. Inasmuch as the contractually stipulated period for completion of the work had been envisaged on the basis of a report of the Indian Institute of Technology[26], Madras, the respondent also referred the matter to Prof Nallayarasu of IIT Madras, who opined that it would take 88 months to complete the project and that the originally stipulated contractual period of 42 months had become impossible of performance.

34. The respondent had presented the aforesaid report of Prof Nallayarasu to the appellant under cover of a letter dated 2 February 2022. Though, prior to the submission of the said opinion, the appellant and respondent were actively in discussion on the aspect of

[26] "IIT", hereinafter

extension of the period of contract, consequent on submission of the report of Prof Nallayarasu by the respondent, all discussions ceased.

35. In these circumstances, the respondent moved this Court by way of OMP (I) (Comm) 208/2022 under Section 9 of the 1996 Act, seeking the appointment of an agency to examine the report of Prof Nallayarasu to work out a way forward to complete the work, and to restrain the appellant from taking coercive steps against the respondent by way of invocation of the BGs.

36. OMP (I) (Comm) 208/2022 was disposed of by a coordinate Bench of this Court by the order dated 30 June 2022 *supra*. Though the respondent assailed the judgment dated 30 June 2022 of the coordinate Bench before the Division Bench in FAO (OS) (Comm) 175/2022, the appellant, in the interregnum, terminated the contract on 6 July 2022.

37. The Division Bench, in its initial order dated 18 July 2022, directed *status quo* to be maintained. The respondent, thereafter, issued a notice to the appellant under Section 21 of the 1996 Act on 15 October 2022, resulting ultimately in the constitution of the learned three-member Arbitral Tribunal, which came to pass the impugned Order on 10 January 2024. The respondent, therefore, moved an application before the learned Arbitral Tribunal under Section 17 of the 1996 Act, seeking, *inter alia*, a restraint against the appellant invoking the BGs.

38. The application was scheduled for hearing by the learned Arbitral Tribunal on 16 March 2023. In that view of the matter, the Division Bench disposed of FAO (OS) (Comm) 175/2022, reserving liberty with the respondent to prosecute its interim prayer before the learned Arbitral Tribunal under Section 17.

39. Before the learned Arbitral Tribunal, the appellant, on 16 March 2023, gave an undertaking that it would not take coercive steps against the BGs. The learned Arbitral Tribunal thereafter proceeded to hear the respondent's Section 17 application, resulting in the passing of the impugned Order on 10 January 2024.

40. Mr. Agrawal also placed reliance on the Notice to Correct issued by the appellant to the respondent on 3 December 2021 under Clause 15.1 of the GCC. He submits that, by the said notice, the appellant imposed, on the respondent, an entirely unrealistic and impractical requirement of achieving a progress of 2.5% average per month for the period upto March 2022. It is worthwhile to reproduce the said letter in *extenso*, thus:

> "Contractor's Representative
> NECVO JV
> NAOB, Project Varsha,
> Rambilli Mandal, Visakhapatnam District,
> Andhra Pradesh – 531061.
>
> Date: 03 December 2021
> Our Ref: 200807/OH/42/13065
> Your Ref: None
>
> Kind Attention: Mr. C S Nagaraja
>
> Dear Sir,
>
> **Project Varsha**

Outer Harbour- Notice to Correct as per Sub Clause 15.1 of General Conditions of Contract (GCC)

1. This refers to

a. Engineer's letter 200807 / OH/42/11992 dated 11 March 2020.

b. NECVO's letter NECVO-HCI-L-1374 dated 02 March 2020.

c. Engineer's letter 200807/OH/42/11938 dated 18 February 2020.

d. Engineer's letter 200807/OH/31/11881 dated 28 January 2020- Sub-Clause 8.6 Rate of Progress.

e. Engineer's letter 200807/OH/31/11868 dated 23 January 2020- Delay in Works as on 31 December 2019.

2. After almost 21 months of our letter referred in para-1 (c) above, it is a serious concern that the Contractor's failure to perform his obligations under the Contract continues. The details are provided in the following paragraphs.

3. Non-performance/further slippage in performance is observed as listed below:

a. <u>Safety and Quality (QHSE)</u>-List of letters which captures concerns during fortnightly QHSE meetings are enclosed as Annexure I. Some of the main concerns are:

i. Slippage in implementation of site safety plan which is reflected in a sub-optimal HSE score of 61% in July 2021 whereas the desirable HSE score is 80%.

ii. Absence of key site personnel in the QHSF, organization chart.

iii. Absence of the Contractor's representative at site for 50% duration in the period from January 2021 till date. As per Sub Clause 4.3 temporary absence is only allowed subject to appointment of suitable replacement with Engineer's prior consent.

iv. Poor workmanship in piling resulting in many piles showing defects.

v. Delay in testing of piles.

vi. Delay in application of protective coat to exposed reinforcement of piles and precast elements from corrosion.

vii. Sub-optimal action in carrying out Sand Stacking Area (SSA) monitoring surveys and reinstating beach profiles after finding that trigger levels have been breached. Non-compliance in this regard may become a serious impediment in renewal of environmental clearance for the overall project.

viii. Delay in closure of NCRs and QHSE observations.

b. Programme and Progress: The Engineer has highlighted to the Contractor, through letters at monthly intervals, his concerns regarding the accumulating delays in the Works. A revised programme with effective mitigation measures for the delays has also been sought.

To date, the Contractor has failed to provide a revised programme to the Engineer.

As on 31 October 2021, the status of the Works are as follows:

i Achieved progress is around 20% against planned progress of 92.5%

ii. Delay of 902 days (30.1 months) providing a forecast finish date of 23 August 2024 for Section 3 of the Works.

Therefore, the main concerns are:

iii. Insignificant progress achieved till date considering the due Time for Completion in accordance with Sub-Clause 8.2 to be 05 March 2022. Breach of obligation in timely completion is imminent, although it is acknowledged that the Contractor's Claim for OH006 (excluding COVID-19 pandemic events) is yet to be agreed or determined.

iv. Non-submission of revised programme in accordance with Sub Clause 8.3.

Additional pertinent points to be noted:

v. The Contractor was allowed to propose alterations in the original design to suit his preferred methods of construction. After due deliberations with the designers during the period from May to July 2021, an in-principle acceptance was provided.

vi. Some alterations, like additional width in dredged trenches of seaside toe, were allowed during the actual execution of works during the 'fair-weather working season' from October 2020 to March 2021. The Employer sought and received from the Contractor details of the progress to be achieved over this period and the equipment that the Contractor would mobilise. The Contractor had committed to achieve considerably less progress than his planned progress as per baseline programme.

vi. The conservative forecast was not achieved. Furthermore, actual progress up to September 2021 was less than 50% of the forecast. Mobilisation of Equipment were also delayed a compared to the Contractor's committed dates.

vii. With the onset of a further 'fair weather working season' from October 2021, in view of the in-principle acceptance of the Contractor's preferred means and methods, a comprehensive revised programme was sought. The Contractor has refused to provide such programme until approval of additional cost and time sought in his proposal and continues to maintain that the original design is not constructible. It is to be noted that there is no provision in the Contract for additional cost and time as sought in the proposal.

Without dilution to the above and without prejudice to the Contract, it is acknowledged that the Parties and the Engineer have been in discussion to seek to reach a solution regarding the construction challenges projected by the Contractor. Until such time that a formal agreement has been reached in this regard (including any extension of time), the Employer is willing to take a pragmatic view of the Contractor's progress against programme

with a requirement to achieve a progress of average 2.5% per month for the period up to March 2022.

4. In view of the above, in accordance with Sub Clause 15.1 of GCC, this letter is being issued as a 'Notice to Correct'. The Contractor is notified herein to make good the failures of his obligations under the Contract and to remedy such failures within the timescales as specified below:

a. Programme and progress:

i. Demonstration of achieving the required average rate of 2.5% per month progress for the period up to March 2022 after the receipt of this letter.

ii. Submission of revised programme as per Sub-Clause 8.3, within 14 days addressing Engineer's comments in letter no 13021.

b. Sand Stacking Area (SSA): Reinstate the beach profiles within a month from the receipt of this letter and conduct monthly monitoring surveys without failure in future,

c. QHSE-Satisfactory close-out of all issues within two months from receipt of this letter.

Yours sincerely

Sam Eralil

Chief Resident Engineer"

41. Mr. Agrawal points out that, on the same date, i.e. 3 December 2021, the appellant's engineer wrote to the respondent, thus:

"Contractor's Representative
NECVO JV
NAOB, Project Varsha,
Rambilli Mandal, Visakhapatnam District,
Andhra Pradesh – 531061.

Date 03 December 2021
Our Ref 200807/OH/31/13063
Your Ref NECVO-HCI-L-2212

Kind Attention: Mr. C S Nagaraja

Dear Sir,

Project Varsha
Outer Harbour – Revised Programme with suggested completion date of April 2024

1. This refers to the following:

a. Contractor's letter NECVO-HCI-L-2212 dated 02 December 2021.

b. Employer's letter DGV/0113/OHMW/Contract dated 29 November 2021.

c. Engineer's letter 200807/OH/31/13042 dated 23 November 2021.

d. Contractor's letter NECVO-HCI-L-2188 dated 18 November 2021.

e. Engineer's letter 200807/OH/31/13021 dated 06 November 2021 - Comments on revied programme.

f. Contractor's transmittal NECVO-HCI-TRN-1604 dated 29 October 2021 enclosed with revised Programme for Section 3 of the Works.

g. Engineer's letter 200807/OH/62/12992 dated 25 October 2021 - Proposal for technical issues.

h. Contractor's letter NECVO-HCI-L-2150 dated 11 October 2021 - Proposal for technical issues.

i. Engineer's letter 200807/OH/31/12951 dated 04 October 2021 - Revised programme.

j. Engineer's letter 200807/OH/62/12850 dated 09 August 2021.

k. Contractor's letter NECVO-HCI-L-2043 dated 04 August 2021 enclosed with Proposal for technical issues.

2. The Engineer has reviewed the Contractor's submission under letter in para 1(a) above and his comments are as follows:

<u>Comments on cover letter:</u>

a.Para-1: Please refer the Employer's letter DGV/0113/OHMW/Breakwater dated 15-Nov-21. The contents of this letter addresses comprehensively and voids the Contractor's contention of unanticipated conditions.

b. Para-2: The Engineer disagrees and refutes the Contractor's statement "Despite engaging to find a solution to these issues, none was provided to the Contractor." The Engineer and the Employer had proactively engaged with the Contractor to address / resolve his construction difficulties. Accordingly, in consultation with the Designer an in-principle acceptance of the technical proposal submitted was provided for the Contractor to proceed with his preferred means and method. Further, the Contractor's revised programme is not complying to Sub-Clause 8.2. Hence, the Contractor's statement that he submitted a programme/plan with suggested means to overcome the issues showing completion by July 2025 is incorrect and misleading. Notwithstanding the non-complaint nature of the programme, the Engineer's comments regarding matters like productivity, inadequate equipment planned, inadequate key personnel, lack of experienced manpower etc. have not been addressed.

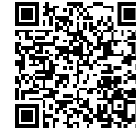
c. Para-3: The Employer's request to complete the outstanding Works by April 2024 is justified as the forecast completion indicated by the Contractor in his monthly report for October 2021 is of 23 August 2024 (per the updated programme as on 31-Oct-21). Further, the Contractor assured the Employer and the Engineer during the meeting with Vice Chief of Naval Staff (VCNS) on 22-Nov-21 that he will expedite the Works to complete by April 2024 by implementing revised techniques. Refer minutes issued by IN under letter DGV/0113/OHMW/Breakwater dated 02-Dec-21.

d. Para-4: The Contractor himself states that timelines are "unrealistic and not achievable". This makes the submission of the programme infructuous. Even whilst making the statement, the Contractor has chosen not to elaborate quantitatively how the anticipated very large quantities are not fitting in against the timelines and no reasons have been provided on why the several dependencies are not in his control. Please clarify on these aspects.

Comments on enclosure:

e. Annexure I (revised programme with completion date April 2024): The Contractor is advised to submit the following.

i. Detailed narrative/ general description of the method of execution of works.



ii. Detailed programme – Level 4 or 6 (the current submission is very high level).

iii. Inter alia works like dredging, revetment beyond SCB, revetment adjacent to Groyne, electrical and mechanical works are not included in the subject programme. Please include all items of work and make it comprehensive.

iv. Resources (equipment/ marine fleet) for better understanding.

v. Reasonable estimate of manpower required to execute the works.

vi. Quarry production details.

Yours sincerely

Sam Eralil
Chief Resident Engineer"

42. This, however, submits Mr. Agrawal, is only one of a series of communications. On 29 November 2021, the appellant wrote to the respondent stating that the concerns of the respondent would be expeditiously addressed and that a revised plan for completion of the project with target completion by April 2024 would be presented to Vice Chief of Naval Staff[27] by the end of November 2021. On 2 December 2021, the respondent, even while providing a revised program for completion of the project by April 2024, emphasized in para 4, as under:

"4. Although a revised programme aiming for the suggested completion dated of April 2024 is enclosed herewith, such plan will require achievement of very large quantities within very short timelines along with several dependencies, which are clearly outside the Contractor's control. The Contractor humbly submits

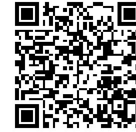
[27] "VCNS", hereinafter

> that the estimated volumes and timelines required by this programme are unrealistic and not achievable."

43. On the next day, i.e., 3 December 2021, the appellant issued, to the respondent, a Notice to Correct and the revised program especially envisaging completion of the project by April 2024, which stands reproduced *supra*. On 2 February 2022, the respondent wrote to the appellant, in response to the Notice to Correct issued by the appellant, stating that the appellant's Engineer had failed to objectively appreciate the difficulties which were being faced in performing the contract. It was also alleged that the inability of the respondent to perform the contract within the initially stipulated period was attributable to some extent to the defaults on the part of the appellant in adhering to its contractual obligations. Specifically drawing attention to the report of Prof Nallayarasu, the respondent submitted that it was entitled to reasonable time to perform the remainder of the contract, which had to be computed taking into account the opinion of Prof Nallayarasu. The appellant was, therefore, requested to examine the respondent's contentions and its entitlement, including reasonable time to comply with the contract.

44. The appellant, in response, issued another Notice to Correct on 4 March 2022, in which the submissions of the respondent were refuted and denied.

45. Mr. Agrawal also placed reliance on Clause 15.6 of the contract, as amended, which provided thus:



> "Without prejudice to the generality of the provisions of the Contract, if the Contractor unsuccessfully challenges any action of the Employer before a court of law regarding invocation of bank guarantee furnished under the Contract or termination of the Contract and any interim directions are obtained against the Employer, which are subsequently vacated by the court, then the Contractor shall be liable to pay:
>
> (a) in case of a bank guarantee interest at 12% of the bank guarantee amount; or
>
> (b) in case of termination of the Contract an amount equivalent to 1/2500 per day of the Accepted Contract Amount.
>
> for the intervening period starting from the date of the interim directions till the final disposal of the case by the court.
>
> Both the Parties agree that the damages stated in sub-paragraph (a) and (b) above are a genuine pre-estimate of the losses suffered by the Employer."

The above clause, submits Mr. Agrawal, recognizes the possibility of interim directions being passed, restraining invocation of the BGs furnished by the respondent, and safeguards the interests of the appellant in such an event by providing that, if the interim injunction were to be subsequently vacated, the contractor would have to pay interest @ 12% of the Bank Guarantee amount for the period between during which the injunction remained in force as damages, which have contractually been made a genuine pre-estimate of the losses suffered by the appellant. Thus, Mr. Agrawal submits that there was no justification for the appellant invoking the respondent's BGs, even while the issue of whether the respondent was entitled to extension of time for completion of contract was under active consideration, and the respondent had with it a report of Prof Nallayarasu of the IIT Madras in its favour.

46. Mr. Agrawal also submits that, in breach of the stipulation, in the contract, that payments against bills raised by the respondent were to be made within a particular time, the appellant was in default of payment, to the respondent, of over ₹ 100 crores, against the bills raised by the respondent. He submits that it is impossible for any contractor to perform the contract sufficiently or expeditiously, if the payment due to it is held up by the employer. In such circumstances, any invocation of the BGs by the employer would, in his submissions, be completely unjust and inequitable.

47. The above facts, Mr. Agrawal submits, constitute "special equities" as would justify injunction against invocation, by the appellant, of the BGs provided by the respondent.

48. He submits that all these aspects were set out in detail by the respondent in its written submissions, filed before the learned Arbitral Tribunal, but the learned Arbitral Tribunal has, unfortunately, not adverted thereto.

49. Mr. Agrawal further submits that the finding, of the learned Arbitral Tribunal, that there existed special equities which would justify injuncting the appellant from invoking the BGs furnished by the respondent, is liable to be upheld on these grounds, even if these do not form the part of the reasoning of the learned Arbitral Tribunal in the impugned award.

50. Mr. Agrawal also relies on Office Memorandum[28] dated 12 November 2020, issued by the Department of Expenditure, Ministry of Finance[29], particularly emphasizing the following paragraphs from the OM:

> "2. The Government is in receipt of many representations that on account of slowdown in economy due to the pandemic, there is acute financial crunch among many commercial entities and contractors, which in turn is affecting timely execution of the contracts. It has also been represented that this may affect the ability of contractors to bid in tenders and hence reduce competition. Requests are being received for reduction in quantum of Security Deposits in the Government contracts.
>
> 3. In view of all above, it is decided to reduce Performance Security from existing 5-10% to 3% of the value of the contract for all existing contracts.However, the benefit of the reduced Performance Security will not be given in the contracts under dispute wherein arbitration/ court proceedings have been already started or are contemplated."

51. Mr. Agrawal submits that, applying the aforesaid OM dated 12 November 2020, the respondent was entitled to reduction of the PBG value from 10% to 3 % of the value of the contract which would result in a reduction from ₹ 633.73 crores to about ₹ 110 crores. He points out that, on 26 November 2020, the respondent had specifically written to the appellant asking for reduction of the PBG amount. The aspect of special equities, he submits, cannot be examined *de hors* this request of the respondent.

52. In this context, Mr. Agrawal reiterates his contention that the delay in performance of the contract was entirely owing to the situation created by the appellant. He has drawn my attention to the

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[28] "OM" hereinafter
[29] "DOE", hereinafter

following paragraphs from the SOC, in which this point was raised before the learned Arbitral Tribunal:

> "357. The COVID-19 pandemic caused a slowdown in the economy causing an acute financial crunch among commercial entities and contractors. To address this economic disruption, the Ministry of Finance (Government of India) on 12.11.2020 issued an Office Memorandum bearing no.F.9/42020- PPD providing for reduction of the PBGs from 5% - 10% to 3% of the value of the Contract. Accordingly, the Claimant issued letter dated 26.11.2020 to the Respondent seeking reduction of the PBG to 3% of the value of the Contract in terms of the Government of India's office memorandum.
>
> 358. The Engineer vide its letter dated 30.11.2020, unscrupulously stated that only on the Claimant giving a declaration to the effect that it was not contemplating any arbitration or court proceedings for its claims till date would its request be taken forward for internal approvals by the Respondent.
>
> *****
>
> 361. In response thereto, on 21.12.2020, the Claimant confirmed the fact that it was not then contemplating any arbitration/court proceedings. Due to lack of response from the Respondent or Engineer, the Claimant issued reminders to the Engineer for the reduction of the PBG as assured by the Engineer in its letter dated 30.11.2020."

53. With respect to the ABG, Mr. Agrawal further submits that the ABG was furnished by the respondent against the advance payment made by the appellant to the respondent. He submits that, against works performed by the respondent, bills were raised, which were examined by the Engineer, after which interim payments were released and interim payment certificates issued. These payments, he submits, were adjusted against the advance paid by the appellant to the respondent. Over a period of time, he submits that the entire advance payment stands adjusted. Having thus adjusted the entire advance

payment, he submits that the appellant could not justifiably seek to encash the ABG.

54. Mr. Agrawal further submits, apropos the ABG, that the advance payment made by the appellant to the respondent had already been spent by the respondent against temporary and enabling works undertaken by it. Consequent on the termination of the contract with the respondent, he submits that the appellant is availing of these works in the new contract, executed with the respondent's successor.

55. These circumstances, submits Mr. Agrawal render the invocation of the ABG by the appellant, liable to be injuncted applying the principle of special equities.

56. Mr. Agrawal cites paragraphs 20, 21 and 22 of the judgment of the Supreme Court in ***Hindustan Construction Company*** to submit that the appellant could not be permitted to invoke the BGs after having financially strangulated the respondent by holding up its bills to the extent of almost ₹ 100 crores. He submits that the respondent had never abandoned the work as alleged by the appellant, but that adherence to the contracted time schedule had become impossible on account of defects in the design configuration in the contract as well as the intervening COVID-19 pandemic. The parties were, at the time, in the process of working out a revised schedule. In such circumstances, he submits that the appellant could not be permitted to encash the BGs provided by the respondent. He also relies on the

judgment of the learned Single Judge of this court in ***PD Alkarma Pvt Ltd v. Canara Bank***[30]***.***

57. These contentions, he submits, were raised in paragraphs 429 and 430 of the SOC:

> "429. Based on Respondent's/ Engineer's expectation that the Works would be completed in 42 months, the Contractor budgeted for the mobilization advance given to the Claimant to be repaid with interest by the 27th month of the said 42 months. The total interest liability of the Claimant for such mobilization advance would have been less than ₹20 crores (₹19.989 crores) after recovery of the total advance amount.
>
> 430. However, due to aforesaid delays arising out of the failures of the Respondent and Engineer, as of April 2022, the Claimant incurred ₹81,88,88,433/- towards recovery of mobilization advance, out of which ₹71,78,19,003/- was wrongly adjusted by the Respondent and its Engineer towards interest on mobilization advance. The recovery of the principal amount of mobilization advance has thereby been wrongly restricted to only about ₹10 crores when it should have been reduced by over Rs. 61 Crores. Therefore, for reasons attributable to the Respondent and Engineer, the Claimant has been wrongly charged interest liability over ₹70 crores on principal recovery of only about ₹10 crores instead of the anticipated interest of only less than ₹20 crores on the overall principal amount."

58. Mr. Agrawal next addresses the issue of invocation of the RBGs. He drawn my attention to paragraphs 50 to 58 of the written submissions filed by the respondent before the learned Arbitral Tribunal:

> "50. In all the said RMBGs, the invocation requires:
>
> > " ... a written demand from the Employer stating that the claimed amount is due by way of breach by the said Contractor of any of the terms or conditions contained in the aforesaid Contract or by reason of the Contractor's failure to perform the said Contract..."

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[30] **1998 (45) DRJ 423**

51. Thus, the Respondent was not just required to state that the Claimant breached the Contract, but that "claimed amount is due by way of" such "breach".

52. However, in its BG Invocation Letters, the Respondent has failed to comply with and adhere to terms of the bank guarantee, as it wrote stating that:

> "3. Notice for Termination of Contract has been issued to M/s Navayuga- Van Oord JV (Contractor) on 06 Jul 22 vide letter at Para 1 above. In accordance with Terms and Conditions of the Contract Bank Guarantees (BGs), it has been decided to invoke the aforementioned BGs in view of the breach of contractual terms and conditions.
>
> 4. It may be noted that your Bank has "irrevocably undertake to pay us, the Beneficiary /Employer, without, any demur, reservations, recourse, contest or protest and/ or without referring to any other sources including the Contractor; merely on a written demand from the Employer stating that the claimed amount is due by way of breach by the said Contract".

53. The Respondent has neither specified the alleged breach of the Contract nor identified any alleged claim amount nor stated that the claimed amount is due by way of the purported breaches by the Claimant. Quoting the provisions of the Bank Guarantee is not an assertion that the Claimant has breached the Contract nor that "claimed amount is due" that too "by way of breach". On the contrary, it only states a clause of the bank guarantee but does not comply with the requirements of the RMBGs at all.

54. As the BG Invocation Letters are not in terms of the RMBGs, for the reasons stated herein above and as per the well settled law, the Claimant is entitled to an injunction restraining any payment under the RMBG.

55. Without prejudice to the above, it is submitted that even otherwise, before any amount can even be purportedly due under the Contract, the Respondent had to comply with the requirements of the Contract, without which compliance, no amount could at all be due by way of breach.

56. The law is also well settled that when a contract provides that something is to be done in a particular manner then it must be

> done in that manner or not at all. (See ***G+H Schallschutz Gmbh v. Bharat Heavy Electricals Ltd***.[31])
>
> 57. The due process for making the claim in terms of the Contract is as follows:
>
> > a) The Respondent must make a claim under Sub-clause 2.5 of the Contract;
> >
> > b) Such claim must be assessed/determined by Engineer under Subclause 3.5 (in present case, because of Engineer's bias, it had to be an independent Engineer); and
> >
> > c) The Claimant must accept the determination or can challenge it as per dispute resolution procedure.
>
> 58. Admittedly the Respondent did not follow such a procedure and the Engineer did not even purport to determine any claim by following the procedure in the Contract prior to the purported invocation letter being issued and thus had no right to even call on the RMBGs."

In this context, Mr. Agrawal relies on the decision of a learned Single Judge of this Court in ***Ansal Properties & Industries Ltd v UOI***[32].

59. Mr. Agrawal then refers me to the findings of the learned Arbitral Tribunal with respect to the compliance of the letters of invocation dated 6 July 2022, with the requirements contained in the RBGs, in paragraph 95 of the impugned order. He points out that the view of the learned Arbitral Tribunal, in the said paragraph, that the letters of invocation did not contain any specific averment that the RBGs were being invoked due to the respondent's breach of the contract, as a result of which the amounts covered by the RBG had become due to the appellant, was at the least a plausible view, which did not call for interference by this Court. In support of this

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[31] **2020 SCC OnLine Del 19**
[32] **1994 (29) DRJ 66**

submission, Mr. Agrawal relies on paragraph 48 of the judgment of a learned Single Judge of this Court in ***Basic Tele Services-I,*** as upheld in ***Basic Tele Services-II*** by the Division Bench.

60. Reverting, thereafter, to the aspect of special equities, Mr. Agrawal, submits that the view expressed by the learned Arbitral Tribunal, to the effect that the encashment of the BGs would place the respondent in severe financial straits and would result in irreversible prejudice to it, was again a view which was plausible and, in the circumstances of the case, did not call for interference. He emphasises, in this context, that, though the invocation of the BGs, as per their express terms, were neither dependent nor linked to termination of the contract, the actual invocation was solely on the ground of termination.

61. Mr. Agrawal refers to the following paragraphs from the written submissions furnished by the respondent before the learned Arbitral Tribunal, which emphasized the contraints faced by the respondent in performing the contract within the originally stipulated period:

> "180. The continuous preventions are apparent from the time periods when Claimants ability to work was constrained:
>
> > a. February 2018 to October 2018 - Delay in notification of commencement date and consequential loss of first fair-weather season and effectively nearly one year.
> >
> > b. 07 May 2018 to 25 January 2019 - Revisions to GFC Drawings because of variance in actual seabed level compared to seabed levels considered in design. This resulted in loss of nearly another fairweather season or second year.

> c. March 2018 to July 2020 - Impediments to access to Site A (Contractor's facilities), Loading jetty, South Breakwater, and other South Side Works because of lack of access compounded by agitations/threats by villagers.
>
> d. May 2019 to August 2021- Collapsing of trenches prepared as per Engineer's designs and GFC Drawings and subsequent attempts to mitigate the challenges of constructability that the Engineer had failed to consider in its designs.
>
> e. March 2020 to September 2021 and December 2021 to February 2022 - COVID -19 pandemic and its consequences, including but not limited to restrictions by central and state governments at various stages. Further, the Respondent did not even extend the reliefs provided by the Government such as reduction in value of PBG to 3% to the Claimant to ease cash flows.
>
> f. July 2020 to July 2022 - Squeezing the cashflow and liquidity of the Claimant on account of COVID-19 pandemic, then illegal withholding of funds and finally non-payment of certified amounts by the Respondent."

62. Mr. Agrawal also seeks to contest Mr. Venugopal's contention that paragraphs 1 and 2 of the letters of invocation of the BGs, issued by the appellant to the Banks, rendered them sufficiently in compliance with the stipulations in of the BGs, by referring to paragraph 30 of the judgment of the Supreme Court in ***NBCC (India) Ltd v Zillion Infraprojects Pvt Ltd***[33].

63. Elaborating on this, Mr. Agrawal has first addressed the issue of invocation of the PBGs. He submits that the PBGs, by their express terms, required the appellant to declare, to the Bank, "that the works have not been supplied according to the contractual obligations" under the contract. In the event of the appellant making such a declaration

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[33] **(2024) 7 SCC 174**

to the Bank in its letters of invocation, Mr. Agrawal accepts that the Banks were required to honour the PBGs without demur. The letters of invocation dated 6 July 2022, he submits, do not contain the requisite declaration that the respondent had not performed the work according to its contractual obligations. Mr. Agrawal submits that the mere reference, in the opening paragraphs of the letters of invocation, to the notice of termination, issued by the appellant to the respondent on the same day, i.e. 6 July 2022, does not suffice to satisfy the requirement of the said declaration, which had necessarily to be made by the appellant to the Banks while invoking the PBGs.

64. Mr. Agrawal points out that, in fact, the appellant's stand before the learned Arbitral Tribunal was not that the letters of invocation had been issued in terms of the stipulations contained in the PBGs, but that the PBGs were themselves unconditional. He draws attention, in this context, to paras 21, 23 and 25 of the Statement of Defence[34], which read thus (omitting the extracts from the BGs provided in the said paras):

> "21. That the Bank Guarantees are unconditional in nature and have been invoked by the Appellant in terms of the said Bank Guarantees. The Hon'ble Arbitral Tribunal while holding that the Bank Guarantees were not invoked in accordance with the terms of such Bank Guarantees, has relied on the following language from the Bank Guarantees.
>
> *****
>
> 23. That the wordings of the Bank Guarantees as quoted hereinabove are clear and unambiguous and reveal that the Bank Guarantees are unconditional in nature. There were no 'conditions' as such which were required to be fulfilled for the invocation of the

[34] SOD

Bank Guarantees and only written demands were required to be raised, which the Appellant duly complied with. The Hon'ble Arbitral Tribunal in paragraph 90 and paragraph 91 makes a distinction between bank guarantee being unconditional 'as to payment' and being conditional 'as to invocation'. It is most respectfully submitted that such a distinction is unknown to law and there exist numerous judicial precedents of the Hon'ble Supreme Court of India and this Hon'ble Court wherein almost identical bank guarantees were in question and were held to be 'unconditional’.

*****

25. The PBGs use clear phrases and terms viz. 'expressly', 'irrevocably' and 'unreservedly', 'on demand', 'without demur', 'written demand shall be conclusive evidence that such repayment is due under the terms of the said Contract'. In the Advance Encashment Notices and supplementary letter dated July 13, 2022 (to be read collectively and in tandem), the Appellant had in fact made a clear declaration that the Respondent has breached the contractual terms and conditions and that works had not been supplied according to the contractual obligations under the Contract. It is submitted that the Project was a contract involving supply of the Outer Harbour works by the Respondent to the Ministry of Defence to strengthen India's strategic defences against foreign vulnerabilities. A breach of the contractual terms and conditions can mean nothing but a non-supply of the works according to contractual obligations and the Appellant was in complete compliance while issuing the Advance Encashment Notices. The Impugned Order fails to consider that the 'non-supply of works in accordance with contractual obligations' in the Project of the present nature is the same as 'breach of contractual terms and conditions ' and any suggested difference between the two is artificial, at best. Therefore, the Appellant by stating that the Respondent was in "breach of contractual terms and conditions” has sufficiently complied with the terms of the PBGs.”

65. Even in its written submissions filed before the learned Arbitral Tribunal, the appellant, Mr. Agrawal submits, maintained the stand that all BGs were unconditional. He draws attention, in this context, to paras 18 and 35 of the written submissions, in which the appellant had contended, firstly, that all BGs were unconditional and, secondly, that the RBGs were in any case unconditional.

66. Mr. Agrawal further submits that the reliance by the appellant, in para 27 of its SOD, on the letter dated 13 July 2022, purportedly addressed by the appellant to the Bank, was itself an acknowledgement that the earlier letter dated 6 July 2022 was not issued in terms of the PBGs. He submits that the reference to the purported second letter dated 13 July 2022 addressed by the appellant to the bank surfaced for the first time in the appellant's reply to the respondent's application under Section 17 before the learned Arbitral Tribunal. The said letter dated 13 July 2022, moreover, was issued only with respect to the PBGs and not with respect to other BGs.

67. Mr. Agrawal has referred me to the letter dated 13 July 2022, paras 1 to 3 of which read as under:

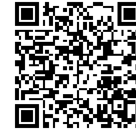
> "1. Refer to following -
>
> (a) Bank Guarantee No. 0999517FG0002374 dated 29 Nov 17.
>
> (b) This Headquarters letter DGV/4(111)/452/7/(iii) dated 06 Jul 22.
>
> (c) Your letter CAG/MUM/IBD/FX/FG/2022-23 dated 07 Jul 22."
>
> 2. The terms and provisions of the BG state that the Bank hereby expressly, irrevocably and unreservedly undertake and guarantee as principal obligators on behalf of the contractor that, in the event employer declares to us that the works have not been supplied according to the Contractual obligations under the aforementioned contract, we will pay you, on demand and without demur, all and any sum up to maximum of INR 741,697,410.00 (say Seven Hundred and Forty-One Million Six Hundred and Ninety-Seven Thousand Four Hundred and Ten Rupees Only).
>
> 3. As brought out vide this Headquarters letter dated 06 Jul 22 at Para 1(b) above, Notice for Termination of Contract has been issued to M/s Navayuga-Van Oord JV (Contractor) on 06 Jul 22

> and it has been decided to invoke the aforementioned BG in view of breach of contractual terms and conditions. We hereby confirm that the works have not been supplied according to the Contractual obligations under the contract."

Paras 2 and 3 of the letter dated 13 July 2022, submits Mr. Agrawal, now contained the requisite recitals as envisaged in the PBGs, and amounted to an overt acknowledgement that the earlier letter dated 6 July 2022 was deficient in that regard.

68. Moreover, referring to para 1 of the letter dated 13 July 2022, Mr. Agrawal points out that the paragraph refers to a letter dated 7 July 2022 from the Bank to the appellant. This letter, he submits, has never surfaced at any point in the arbitral proceedings or before this Court. It, nonetheless, indicates that the letter of invocation dated 6 July 2022, from the appellant to the Banks, was immediately followed up by a communication from the Banks to the appellant on 7 July 2022, in response to which the appellant, by its letter dated 13 July 2022, rectified the lacunae existing in the earlier letter dated 6 July 2022 and incorporated the requisite recitals, in terms of the requirements contained in the PBGs. This indicates that the Banks were also not satisfied with the letter dated 6 July 2022, which was why, on 7 July 2022, they wrote back to the appellant, most probably underscoring deficiencies in the recitals contained in the letter dated 6 July 2022, pursuant to which the appellant issued a second letter dated 13 July 2022, taking corrective steps.

69. The appellant, he submits, cannot rely on the letter dated 13 July 2022. In the first instance, the letter refers only to the PBGs, and



does not cover the ABG or the RBGs. Secondly, the letter has been issued in violation of the order dated 30 June 2022 of this Court in OMP (I) (Comm) 208/2022, preferred by the respondent under Section 9 of the 1996 Act, which required a copy of the letter to be given to the respondent. Inasmuch as no copy of the letter dated 13 July 2022, addressed by the appellant to the Banks, had been provided to the respondent, the letter could not be relied upon, having been issued in breach of the order passed by this Court. For this proposition, Mr. Agrawal also cites the judgment of the High Court of Bombay in ***Sri Sai Krishna Constructions v Glove Infracon***[35].

70. Mr. Agrawal next trains his guns on the invocation, by the appellant, of the ABG. He submits that the ABG was also conditional, and not unconditional as the appellant would contend. The liability of the bank to make payment to the appellant in terms of the ABG was conditional on the contractor (i.e. the respondent) failing to deliver the works in accordance with the terms of the contract, or the whole or any part of the contract on account payments becoming repayable to the appellant at any time. These requirements, submits Mr. Agrawal, were not met.

71. Mr. Agrawal further submits that the appellant was seeking to contend that the allegation, by the appellant, of the respondent having breached the contract, impliedly indicated that the respondent had not delivered the works to the appellant as contractually required. He submits that this inference does not logically follow.

[35] **2019 SCC OnLine Bom 1406**

72. Mr. Agrawal further relies on the concluding reference, in para 1 of the ABG, to the effect that the payment of the amount covered by the ABG would be made by the Bank to the appellant in accordance with Clause 14.2 of the contract. The provisions of Clause 14.2, therefore, stood incorporated by reference in the ABG.

<u>Submission of Mr. Venugopal by way of rejoinder</u>

73. Arguing in rejoinder, Mr. Venugopal first addresses Mr. Agrawal's contention that paragraphs 1 and 2 of the letters of invocation did not result in the letters of invocation being compliant with the stipulations contained in the BGs. He submits that the allusion, by Mr. Agrawal, to the principle of incorporation by reference, which essentially applies to legislative instruments, was misdirected. There is no occasion to apply the said principle, as the entire notice of termination dated 6 July 2022 was annexed to the letters of invocation of the same date, and all necessary averments, to comply with the requirements of the BGs, are to be found in the notice of termination. This, therefore, is not a situation in which there is a mere reference to the notice of termination in the letters of invocation of the BGs, so as to apply the principle of incorporation by reference.

74. Mr. Venugopal next deals with Mr. Agrawal's complaint that the appellant did not reduce the quantum of the PBGs from 10% to 3% as envisaged by the DOE OM dated 12 November 2020. Mr. Venugopal points out that the OM itself contained a caveat, rendering it

inapplicable to contracts in which, arbitral proceedings had started *"or were contemplated"*. He refers to the letter dated 31 December 2020 from the respondent to the appellant, which contained various complaints regarding the facilities available and provided by the appellant which, according to the respondent, had rendered it impossible to comply with the respondent's obligations under the contract within the contractually stipulated time. Given the tenor of the grievances urged in the said letter, Mr. Venugopal submits that arbitration was imminent. In that view of the matter, the OM dated 12 November 2020 would not apply.

75. Mr. Venugopal points out that the contractually fixed period of 42 months was on the basis of the recommendation of the IIT Madras. The respondent had been given 253 days' extension beyond the said period of 42 months but was still unable to complete the contract. Being thus unable to complete the contract even within the extended period, the respondent obtained an opinion from Prof Nallayarasu stating that it would take 88 months to complete the contract. The appellant clarified this position with the IIT Madras, which reiterated that 42 months were enough to complete the contracted work and that the opinion of Prof Nallayarasu was rendered without the requisite material.

76. Mr. Venugopal submits that the appellant had, in fact, requested the respondent not to go in for arbitration, but the respondent refused. It was in these circumstances that the appellant did not deem it appropriate to reduce the value of the PBGs to 3%.

77. Dealing, next, with Mr. Agrawal's contention that the appellant was recovering, from each bill raised by the respondent, 15% towards the advance extended by the appellant to the respondent, Mr. Venugopal places reliance on Clause 15.4 of the contract, as amended, which read thus:

> "Payment after Termination
>
> 15.4. Delete the wording of Sub-Clause 15.4 in its entirety and replace with the following:
>
> > "After notice of termination under Sub-Clause 15.2 [Termination by Employer] has taken effect, the Employer may:
> >
> > > (a) proceed in accordance with Sub-Clause 2.5 [Employer's Claims];
> > >
> > > (b) withhold further payments to the Contractor until the actions in accordance with the following sub-paragraphs (c) and (d) are completed;
> > >
> > > (c) encash and forfeit the whole of the amounts of Performance Security and Retention Money and take possession of Plant and Materials delivered to Site, for which payment has been made by the Employer;
> > >
> > > (d) encash and appropriate the bank guarantee for the Advance Payment to recover the outstanding amount, if any, of the Advance Payment and/ or other outstanding amount; and
> > >
> > > (e) pay to the Contractor any sums due under Sub-Clause 15.3 [Valuation at Termination], after the full amounts of the Performance Security and Retention Money and twenty percent (20%) of the cost of the balance of the work (as per Sub-Clause 15.3) and any other amount due from the Contractor to be received by the Employer. Any outstanding amounts against the Contractor shall immediately become due and payable by the Contractor to the Employer."

In view of the above contractual stipulation, Mr. Venugopal submits that Mr. Agrawal's contention that the respondent had spent the advance extended by the appellant and that, therefore, the appellant could not legitimately invoke the ABG, was bereft of substance.

78. Adverting next to the RBGs, Mr. Venugopal submits that, as in the case of the PBGs, Clause 15.4(c) of the contract entitled the appellant as of right to encash and forfeit the RBGs, once the contract had been terminated.

79. With respect to the submission that the wording in the letters of invocation, in so far as they pertained to the RBGs, were not in terms of the RBGs themselves, Mr. Venugopal has drawn attention to para 4 of the letters of invocation, which read thus:

> "4. It may be noted that your Bank has "irrevocably undertake to pay us, the Beneficiary/ Employer, without, any demur, reservations, recourse, contest or protest and/or without referring to any other sources including the Contractor, merely on a written demand from the Employer stating that the claimed amount is due by way of breach by the said Contract'.

The recital in para 4 that "the claimed amount" was "due", submits Mr. Venugopal, was sufficient compliance with the requirements of the RBGs themselves. Moreover, in para 7 of the notice of termination dated 6 July 2022, which was annexed to the letters of invocation, it was specifically stated that the respondent was "liable to pay Delay Damages from 29 April 2022 until the Notice of Termination becomes effective". This again put the respondent on notice regarding the amount payable.

80. Apropos the observation of the learned Arbitral Tribunal that, if the BGs were to be encashed, the business of the respondent would be financially destroyed, Mr. Venugopal relies on para 151 of the appellant's reply to the Section 17 application filed by the respondent before the learned Arbitral Tribunal, which read thus :

> 151. Paragraphs 100 to 104 are denied in toto. The Claimant's submissions are baseless and unfounded in law and in the facts and circumstances of the present case. The Respondent refers to the submissions made above, which address the Claimant's contention. *Briefly, however, the Claimant fails to prove (even at a prima facie level) how or why its business relationship would be at "severe" unrest; and how or why it would be "financially" crippled or artificial liquidity as a JV (that is jointly and severally liable). The Claimant admits that the JV and its members are doing over a dozen projects across the State, equating to tens of thousands of crores. Therefore, the Claimant admits that it can take huge commercial risks, and the BGs make up for only a fraction of it. The Claimant fails to prove (even at a prima facie level) how or why it would be blacklisted/ disqualified in various other future tenders and how or why it threatens the Claimant's commercial existence (despite being the market leaders in the construction industry). The Claimant's submissions are superficially made up, without substance or girth*."
>
> (Emphasis supplied)

81. The decisions cited by the respondent, submits Mr. Venugopal, are clearly distinguishable. Referring to paragraphs 29 and 47 of the judgment of the learned Single Judge in ***Basic Tele Services***, Mr. Venugopal points out that, in that case, it had been specifically observed that to get the benefit of the said paragraph, the respondent had to state that the money covered by the BGs was not due from it. In the present case, the amounts covered by the BGs, he submits, were clearly due from the respondent to the appellant, consequent on the termination of the contract. ***Ansal Properties***, he submits, is clearly

distinguishable as the wording of the Bank Guarantee in that case is different from that in the present, for which purpose, he refers to para 3 of the decision. In support of his submissions, Mr. Venugopal places reliance on ***Reliance Infrastructure Ltd v NLC India Ltd***[36].

82. Mr. Venugopal submits that the entire advance extended by the appellant to the respondent was still with the respondent. The very purpose of the ABG was to recover the advance given of ₹ 181 crores.

83. Retention payment, submits Mr. Venugopal, was to be released by the appellant only on successful completion of the project at the time, it was taken over by the appellant. Nonetheless as the respondent wanted the retention money upfront, the appellant provided it and required the respondent to furnish the RBGs to secure the said retention money. As the respondent had failed to complete the project, the appellant was entitled to be returned the retention money. The respondent was therefore, in effect, seeking to retain the money and the RBGs, without successfully completing the project.

84. Mr. Venugopal submits, therefore, that the impugned order of the learned Arbitral Tribunal is unsustainable in law and has therefore to be set aside.

Analysis

The law

[36] **MANU/MH/0944/2022**

85. Though Mr. Agrawal took the Court through the entire labyrinth of the facts in an earnest effort to justify the impugned order passed by the learned Arbitral Tribunal, such a detailed excursion into facts is, in the opinion of the Court, unjustified in a case where the only issue for consideration is whether the invocation of the BGs furnished by the respondent could legally have been injuncted.

86. Every order of injunction is, in its nature, fundamentally discretionary. Mr. Agrawal also cited the judgment of the Supreme Court in ***Wander Ltd v Antox India (P) Ltd***[37]***,*** which advocates restraint while interfering, in appeal, with discretionary orders passed by hierarchically lower authorities, and there can be no dispute about this proposition. Had it been a mere issue of exercise of discretion by the learned Arbitral Tribunal and nothing more, the Court would have been loath to interfere, even in exercise of the appellate jurisdiction vested in it by Section 37(2)(b) of the 1996 Act. The issue here is, however, not merely of exercise of discretion. With greatest respect to the members of the Arbitral Tribunal, whose legal knowledge and acumen is unquestionable and whom I hold in the highest regard, I am unable to satisfy myself that the manner in which the learned Arbitral Tribunal has exercised its discretion is in sync with the law, and this makes it incumbent on me to interfere.

[37] **1990 Supp SCC 727**

87. The law relating to grant of injunction against invocation of BGs is by now fossilized through a veritable slew of authorities of the Supreme Court and of various High Courts.

88. Empirically stated, a Bank Guarantee may be either conditional or unconditional. In either case, it is an independent contract between the Bank and the beneficiary of the guarantee. The person, at whose instance the guarantee is issued by the Bank is not a party to it. He is merely a benefactor from whose account the payment covered by the Bank Guarantee would be realized, in the event, the Bank Guarantee is to be honoured. The benefactor is, therefore, a stranger to the Bank Guarantee, even if the Bank Guarantee is issued at his instance. Any prayer for injunction of the invocation of the Bank Guarantee, by the benefactor, is therefore, in the nature of a prayer by one party seeking a restraint against a second party complying with its statutory obligations towards a third party. Such an order of restraint is not therefore ordinarily or routinely to be granted. It is for this reason that the law both in this country as well as in foreign jurisdictions has evolved along distinct and well-identified channels, where a question of injunction against invocation of a Bank Guarantee arises for consideration.

89. The position of law is clear.

90. If a Bank Guarantee is conditional, the invocation must conform to the conditions of the Bank Guarantee. If, therefore, a Bank Guarantee requires a particular recital to be contained in the letter of

invocation, that recital must figure in the communication to the Bank, failing which the invocation is not in terms of the Bank Guarantee and would not be honoured by the Bank.

91. If a Bank Guarantee is unconditional, restraint against invocation can be granted only if one or more of three conditions is shown to exist. The party seeking injunction has to establish that the injunction is vitiated by egregious fraud, or that invocation would result in irretrievable injustice, or that there exist special equities which justify grant of injunction against invocation. The use of the adjectives "egregious", "irretrievable" and "special", preceding these stipulations, is significant. It is not merely fraud, or injustice, or existence of equities, which can justify injunction against invocation of an unconditional Bank Guarantee. The fraud must be egregious, the injustice must be irretrievable and the equities must be special. It is only, therefore, if these standards are met that a Court can injunct the invocation of an unconditional Bank Guarantee.

92. In the present case, the learned Arbitral Tribunal has sought to justify the decision to grant injunction against invocation of the BGs furnished by the respondent on two grounds – actually three – firstly, that the letters of invocation dated 6 July 2022 did not conform, in the language which they employed, to the conditions contained in the BGs and, secondly, that special equities existed, justifying grant of injunction. The finding of existence of special equities is, *inter alia*, sought to be supported by the finding that, if the BGs were permitted

to be invoked, irretrievable injustice and prejudice would result to the respondent.

93. The sustainability of the impugned order is therefore to be examined by addressing the following two queries:

(i) Were the letters of invocation dated 6 July 2022 issued in terms of the BGs?

(ii) Did there exist any special equities as would justify grant of injunction against invocation of the BGs?

94. Before adverting to these issues, on facts, I deem it appropriate to cite, with humility, two decisions rendered by this Bench in which the law relating to grant of injunction against invocation of BGs was examined. They are ***CRSC Research and Design Institute Group Company Ltd*** and ***Garg Builders v. Hindustan Prefab Ltd***[38]. The following paragraphs from these decisions are relevant:

From ***CRSC Research and Design***

> 24. ***Himadri Chemicals*** is an important judgment, in this canon. Para 14 of the report, in the said case, enumerates the following six principles, governing the grant of injunction against the invocation of unconditional bank guarantees:
>
> > "(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 Letter of Credit in terms thereof

[38] **291 (2022) DLT 135**

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 Letter of Credit.*

(iv) Since a Bank Guarantee or 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 Guarantee or Letter 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 Letter of Credit would result in irretrievable harm or injustice to one of the parties concerned."

25**.** The learned Solicitor General also placed reliance on ***Vinitec Electronics*** which, in turn, took note of the earlier decisions in ***U.P. State Sugar Corporation***[39], ***B.S.E.S. Ltd. v. Fenner India Ltd.***[40], ***Himadri Chemicals*** and ***Mahatma Gandhi Sahakara Sakkare Karkhane v. National Heavy Engineering Coop. Ltd.***[41], and proceeded to hold thus (in paras 11, 12 and 14 of the report):

"11**.** The law relating to invocation of bank guarantees is by now well settled by a catena of decisions of this Court. The bank guarantees which provided that they are payable by the guarantor on demand is considered to be an unconditional bank guarantee. When in the course of commercial dealings, unconditional guarantees have been given or accepted the beneficiary is entitled to realise such a bank guarantee in terms *thereof irrespective of any pending disputes.* In ***U.P. State Sugar Corpn. v. Sumac***

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[39] UP State Sugar Corpn v Sumac International Ltd, (1997) 1 SCC 568
[40] (2006) 2 SCC 728
[41] (2007) 6 SCC 470

International Ltd., this Court observed that: (SCC p. 574, para 12)

> "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 realise 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 realisation 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 coexist in some cases."

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 Ltd. v. Fenner India Ltd.*** 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, <u>such as when 'irretrievable injury' or 'irretrievable injustice' would occur if such an injunction were not granted.</u>* The general rule and its exceptions has been reiterated in so many judgments of this Court, that in *U.P. State Sugar Corpn.* v. *Sumac International Ltd.*, (1997) 1 SCC 568 this Court, correctly declared that the law was 'settled'."

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14. In ***Mahatma Gandhi Sahakra Sakkare Karkhane v. National Heavy Engg. Coop. Ltd.*** this Court observed :

"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 <u>on the pretext that the condition for enforcing the bank guarantee in terms of the agreement entered into between the parties has not been fulfilled. Such a course is impermissible</u>. 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.*

<u>What is relevant are the terms incorporated in the guarantee executed by the bank.</u> 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. *<u>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</u>*."

26**.** The following principles clearly emerge from the decision in ***Vinitec Electronics***:

(i) Bank guarantees, which are payable on demand by the guarantor, are unconditional bank guarantees.

(ii) Unconditional bank guarantees entitle the guarantor to realisation thereof, irrespective of any pending disputes. In fact, *disputes between the guarantor, and the parties, at whose instance the bank has given the guarantee, are immaterial and of no consequence. Enforcement of the guarantee cannot be injuncted on the pretext that the condition for enforcing the bank guarantee, in terms of the agreement between the parties, has not been fulfilled. What is relevant are the terms incorporated in the guarantee (and not those in the agreement between the parties). The mere fact that the bank guarantee refers to the principal agreement, without referring to any specific clause, does not make the bank guarantee conditional*.

(iii) Courts should, therefore, be slow in injuncting realisation of unconditional bank guarantees.

(iv) The only exceptions, to this general rule, are where there exist/exists

(a) fraud of an egregious nature, or

(b) irretrievable injustice resulting to the parties, at whose instance the bank gave the guarantee, were the injunction not granted, or

(c) special equities, of which the possibility of irretrievable injustice is itself one.

(v) "Irretrievable injustice", for this purpose, has to be of such an exceptional nature as would override the terms of the guarantee and the adverse effect of the grant of such injunction on commercial dealings in the country.

27**.** The Court, in ***Vinitec Electronics*** proceeded, thereafter, to examine whether the bank guarantee, forming the subject matter of the controversy before it, was conditional or unconditional, and the discussion, in the judgment, on this aspect, is instructive. Paras 17, 18 and 19 of the report deserve, in this context, to be reproduced *in extenso:*

"17**.** The relevant clause in the bank guarantee dated 10-8-2001 furnished by the appellant is to the following effect:

"Whereas M/s Vinitec Electronics Pvt. Ltd., H-33, Bali Nagar, New Delhi (hereinafter called 'the supplier') supplied their Vinitec online UPS systems

of various capacities pursuant to their agreement dated 10th May, 2000 and PO No. 4500011730 dated 30-5-2000 (hereinafter called 'the Company') for the final purchaser President of India through the Director, National Crime Records Bureau, Ministry of Home Affairs, Government of India, New Delhi (hereinafter called 'the purchaser').

Whereas in terms of Clause 15 of the agreement for receiving the entire balance payments of Rs. 49,99,335 from the company, the supplier has agreed to provide a performance bank guarantee equivalent to Rs. 16,81,238.50/- as 10% of the value of the contract to be kept valid till the warranty period during which time the supplier is required to perform their warranty obligations to the purchaser; and

Whereas pursuant to the application made by the supplier, we, Oriental Bank of Commerce, Kirti Nagar, New Delhi (hereinafter called 'the Bank') have accordingly agreed to give the supplier a bank guarantee for the aforesaid purpose.

Therefore, we, the Bank, hereby affirm that we are guarantors and responsible on behalf of the supplier up to a total of Rs. 16,81,238.50/- (Rupees sixteen lakhs eighty-one thousand two hundred thirty-eight and paise fifty only) and we undertake to pay any sum or sums within the limit of Rs. 16,81,238.50/- (Rupees sixteen lakhs eighty-one thousand two hundred thirty-eight and paise fifty only) as aforesaid upon *receipt of written demand from the purchaser and Company within the validity of this bank guarantee* *establishing the supplier to be in default for the performance of their warranty obligations under the contract*.

We, the Bank, affirm that our liability under this guarantee is limited to the total amount of Rs. 16,81,238.50/- (Rupees sixteen lakhs eighty-one thousand two hundred thirty-eight and paise fifty only) and it shall remain in full force up to and including 31st August, 2003 and shall be extended from time to time for such further period(s) as desired by the purchaser, Company and supplier on whose behalf this guarantee has been given."

18. Thereafter by a letter dated 20-8-2001, the bank guarantee was amended and Para 4 of the bank guarantee dated 10-8-2001 was substituted and the same reads as under:

> "Therefore, we, the Bank, hereby affirm that we are guarantors and responsible on behalf of the supplier up to a total of Rs. 16,81,238.50/- (Rupees sixteen lakhs eighty-one thousand two hundred thirty-eight and paise fifty only) and we undertake to pay any sum or sums within the limit of Rs. 16,81,238.50/- (Rupees sixteen lakhs eighty-one thousand two hundred thirty-eight and paise fifty only) as aforesaid *upon receipt of written demand from the Company within the validity'. of this bank guarantee*."

19. In the unamended bank guarantee the Bank affirmed that they are guarantors and responsible on behalf of the supplier up to a total of Rs. 16,81,238.50/- (Rupees sixteen lakhs eighty-one thousand two hundred thirty-eight and paise fifty only) and had undertaken to pay any sum or sums within that limit upon receipt of written demand from the purchaser within the validity of bank guarantee provided it is established that *the supplier be in default for the performance of their warranty obligations under the contract.* This makes it abundantly clear that what was furnished was a conditional bank guarantee and the bankers were liable to pay the amounts only upon establishing the fact that the supplier was in default for the performance of their warranty obligations under the contract. But by the subsequent letter dated 20-8-2001, the relevant clause in bank guarantee was amended whereunder the Bank stood as guarantor and responsible on behalf of the supplier up to a total of Rs. 16,81,238.50/- (Rupees sixteen lakhs eighty-one thousand two hundred thirty-eight and paise fifty only) and had undertaken to pay any sum or sums within that limit "upon receipt of written demand from the Company within the validity of this bank guarantee". This amended clause makes it abundantly clear that the Bank had undertaken to pay amounts up to a total of Rs. 16,81,238.50/-. The condition that the amounts shall be paid only upon establishing the supplier to be in default for the performance of their warranty obligation under the contract has been specifically deleted. In our considered opinion, the bank guarantee as amended replacing Para 4 of the original bank guarantee makes the bank guarantee furnished as unconditional one. The bankers are bound to

honour and pay the amounts at once upon receipt of written demand from the respondent."

(Emphasis supplied)

28. These paras illustrate, lucidly, the distinction between a conditional bank guarantee and an unconditional bank guarantee. The judgment in ***Vinitec Electronics*** makes it abundantly clear that the first aspect, to be taken into consideration, is the bank guarantee itself, and the terms thereof. If the bank guarantee is conditional, then, if the conditions have not been fulfilled, injunction, against encashment and invocation, may unquestionably follow. If, however, the bank guarantee is unconditional, then injunction can be granted only if egregious fraud, irretrievable injustice, or special equities, exist, and not otherwise.

29. The issue was revisited, by the Supreme Court, in its more recent decision in ***Standard Chartered Bank v. Heavy Engineering Corporation Ltd.*** The terms of the bank guarantees, in that case, contemplated their invocation "against any loss or damage caused to or suffered by the Corporation by reason or any breach or failure by the said supplier, in due performance of the aforesaid contract". The specifics of the controversy between the parties need not detain us. Suffice it to state that the Supreme Court held the bank guarantees to be "unconditional" and "specific in nature". Thereafter, the Supreme Court, relying on its earlier decisions ***Ansal Engineering Projects Ltd. v. Tehri Hydro Development Corporation Ltd., Hindustan Construction Co. Ltd. v. State of Bihar, State Bank of India v. Mula Sahakari Sakhar Karkhana Ltd.***[42], ***Himadri Chemicals*** and ***Gujarat Maritime Board v. Larsen & Toubro Infrastructure Development Projects Ltd***[43], reiterated the principles already set out hereinabove, and emphasised, additionally, that fraud or special equities had, to support the prayer for stay of invocation of bank guarantees, to be "pleaded and *prima facie* established by strong evidence as a triable issue".

30. The above legal position stands reiterated in ***Yograj Infras. Ltd. v. Ssangyong Eng. & Construction Co. Ltd.***[44] and ***Adani Agri Fresh Ltd. v. Mahaboob Sharif***[45].

31. Thus far, the position in law appears to be crystal clear.

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[42] **(2006) 6 SCC 293**
[43] **(2016) 10 SCC 46**
[44] **(2012) 2 Scale 58 : JT (2012) 2 SC 17**
[45] **(2016) 14 SCC 517**

32**.** Some scope for debate, however, arises, on the concept of "special equities". The decisions of the Supreme Court - perhaps, advisedly - do not delineate, in precise contours, the ambit of the expression. Significantly, ***Fenner India Ltd.*** regards "irretrievable injustice" as a specie of the "special equities" genus, whereas ***Standard Chartered Bank*** treat "special equities" and "irretrievable injustice" as distinct circumstances, either of which would justify injuncting the invocation of a bank guarantee. *"Irretrievable injustice", to reiterate, has to be of such a magnitude as would override the twin considerations of the express terms of the guarantee and the adverse effect, from the grant of injunction, on commercial dealings in the country. "Special equities", too, must, therefore, be so "special" so as to prevail over these two considerations, otherwise paramount while examining a prayer for injunction against invocation of a bank guarantee. While, therefore, examining whether "special equities" exist, so as to justify the grant of a prayer for injuncting invocation of a bank guarantee, the Court has to tread warily, and cannot confer, on the expression "special equities", so elastic a construction, as would snap the rule.*

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40**.** Having noted this, the Court deems it necessary to clarify that, even if there was material to indicate that such statements had been furnished, it would not be open to the petitioner to come to the Court, seeking a restraint on the invocation of the bank guarantees, on the ground that the statements were not correct. In other words, in the case of the *Performance Bank Guarantee*, for example, if Respondent No. 1 were to furnish a statement, to the Bank - in that case, the Industrial and Commercial Bank of China Ltd. - that the petitioner is in breach of its obligations under the contract, the Bank would, *ipso facto*, be obligated to honour the Bank Guarantee, and Respondent No. 1 would be entitled to invoke it. *It would not be open to the petitioner to come to the Court, questioning the correctness of the statement furnished by Respondent No. 1 to the Bank, by contending that it had not, in fact, breached its obligations under the contract, for the simple reason that the dispute between the petitioner and Respondent No. 1 is entirely foreign to the bank guarantee, and to the obligations of the Bank under the bank guarantee, which requires only furnishing of a statement by Respondent No. 1, and nothing more*. The bank guarantee constitutes an independent contract between the Bank and Respondent No. 1, which has to abide by the covenants of that contract.

41**.** Equally, in the case of the Advance Bank Guarantees, if Respondent No. 1, as the beneficiary thereunder, furnishes a signed

document, accompanying the demand for invocation, to the effect that the petitioner has used the advance payment for purposes other than mobilization, or has failed to repay the advance payment in accordance with the contract conditions, in whole or in part, the Bank would, *ipso facto*, be bound to honour the request for invocation of the Bank Guarantee. *It would not be open to the Bank to go behind the signed statement tendered by Respondent No 1, or to carry out any enquiry or investigation to verify the correctness thereof.* Any such attempt by the Bank would be in gross violation of the terms of the Bank Guarantee and, as the Supreme Court has cautioned in the afore-quoted decisions, would throw, into disarray, the very credibility of the commitment of the Bank, towards its customers. The faith of the investing public, in the entire banking system of the country would also, in the bargain, be irrevocably compromised.

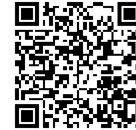
42**.** The jurisdiction of the Court to interfere, in such cases, is, however, not irrevocably foreclosed. In cases of egregious fraud, irretrievable injustice, or special equities, the Court can still step in and injunct the invocation of the bank guarantee(s).

43**.** Courts cannot afford to be over-aware of the use, in the above principle, of the qualifying adjectives "egregious", "irretrievable" and "special". It is only fraud which is egregious in nature, injustice which is irretrievable and equities which are special, the existence of which would justify the stay of invocation of an unconditional bank guarantee. *In each case, the circumstance must be pleaded and proved, by cogent evidence.*

*****

48**.** On the second aspect, of the likelihood of irretrievable injustice occurring to the petitioner, were stay of invocation of the bank guarantee not granted, the petitioner seeks to liken the situation to that which was obtained in ***Itek Corpn***[46], to plead that "even if the petitioner succeeds in the arbitration proceedings, it may not be able to recover the award amount from Respondent No 1". The contention, in my view, is wholly without merit. ***Itek Corpn*** involved a situation in which an exporter, in USA, entered into an agreement with the Government of Iran. Certain letters of credit, issued by an American Bank, in favour of an Iranian Bank, constituted part of the contract. The USA exporter sought an order terminating its liability, consequent on the said letters of credit. This, in turn, was sought as, consequent on hostilities between the US and the Iraqi government, all Iranian assets, within the jurisdiction of the US, were blocked by the US government, which

[46] **Itek Corpn v First National Bank of Boston, 566 Fed Supp 1210 (1983)**



also cancelled the export contract. In these circumstances the Court upheld the contention of the US exporter that any claim for damages, against the Iranian purchaser, even if decreed by the Courts in the US, would not be executable in Iran. In these circumstances, as realisation of the letters of credit would result in irreparable harm to the American plaintiff, relief as sought, was granted. There is no parallel, whatsoever, between that case and this. Here, if the plaintiff is to succeed in arbitration, there is no reason why it would not be able to enforce the award against Respondent No. 1 - which, as the learned Solicitor General correctly submits, is a reputed Indian Company - in India. The two cases are as alike as chalk and cheese.

49**.** Which leaves us with the third circumstance, in which stay of invocation of an unconditional bank guarantee can be legitimately directed by the court, i.e. the existence of special equities. Again, the petitioner has, undoubtedly, averred, in the petition, that such “special equities” do exist; the justifiability of the averment, however, requires to be examined.

50**.** Without extracting the specific references, to the existence of “special equities”, as made in the petition, suffice it to state that the only ground, on which the petitioner has urged the existence of such “special equities”, is its averment that its claim, against Respondent No. 1, is far in excess of the amounts of the bank guarantees. There is no other ground, on which the existence of “special equities” has been pleaded.

51**.** *Can a mere claim, of the petitioner, against the respondent - the sustainability of which is yet to be adjudicated - constitute “special equities”, so as to justify injuncting the invocation of unconditional bank guarantees, issued by the bank, at the petitioner's instance, in favour of Respondent No. 1, even if such a claim is in excess of the amount covered by the bank guarantees? In my considered opinion, it cannot.*

52**.** Extrapolating from the principle enunciated in ***Fenner India Ltd.*** in the context of irretrievable injury, I have already opined, hereinbefore, that *“special equities” must be so special as to override the twin considerations of the sanctity of the terms of the bank guarantee, and the deleterious effect which the grant of injunction, against honouring of unconditional bank guarantees, would have on the commercially transacting public.* The Supreme Court has held, in ***Meet Singh v. State of Punjab***[47], that *the word “special” means “distinguished by some unusual quality, peculiar or out of the ordinary” and that it “has to be understood in*

[47] **(1980) 3 SCC 291**

contradistinction to the word 'general' or 'ordinary'." Viewed in this background, Respondent No. 1 is entitled, on the express terms of the bank guarantees, to their invocation in its favour, subject to Respondent No. 1 submitting the required signed statements. The Performance Guarantee goes so far as to specifically stipulate that Respondent No. 1 was not required to prove or establish the breach of contract, on the part of the petitioner, before being entitled to the invocation of the bank guarantee. These are strong equities in favour of Respondent No. 1, and the sanctity attached to bank guarantees, and to the credibility of the banking system which provides such guarantees, serves to augment the equities. Can these equities be offset by the mere fact that the petitioner may have a yet to be established claim, against Respondent No. 1, so as to justify restraining the Bank from honouring the covenants of the bank guarantees? The answer, in my opinion, has necessarily to be in the negative."

From ***Garg Builders***

"34. Despite the clear enunciation of the law as above, and at least till I sat in that roster, petition after petition continued to be filed, seeking stay of invocation of unconditional irrevocable bank guarantees. In nearly every such case – including the present petitions – reliance was placed, by the petitioners, on the disputes between the parties relating to the performance/non-performance of the original contract. The fact that the petitioner, seeking stay of invocation of the bank guarantees, had a subsisting claim against the respondent beneficiary of the bank guarantees is also inevitably taken as a ground for seeking stay of invocation.

35. In view of the well-crystallised law on the subject, any reference to the original dispute between the parties, relating to the performance of the contract, is completely irrelevant, insofar as the issue of stay of invocation of the bank guarantees is concerned. That dispute has necessarily to form substratum of an entirely different proceeding, to be resolved either by arbitration or by adjudication by a court. While I have recorded the submissions of learned Senior Counsel for the petitioner regarding the petitioner's substantive grievances against HPL, I do not, in view of the law that stands settled in that regard, propose to deal with the said contentions here.

36. With these prefatory observations, I deem it appropriate, before applying the law to the facts of the present case, to itemise the basic principles relating to bank guarantees, their invocation and the interdiction of such invocation, thus:

(i) Commercial contracts often contain clauses requiring the contractor to furnish bank guarantees.

(ii) These bank guarantees are, principally, either bank guarantees provided towards security, for having been awarded the contract, or performance bank guarantees, to guarantee performance of the contract, though, on occasion, other bank guarantees such as bank guarantees towards mobilisation advance, etc. may also be required to be provided.

(iii) The contract, in such cases, also provides for the circumstances in which the bank guarantees could be invoked, as well as the purpose for requiring the bank guarantees to be provided in the first place.

(iv) No bank guarantees payment to anyone gratis. Every bank guarantee is of necessity issued by a bank on instructions. In case of a commercial contract, such as the contract in the present petition, the instruction to the bank, to provide a bank guarantee, is given by the person to whom the contract is awarded; in the present case, the petitioner. The party to whom the contract is awarded, in other words, instructs the bank, in lieu of having been awarded the contract, to issue a bank guarantee in favour of the person awarding the contract. In the present case, as required by the agreements between the petitioner and the HPL, and that the petitioner's instance, bank guarantees were issued by the bank in favour of HPL which, therefore, is the beneficiary of the bank guarantee.

(v) These bank guarantees are, however, bilateral contracts between the bank and the beneficiary i.e. HPL, even if they were issued at the instance of the petitioner. The petitioner is not a party to the bank guarantees. It is, therefore, legally a stranger to the contract, insofar as the bank guarantees are concerned.

(vi) Like all independent commercial contracts, every bank guarantee has to abide strictly by its terms. Honour and compliance of a bank guarantee, as per its terms, is, therefore, mandatory. In the case of bank guarantees, especially, the Supreme Court has stressed this aspect, as there is an overwhelming element of public interest involved in requiring banks to honor their commitments towards customers and clients. If a bank is to be interdicted, at the instance of a third party, who is a stranger to the bank guarantee between the bank and the beneficiary, from

honouring the bank guarantee, the Supreme Court has held in ***United Commercial Bank* v. *Bank of India***[48] and ***Hindustan Steelworks Construction Ltd.* v. *Tarapore & Co***.[49], that it would erode the public faith in the banking institution of the country.

(vii) The bank is, therefore, concerned only with the terms of the bank guarantee. *The elements of any dispute between the contractor and the beneficiary of the bank guarantee, or the conditions existing in the contract between the contract awardee and the beneficiary of the bank guarantee i.e. in the present case between the petitioner and HPL, are, therefore, generally irrelevant to the aspect of invocation of the bank guarantee. Even the circumstances stipulated in the contract between the beneficiary and the contract awardee, in which the bank guarantee could be invoked, are also of no relevance insofar as the liability of the bank to honour the bank guarantee is concerned.*

(viii) *In order for the aspect of performance, or failure of performance, of the parent contract, by either party, to become relevant as a consideration for invocation of the bank guarantee, they have necessarily to be incorporated by express reference in the bank guarantee itself. In other words, if the bank guarantee were to stipulate that the bank would be required to make payment to the beneficiary only in the event of failure, on the part of the contract awardee, to abide by its obligations under the contract, then the aspect of performance of the contract by the contract awardee would become a relevant consideration, while assessing the obligation of the bank to make payment to the beneficiary.*

(ix) Similarly, oftentimes, a contract may stipulate the particular stage at which, or exigency in which, the bank guarantee could be invoked by the beneficiary. Such a stipulation in the contract would, however, become relevant for the bank, when called upon by the beneficiary to honour the bank guarantee, only if that stipulation figures expressly in the body of the bank guarantee itself.

(x) *Else, the bank is not expected, much less required, to advert to the covenants of the original contract between the contract awardee and the beneficiary, to which the bank*

48 (1981) 2 SCC 766
49 (1996) 5 SCC 34

is a stranger — just as the contract awardee is a stranger to the bank guarantee. Nor is it required to enter into the disputes between the contract awardee and the beneficiary of the bank guarantee, or into the aspect of performance, or non-performance, of the contract. Nor, for that matter, is the bank entitled to examine whether the stage at which the contract between the parties envisages invocation, or enforcement, of the bank guarantee, has, or has not, been reached. The bank, being a stranger to the contract between the contract awardee and the beneficiary of the bank guarantee, has no authority to probe into the said contract, unless the terms of the bank guarantee expressly require it to do so. The bank has necessarily to be concerned only with the terms of the bank guarantee, to which alone it is a party.

(xi) *If the invocation of the bank guarantee by the beneficiary thereof is, therefore, in terms of the bank guarantee, the court cannot interdict the bank from honouring the bank guarantee, by referring to the covenants in the contract between the contract awardee and the beneficiary of the bank guarantee. Any such attempt by the court would amount to directing the bank to violate the contract, with the beneficiary of the bank guarantee, to which it is a party and, therefore, to direct the bank to commit an illegality. This, quite obviously, is completely impermissible.*

(xii) *Equally, it is not permissible, either, for the court to interdict the invocation of a bank guarantee on the ground that the stage for such invocation, as per the contract, has not been reached, or that the exigency in which the bank guarantee could be invoked as per the contract, does not exist, unless that stage, or that the exigency, is incorporated as a condition for invocation in the bank guarantee itself.*

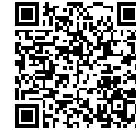
(xiii) Interdiction of invocation of unconditional bank guarantees would be justified, where the invocation is otherwise in terms of the covenants in the bank guarantees, only where there is found to exist egregious fraud, or special equities, or where irretrievable injustice would ensue were invocation not to be injuncted. In this regard, I deem it appropriate to reproduce, with humility, the following passages from my decision in ***Kuber Enterprises v. Doosan Power Systems India (P) Ltd.***[50], in which I have followed the Division Bench pronouncement

[50] **2021 SCC OnLine Del 5049**

in ***CRSC Research and Design Institute Group Co. Ltd. v. Dedicated Freight Corridor Corpn. of India Ltd***:

> "18. Admittedly, the bank guarantee provided by the petitioner to the respondents is unconditional. Stay of invocation of an unconditional bank guarantee can be granted only in exceptional circumstances. This Court in ***SES Energy Services India Ltd. v. Vendant A Ltd.***[51], has noted these exceptions and observed thus:
>
> > "9. In cases where the bank guarantee is unconditional, the law recognises only three circumstances in which courts could injunct invocation or encashment of the bank guarantee. These three circumstances, essentially, dovetail into two, with the pronouncement of courts in that regard. The three circumstances, in which the courts may interfere, and may injunct the invocation of unconditional bank guarantees, is where there is egregious fraud, special equity exists, or where irretrievable injustice or prejudice is likely to result, if the bank guarantee is invoked or encashed. The latter two circumstances have been treated, by the Supreme Court, as well as by the Division Bench of this Court in ***CRSC Research and Design Institute Group Co. Ltd. v. Dedicated Freight Corridor Corpn. of India Ltd***. to be interconnected, in that special equities would be set to exist if the invocation of the bank guarantee would result in irretrievable injustice to the opposite party. The following passage, from ***BSES Ltd. v. Fenner India Ltd.***, neatly encapsulates this position:
> >
> > > "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

[51] **2021 SCC OnLine Del 4196**



> 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 Corpn. v. Sumac International Ltd***. , that this Court, correctly declared that the law was 'settled'.'"

Additionally, in para 72 of the report in ***Svenska Handelsbanken v. Indian Charge Chrome***[52], a Bench of three Hon'ble Judges of the Supreme Court has held that *mere irretrievable injustice, in the absence of established fraud, does not make out a case for injuncting invocation of an unconditional bank guarantee.* Having said that, a bench of two Hon'ble Judges, in ***Hindustan Steelworks Construction Ltd. v. Tarapore & Co***. held, after noticing and interpreting ***Svenska Handelsbanken***, that, in ***Svenska Handelsbanken***, the court was 'not called upon to decide whether apart from the case of fraud there can be any other exceptional case wherein the court can interfere in the matter of encashment of a bank guarantee'. As such, it was held, 'not much importance' could be attached 'to the use of the word 'and' in the observation that 'it cannot be interfered with unless there is fraud and irretrievable injustice involved in the case". ***Vinitec Electronics*** and ***BSES Ltd.*** hold that *special equities, if pleaded as ground for stay of invocation of bank guarantee, should be in the nature of irretrievable injustice.*

19. While, therefore, there appears to be some fluidity in judicial thinking on the issue of whether the 'fraud' element would permeate the other two considerations of 'special equities and 'irretrievable injustice', there does appear to be consensus on the position, in law, that fraud, if pleaded, has to be egregious in nature, and that special equities, if pleaded, have to be in the nature of irretrievable

[52] **(1994) 1 SCC 502**

injustice. To that extent, therefore, these considerations, to one extent or another, juxtapose."

37. In this context, *it is necessary to distinguish between recitals in a bank guarantee which set out the purpose for issuing the bank guarantee and recitals which set out the conditions for invoking the bank guarantee. These are aspects which are often confused with each other. Bank guarantees issued in compliance with the requirements in commercial contracts often set out, in their preambular or opening recitals, the fact that they are being furnished to ensure performance of the contract by the contractor/contract awardee. That recital, by itself, does not make performance of the contract by the contract awardee, a condition for invocation of the bank guarantee. A bank guarantee has, therefore, to be carefully read in order to understand the exact governing condition in which the bank guarantee would become invocable, and in which the bank would be obligated to honor the bank guarantee.*

38. This aspect would become clear if one refers, in the present case, for example, to the bank guarantee dated 6-10-2018. *The opening preambular recital in the bank guarantee states that the bank guarantee was being provided, "as a security/guaranteeing from the contractor(s) for compliance of his obligations in accordance with the terms and conditions in the said agreement". This opening recital does not make the fact of compliance or non-compliance by the contractor i.e. by the petitioner, of its obligations under the agreement with HPL, a relevant consideration, where the aspect of invocability of the bank guarantee is concerned. That has to be decided by the covenants governing invocation as contained in the bank guarantee*, which read thus:

"1. We, HDFC Bank Limited, E-13/29, 2nd Floor, Harsha Bhavan, Middle Circle, Connaught Place, New Delhi 110 001 (hereinafter referred to as 'the bank') hereby undertake to pay to the employer an amount not exceeding Rs 7,500,000.00 (rupees seventy-five lakhs only) on demand by the employer.

2. We, HDFC Bank Limited (indicate the name of the bank) do hereby undertake to pay the amounts due and payable under this guarantee without any demure, merely on a demand from the employer stating that the amount claimed as required to meet the recoveries due or likely to be due from the said contractor(s). Any such demand made on the bank shall be conclusive as regards the amount due and payable by the bank under this guarantee. However, our liability under this guarantee shall be restricted to an

amount not exceeding Rs 7,500,000.00 (rupees seventy-five lakhs only).

3. We, the said bank further undertake to pay the employer any money so demanded notwithstanding any dispute or disputes raised by the contractor(s) in any suit or proceeding pending before any court or tribunal relating thereto, our liability under this present being absolute and unequivocal. The payment so made by us under this bond shall be a valid discharge of our liability for payment there under and contractor(s) shall have no claim against us for making such payment."

39. *Though, therefore, the opening preambular recital, identifies the purpose for providing of the bank guarantee as ensuring compliance, by the contractor i.e. by the petitioner, of its obligations under the agreement with HPL, the only condition requiring fulfilment, by HPL, to be entitled to the benefit of the bank guarantee is "a demand … stating that the amount claimed (was) required to meet the recoveries due or likely to be due from" the petitioner.*

40. To that extent, one may say that the use of the expression, "unconditional", in respect of bank guarantees, is actually a misnomer. Bank guarantees are, etymologically, never "unconditional". (Courts have, however, classically referred to bank guarantees such as those issued in the present petitions as "unconditional".) *What has to be identified is the condition in the bank guarantee which governs the obligation(s) of the bank thereunder.* Even in the present case, the bank guarantees furnished by the petitioner were, stricto sensu, not unconditional; the only condition was, however, that a demand letter was required to be issued by HPL.

41. It is important to note *the specific stipulation, in the bank guarantee, that the only requirement to be met by HPL was raising of a demand on the bank, stating that the amount claimed was required to meet recoveries due or likely to be due from the petitioner. Whether these amounts were actually due or likely to be due is, for the purposes of the bank guarantees forming subject-matter of the present petition, completely irrelevant. What was required was a statement from HPL to the bank, stating that these amounts were due or likely to be due from the petitioner.*

42. *Once such a statement was made, neither could the bank refuse to honour the bank guarantee by going behind the statement or seeking to verify whether the statement was right or wrong, nor could any court interdict such invocation on that ground. To*

repeat, what was required by the bank guarantees was a statement by HPL that the amounts in question were required to meet the recoveries due or likely to be due from the petitioner, and no more. Once such a statement was made, any interdiction against invocation of the bank guarantee by examining whether, in fact, any such amount was, or was not, due from the petitioner to HPL, would be an unjustified exercise and would also be in the teeth of the express covenants of the bank guarantee.

43. A plea for stay of invocation of a bank guarantee would be predicated either on the premise that the invocation was contrary to the terms of the agreement between the parties or contrary to the terms of the bank guarantee itself.

44. *Once, however, the beneficiary of the bank guarantee proceeds towards invocation of the bank guarantee by writing to the bank, the first argument, of the invocation being contrary to the terms of the parent contract between the parties, ceases to be available to the contractor.* The reason is simple. Referring to the facts of the present case, the petitioner has instructed the bank to issue bank guarantees favouring HPL, for availing the benefit of which HPL merely had to communicate to the bank stating that the amount claimed was required to meet the recoveries due from the petitioner. *Once, therefore, such a communication was made by HPL to the bank, the petitioner could not seek, thereafter, to interdict invocation of the bank guarantee by referring to the terms of the original contract. No equities could sway in favour of the petitioner in such a situation, predicated on the terms of the contract, breach of the contract, default or absence of default, etc. The petitioner cannot, in such circumstances, seek to come between the two independent contractual parties, namely, the bank and HPL, in the matter of performance of the contract between those parties, to which the petitioner is a stranger.*

45. *If, therefore, the grievance of the petitioner is that the invocation of the bank guarantee by HPL, though otherwise in accordance with the covenants in the bank guarantee, is contrary to the covenants in the parent agreement, the remedy with the petitioner would be to proceed against HPL to recover the monies released by HPL by invocation of the bank guarantees, not to interdict such invocation, which is a matter between the bank and HPL, and to which the petitioner is a complete stranger. The grievance of the petitioner, in such an event, is vis-à-vis HPL, and not the bank. The grievance between the petitioner and HPL, being relatable not to the covenants of the bank guarantee, but to the covenants of the agreement between the petitioner and HPL, would have to be decided on the basis of the appropriate protocol in that regard; if arbitrable, by arbitration, else by judicial adjudication.*

46. In the present case, the covenants in the contract, as well as the aspect of compliance/non-compliance with the contractual obligations have not been made conditions governing honouring of the bank guarantees by the bank. The bank guarantee dated 17-12-2016, merely requires HPL to demand, of the bank, the amount governed by the bank guarantee and the bank would become immediately liable to transmit the amount to HPL. The remaining three bank guarantees are a trifle more specific, in requiring the demand from HPL to state that the amount claimed was required to meet the recoveries due or likely to be due from the petitioner. Once such a demand, with such a statement, is made by HPL, the demand is conclusive regarding the amount covered thereby and operates *proprio vigore*, rendering the bank liable to honour the bank guarantee and to pay, to HPL, the amount covered by the bank guarantee, as demanded by it. All the four bank guarantees are equally categorical in stipulating that the demand by HPL would be conclusive regarding the liability of the bank, notwithstanding any dispute raised by the contractor i.e. the petitioner.

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49. There are, however, as already noted earlier, select circumstances in which invocation of an "unconditional" bank guarantee, even if superficially in terms of the covenants in the bank guarantee governing its invocation, may be interdicted by a court. These are (ii) where the bank guarantee is vitiated by egregious fraud, (iii) where irretrievable injustice would result if the bank guarantee were permitted to be invoked, and; (iv) where special equities exist, as would justify interdiction or invocation of the bank guarantees.

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51. *The petitioner's contention that HPL owes, to the petitioner, amounts in excess of the amount covered by the bank guarantees is obviously completely tangential to the issue at hand. Any amounts owed by HPL to the petitioner would have to form subject-matter of resolution by arbitral proceedings. This Court does not require to return any finding, in the present case, regarding the petitioner's entitlements against HPL, or vice versa.*

52. Nor can the present case be said to be one of special equities or irretrievable injustice. Indeed, the contention of learned Senior Counsel for the petitioner was essentially predicated on the irretrievable injustice principle, as learned Senior Counsel sought to contend that the financial condition of HPL was so precarious that, were the bank guarantees to be permitted to be encashed and

the amounts credited into the account of HPL, there was every likelihood of HPL not being financially in a position to restitute the petitioner, even though the petitioner to succeed in arbitration.

53. I have already alluded to the rival contentions of learned counsel regarding the financial condition of HPL. Learned counsel for both sides have invited my attention to certain recitals in the audited statement of accounts and balance sheet of HPL. They cannot all be said to be pointing one way, or to be making out a case of HPL being in such straitened financial circumstances as to be unable to pay the amount covered by the subject bank guarantees to the petitioner, if so directed at a later stage in the arbitral proceedings. No case of irretrievable injustice can, therefore, be said to exist.

54. Special equities, as held by the Supreme Court in ***U.P. State Sugar Corpn. v. Sumac International Ltd.*** and in ***Svenska Handelsbanken***, have to partake the character of irretrievable injustice. Even otherwise, it cannot be said that any such case of special equities has been made out by the petitioner, as would justify interdicting invocation of the subject bank guarantees. Indeed, the contentions of learned Senior Counsel for the petitioner essentially revolved around compliance with the conditions stipulated in the bank guarantee for transfer of the guaranteed amount to the credit of HPL, and on the aspect of irretrievable injustice.

55. In view thereof, it cannot be said that, within the boundaries of the law relating to interdiction of invocation of the irrevocable bank guarantees, a case for such interdiction has been made out by the petitioner in the present case, insofar as the subject bank guarantees are concerned."

95. All that is needed, therefore, is application of the above principles to the facts of the present case.

Was the letter of invocation in terms of the BGs?

PBGs

96. The opening paragraph of the PBGs merely sets out the circumstances in which the PBGs were furnished. It is stated that the appellant had entered into a contract dated 24 October 2017 with the respondent, for construction of the Outer Harbour for project Varsha and that the respondent had undertaken to produce a PBG for 10% of the total contract value amounting to ₹ 292.54 crores to secure its obligations to the appellant.

97. The second para of the PBGs refers to the express, irrevocable and unreserved undertaking and guarantee by the Bank to pay to the appellant, on demand and without demur, any sum upto ₹ 292.54 crores *in the event of the appellant declaring to the Bank* that the respondent had not supplied the works according to its obligation under the contract.

98. Para 1 of the PBGs, which follows, stated that the written demand of the appellant would be conclusive evidence that the payment covered by the PBGs was due in terms of the contract. The Bank undertook to effect payment on receipt of the written demand.

ABG

99. Para 1 of the ABG initially observes that the ABG was being tendered by the respondent "in consideration of the Employer having agreed to make an advance payment in accordance with the terms of the Said Contract" to the respondent. This is a mere recital of the reason for furnishing of the ABG. The para goes on to state that the

Bank would, "on demand and without demur", pay, to the appellant, the amount covered by the ABG, "if the Said Contractor would have failed to deliver the Works in accordance with the terms of the said Contract for any reason whatsoever or failed to perform the Said Contract in any respect or should whole or part of the said on account payments at any time the company payable to (the appellant) for any reason whatsoever". While this stipulation, seen in isolation, might make it appear that the contractor, i.e. the respondent, can plead lack of default, on its part, in complying with its contractual obligations, as a defence to the invocation of the ABG, this possibility stands completely dispelled by para 2 of the ABG, in which it is stated, with no equivocation whatsoever, *that the appellant would be the sole judge* as to whether the respondent has failed to deliver the works in accordance with the contract or has failed to perform the contract is in respect or whether the whole or part of the advance payment made to the respondent has become repayable to the appellant. *While examining the aspect of whether the Bank was required to honour the letter of invocation of the ABG, issued by the appellant, all that was required to be seen was whether, in the letter of invocation, the appellant had asserted the existence of one or more of the three circumstances envisaged in the ABG, in which event the Bank would be bound to pay, to the appellant, the amount covered by the ABG, which are (i) failure, on the part of the respondent, to deliver the contract work in accordance with the contract, (ii) failure, on the part of the respondent, to perform the contract in any respect, or (iii) the whole, or any part of the advance payment made by the appellant to the respondent becoming repayable to the appellant. Of these,*

circumstance (ii) is worded in terms as wide as they can be. They cover any, and every, default, by the respondent, of the terms of the contract. Nothing is excluded. The extent of failure to perform is irrelevant. If the appellant alleges that the respondent is in default of its obligations under the contract, that is enough. The Bank would be required, ipso facto, to release, to the appellant, the entire amount of ₹ 199,94,47,196/– covered by the ABG. As to whether the respondent was, or was not, actually in default of its obligations under the contract, is irrelevant. Equally irrelevant is the reason for such default, or whether the default is attributable, even in part, to the appellant. Neither can the Bank, nor can the court, dealing with the requirement of invocation of the ABG, examine whether the respondent was actually in default of its obligations under the contract or, if it was, the reason for such default. The reciprocal obligations of the appellant and respondent to each other, under the contract are, therefore, entirely irrelevant.

100. That said, the appellant was, nonetheless, required, in its letter addressed to the Bank, seeking invocation of the ABG, to aver that one or more of the circumstances existed, i.e., that the respondent had failed to deliver the works in accordance with the contract, or that the respondent had failed to perform the contract in any respect, or that the whole or part of the advance payment made to the respondent had become repayable to the appellant.

<u>RBGs</u>

101. Para 1 of the RBGs noted the fact of awarding of the contract by the appellant to the respondent, and the value of the contract. Para 2 states that the Bank had been informed by the respondent that Retention Money was required to be deducted, from each Interim Payment Certificate, at the rate of 10%, subject to a maximum of 10% of the Accepted Contract Amount, but that no such deduction would take place if the respondent would submit an unconditional RBG equal to the retention money to be withheld. These paragraphs do not, in any way, refer to the circumstances or conditions in which the RBGs would become invocable.

102. Para 3 is, however, important, significant and in fact dispositive of the issue. It contains the guarantee, by the Bank that, "merely on the written demand from (the appellant) stating that the claimed amount is due by way of breach by (the respondent) of any of the terms of conditions contained in the contract or by reason of the (respondent's) failure to perform the contract", the Bank would, "*without any demur, reservations, recourse, contest or protest <u>and without referring to any other sources including the (respondent)</u>*", pay, to the appellant, the amount covered by the RBGs. Thus, all that was required, for the Bank to be contractually obligated to pay, to the appellant, the amount covered by the RBGs, was a statement, by the appellant, that the amount claimed was due to the appellant from the respondent, by reason of breach, by the respondent, of the contract, irrespective of the nature or extent of breach. Once such a statement was made, the amount became payable. Of greatest significance, in this regard is, probably, the stipulation that the Bank would not, prior

to making payment to the appellant of the amount covered by the RBGs, "refer to any sources including the contractor". This indicates that the respondent has no role to play in the invocation of the RBGs. Where the Bank was not entitled even to make a reference to the respondent, there is no question of the respondent being able to advance any submission in its defence, or obstructing the invocation of the RBGs. The issue was entirely bilateral, between the Bank and the appellant, with the respondent playing no part. The obvious sequitur is that no defence of the respondent, to any assertions made by the appellant to the Bank, while invoking the RBGs, was permissible.

Do the letters of invocation conform to the requirements of the BGs?

103. The learned Arbitral Tribunal has, in holding that the letters of invocation had not been issued in terms of the BGs themselves, restricted its consideration to paras 3 and 4 of the letters of invocation (in para 87 of the impugned Order). This, according to Mr. Venugopal, is an error on the part of the learned Arbitral Tribunal and – again, with greatest respect to the learned members of the Arbitral Tribunal – I am inclined to agree with him.

104. Indeed, had the learned Arbitral Tribunal taken into consideration para 1 of the letters of invocation, it is doubtful, in my opinion, if it would have taken the view that it ultimately did.

105. I am in agreement with Mr. Venugopal that there is really no scope for applying, in the facts of this case, the principles of incorporation by reference, to which Mr. Agrawal alluded. Para 1 of the letters of invocation clearly invite reference to the notice of termination dated 6 July 2022 addressed by the appellant to the respondent, terminating the contract. The notice of termination was, moreover, annexed to the letter. The contents of the notice of termination have, therefore, clearly to be read along with the assertions contained in the letters of invocation. There is no inflexible principle that the recitals required to be contained in the letters of invocation, as per the BGs, were expressly to be found in the letters of invocation themselves. There was clearly nothing irregular, much less erroneous, in the respondent referring to the allegations contained in the notice of termination dated 6 July 2022 and annexing the said notice with the letters of invocation. Needless to say, the invitation, in para 1 of the letters of invocation, to refer to the notice of termination, issued on the same day, required the Banks to read both documents together. Thus, read, it is clear that all requirements of the PBGs, ABG and RBGs were contained in the communications from the appellant to the Banks, for invocation of the BGs.

106. Among the three of them, the BGs required the appellant to aver/assert that (i) the respondent had not supplied the works according to its obligations under the contract, and (ii) the claimed amount was due to the appellant because of breach, by the respondent, of any of the terms and conditions contained in the contract or because the respondent had failed to perform the contract. Nothing else was

required to be alleged, or averred, by the appellant, in its letters of invocation, in order for the Banks to be obligated to make payment of the amounts covered by the BGs. Once these assertions were contained in the communications made by the appellant to the Banks, the obligation of the Banks to pay, to the appellant, the amounts covered by the BGs *ipso facto* followed as a natural consequence. Neither could the Banks refuse to do so nor, more importantly, could the learned Arbitral Tribunal, or this Court in appeal against the decision of the learned Arbitral Tribunal, injunct or restrain the Bank from doing so.

107. The reliance, by Mr. Agrawal, on ***Zillion Infraprojects*** is, in this context, inapt. ***Zillion Infraprojects*** addressed the issue of whether, in a case in which the parties entered into two agreements, and one made reference to the provisions of the other, the reference could also be said to incorporate, *ipso facto*, the arbitration clause contained in the latter. The Supreme Court held that, in the absence of specific incorporation, by reference, of the arbitration clause, it could not be said to have been incorporated by implication. The present case does not deal with two contracts, or any need to read into one contract the provisions of the other; moreover, as already noted, it is not a case of incorporation by reference at all. As such, ***Zillion Infraprojects*** cannot apply.

108. It is clear, on a plain reading of the notice of termination dated 6 July 2022, that there are more than sufficient assertions regarding failure, on the part of the respondent, in complying with its obligations

under the contract, and the resultant entitlement, of the appellant, to be paid the amounts covered by the BGs. In this context, Clause 15.4 of the contract is also relevant. The said clause *ipso facto* entitled the appellant to be paid the amounts covered by all BGs as a consequence of termination of the contract. The right was, as Mr. Venugopal correctly submits, absolute and indefeasible. The only caveat on the said right was the requirement of the letters of invocation conforming to the stipulations contained in the BGs. That requirement, when one reads the letters of invocation which the notice of termination dated 6 July 2022, is amply met.

109. It is hardly necessary to refer, in any detail, to the allegations contained in the notice of termination. Suffice it to state that the said notice alleges, *inter alia,* that

(i) the respondent was in breach of the conditions of confidentiality contained in Clause 1.15 of the contract, as was conveyed to the respondent by the Engineer *vide* letter dated 4 May 2022,

(ii) in this context, the Engineer had also issued a Notice to Correct to the respondent under Clause 15.1 of the contract on 3 December 2021, despite which the respondent failed to make good its failures and remedy its defaults,

(iii) the respondent's progress was abysmal to the extent that, as on 31 May 2022, the respondent had achieved only 25.47% of overall works and 6-7% of OH works,

(iv) the letter dated 18 February 2020, from the Engineer to the respondent illustrated the failures of the respondent, for which the respondent alone was responsible,

(v) despite the respondent having been granted extension of time, extending the date of completion of the contract till 28 April 2022, the progress was so alarming that the potential for levy and exhaustion of delay damages amounting to 10% of the contract price was inevitable,

(vi) the respondent was, therefore, notified that it was liable to pay delay damages @ 10% of the contract price from 29 April 2022 till the notice of termination became effective,

(vii) the lack of willingness and intent, on the part of the respondent, to adhere to the terms and conditions of the contract was demonstrated by inordinate delays in the preparatory works, abysmal progress, lack of comprehensive/cohesive methodology, insufficient quarry production and transportation, insufficient mobilization of resources and manpower, and other issues of appalling inadequacy and deficiency in the respondent's progress, and

(viii) the contractor also exhibited lack of due diligence during the construction period.

These assertions more than sufficiently alleged breach, by the respondent, of its contractual obligations, failure to complete the contracted works and deliver them in time and resultant liability, of the respondent to make payments to the appellant, including delay damages quantified @ 10% of the contract price.

110. Thus, when the letters of invocation are read along with the notice of termination, the requisite assertions and allegations, as envisaged by the BGs, were duly communicated by the appellant to the Banks.

111. In this context, I am in full agreement with the view expressed by the Division Bench of the High Court of Bombay in ***Reliance Infrastructure*** which read thus:

> "54. An invocation letter is a commercial document and its interpretation has to take a common-sense approach, without being bogged down by unnecessary semantics. Even assuming that Shri Kadam is correct in his submission that the Invocation Letters dated 24th December, 2021 ex-facie do not contain the exact language required by the Bank Guarantees, we find that the demand made by the letter dated 27th December, 2021 meets the requirements of the Bank Guarantees in so far as it advises the Banks of "failure on the part of the Contractor viz. Reliance Infrastructure Limited to fulfil its obligations stipulated in the Contract."
>
> 55. We need not examine the Invocation Letters dated 27th December 2021 with a fine toothed comb to conclude whether they are fresh invocation letters or curative notices/ addendums to the Invocation Letters dated 24th December, 2021. This question would be relevant only if the law prevented a party from issuing a curative notice/ addendum to overcome a defective invocation letter.
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> 56. In this regard, Shri Dhond has relied upon the decision of the Supreme Court of India in ***Standard Chartered Bank***. In this case, the Supreme Court has expressly held that even if the first invocation letter is found to be defective, it must be read along with subsequent correspondence to ascertain whether the invocation is in terms of the Bank Guarantee. The Court held that:
>
> > "15. The learned counsel further submits that the bank guarantees are in reference to two category of losses (i) non-supply/defective supply of plant and equipment (ii) "other contractual deficiencies" and by the invocation vide letter dated 19-12-1998 claims caused by "non-supply/defective supply of plant and equipment and other

contractual deficiencies" is outside the purview of the bank guarantee. Further, assuming the correctness of the claim, the 1st respondent if suffered loss for both (i) non-supply/defective supply of plant and equipment (ii) "other contractual deficiencies", it is difficult to determine the apportionment between the two categories, because the invocation does not state how they are apportioned. The invocation is thus inchoate and incomplete and this according to the appellant does not constitute a valid invocation at all and it has not been properly appreciated by the Division Bench of the High Court in the impugned judgment [***Heavy Engg. Corpn. Ltd.***] and has to be interfered by this Court."

25. From the correspondence that has been exchanged by and between them pertaining to invocation of the said guarantees, it clearly manifests that the initial letter of invocation written by the 1st respondent-plaintiff dated 6-11-1998 indeed was per se inadequate and did not enumerate any condition for invocation of said guarantees save and except a reference to "a substantial amount to be recovered from SCIL". However, in the later correspondence exchanged between the parties dated 19-12-1998 followed by a letter dated 28-12-1998, 1st respondent informed the appellant Bank that due to defective supply of plant and equipment as well as non-supply of plant and equipment and also other contractual deficiencies of SCIL, losses had been suffered by the 1st respondent and it was duly informed to the appellant Bank that the losses had been incurred both on account of supply of plant and equipment and on account of performance of the supply of plant and equipment. On reading of letters exchanged by and between 1st respondent and the appellant Bank pertaining to invocation of the guarantees, the condition of the guarantees had been duly complied with."

57. Therefore, the Supreme Court in Standard Chartered Bank has rejected the hyper-technical approach towards construing invocation letters, and has expressly recognised that a defective invocation letter may be cured by a subsequent addendum, which may be read along with it."

112. As is unexceptionably held by the High Court of Bombay in the afore extracted passages from ***Reliance Infrastructure***, the requirement of the letters of invocation being in terms of the BGs has

to be realistically applied. The Court cannot expect word to word, comma to comma, reproduction, in the letters of invocation, of the stipulations contained in the BGs. The allegations, if any, which the BGs envisage as being communicated by the beneficiary to the Bank, must be so communicated. There is, however, no pristine form in which this communication should take place. What has to be seen is whether, in substance, the required assertion/allegation was made in the letters of invocation. Those allegations/assertions may equally be made in a document annexed to the letters of invocation, to which the letters of invocation invite reference, as in the present case.

113. In that view of the matter, it cannot be said that the letters of invocation dated 6 July 2022, addressed by the appellant to the Banks, whereby the appellant sought invocation and encashment of the PBGs, ABG and RBGs, did not conform to the stipulations contained in the BGs.

114. The finding of the learned Arbitral Tribunal to the contrary cannot, therefore, sustain.

Can the invocation of the BGs be injuncted by applying the principle of special equities?

115. The impugned order of the learned Arbitral Tribunal also applies the principles of special equities, to justify injuncting invocation of the BGs. In doing so, however, the learned Arbitral Tribunal has proceeded on considerations which are not forthcoming

from the material on record and are, with greatest respect, presumptive in nature.

116. As has been held by the Supreme Court in ***Svenska Handelsbanken*** and ***Fenner India***, special equities must partake of the character of irretrievable injustice. In other words, the equities in favor of the party restricting invocation of the BGs must be so overwhelming that they must predominate and override the obligation of the Bank to honour its commitment to the beneficiary under the BGs. They cannot be ordinary equities. The burden of proving the existence of special equities is on the party so asserting. It has to be proved, by cogent and convincing evidence, that the invocation of the BGs is so thoroughly and fundamentally inequitable that the Bank cannot be permitted to honour its obligations thereunder.

117. Para 72 of the decision in ***Svenska Handelsbanken,*** rendered by three Hon'ble Judges of the Supreme Court, merits reproduction in this context:

> "72. Again in this very judgment Shetty, J. referred to the observations of Mukharji, J. that *there should be prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Mere irretrievable injustice without prima facie case of established fraud is of no consequence in restraining the encashment of bank guarantee*."
>
> (Emphasis supplied)

118. In the above passage, the Supreme Court has effectively conflated the concepts of fraud, irretrievable injustice and special equities, while examining the aspect of injunction against invocation of unconditional BGs. The position that seems to emerge from the

above passage is that all three circumstances must coalesce. The Supreme Court holds, in the first sentence of para 72 of ***Svenska Handelsbanken*** that "there should be *prima facie* case of fraud *and* special equities in the form of preventing irretrievable injustice between the parties", for an invocation of an unconditional BG to be stayed. In other words, the Supreme Court observes that the considerations of fraud and special equities, with special equities being in the form of irretrievable injustice, must be conjointly found to exist for invocation of an unconditional BG to be injuncted. This position is reiterated in the second sentence of para 72, which emphasizes that even if there is irretrievable injustice, that alone cannot be sufficient to restrain the encashment of a BG, unless there is simultaneously, a *prima facie* case of established fraud.

119. If one were to apply the principle enunciated in para 72 of ***Svenska Handelsbanken,*** the impugned decision of the learned Arbitral Tribunal in the present case would straightaway have to be set aside, as the respondent has never even alleged, much less pleaded, fraud against the appellant. Applying para 72 of ***Svenska Handelsbanken,*** *in the absence of an allegation of fraud, even if special equities or irretrievable injustice are found to exist*, there can be no injunction of an unconditional bank guarantee.

120. Even if, for a moment, one were to wish away the requirement of alleging fraud, and treat the existence of special equities as sufficient to injunct invocation of an unconditional bank guarantee, those special equities must necessarily be in the form of irretrievable

injustice. The learned Arbitral Tribunal is clearly conscious of this legal position, which is why it has not held special equities to be existing in favour of the respondent on the basis of the allegations and counter allegations relating to the merits of the dispute before it, but has concentrated on the aspect of irretrievable injustice. The learned Arbitral Tribunal holds that, if the appellant were to be permitted to encash the BGs, it would result in "immediate and huge financial distress", resulting in irretrievable injustice to the respondent. Further, in para 109 of the impugned order, the learned Arbitral Tribunal observes that special equities emerged in favor of the respondent "as its financial position shall definitely become precarious and it will be left crippled, financially speaking", if the appellant were permitted to encash the BGs.

121. No basis for these findings is available on the record. There is no empirical data, to which the learned Arbitral Tribunal makes reference, which would support its finding that encashment of the BGs would leave the respondent financially crippled or render its financial position precarious. The appellant had, for its part, specifically traversed this position in para 151 of its reply to the Section 17 application of the respondent, as reproduced in para 80 *supra*. It was pointed out by the appellant, in the said paragraph, that the respondent and its members were engaged in over a dozen projects across states, involving tens of thousands of crores of rupees, of which the amounts covered by the BGs constituted only a miniscule fraction. The learned Arbitral Tribunal has not taken this aspect into consideration at all, but

has held, without any supportive material that invocation/encashment of the BGs would financially cripple the respondent.

122. I am entirely in agreement with Mr. Venugopal that, *if this line of reasoning were to be accepted, every BG would become vulnerable to injunction against invocation, on the ground that the invocation would result in serious financial prejudice.*

123. The learned Arbitral Tribunal further holds, again without any supportive material or evidence, in para 109 of the impugned order, that allowing the appellant to realize the amounts covered by the BGs would result in a position in which restitution of the respondent would become nearly impossible.

124. Mr. Venugopal correctly submits that, as the appellant is a wing of the Indian Navy, there is no question of restitution of the respondent becoming impossible in the event it succeeds in the arbitral proceedings, even if the BGs were to be allowed to be encashed by the appellant. This aspect hardly merits further discussion. Suffice it to state that, even on facts, the observation of the learned Arbitral Tribunal that allowing the appellant to encash the BGs would render restitution of the respondent at a later stage impossible, cannot sustain on facts or in law.

125. The effort of Mr. Agrawal to make out a case of existence of special equities in favour of the respondent, justifying injunction of invocation of the BGs, on the basis of the facts of the case, cannot

sustain. Aspects such as the alleged withholding, by the appellant, of amounts due to the respondent, the perceived impossibility of performing the contract within the stipulated time owing to circumstances beyond the respondent's control, and the purported discussions which were in progress regarding extension of the contract period, are all matters which are highly disputed and require a detailed trial and leading of evidence. Needless to say, the appellant disputes these assertions of the respondent, as is amply evident even from the allegations contained in the notice of termination dated 6 July 2022. Such disputed factual claims cannot constitute "special equities", as understood in law as a consideration on which the invocation of unconditional BGs can legitimately be injuncted. Nor is it open to seek injunction against invocation of an unconditional BG on the ground that the stage for such invocation, as envisaged by the contract, had yet to reach.

126. The reliance, by Mr. Agrawal, on Clause 15.6 of the contract is also, with respect, misplaced. Clause 15.6 no doubt entitles the appellant, in the event of invocation of the BGs being injuncted, to recover the injuncted amounts with interest at a later stage. That cannot, however, determine whether a case for grant of injunction did, or did not, exist. The injunction was sought by the respondent, not the appellant. It was for the respondent to make out a case justifying injunction, within the parameters of the applicable law.

127. That, in my considered opinion, the respondent has not succeeded in doing, either before the learned Arbitral Tribunal or before this court.

<u>The sequitur</u>

128. The sequitur is apparent. The findings of the learned Arbitral Tribunal are unsustainable in law or on facts. No case for injuncting invocation of the BGs furnished by the respondent to the appellant can be said to exist.

129. Neither of the grounds which have persuaded the learned Arbitral Tribunal to grant injunction against invocation of the BGs can be said to be sustainable on facts or in law. The requirements of the BGs were clearly satisfied in the letters of invocation read with the notice of termination issued on the same day, i.e., 6 July 2022. It cannot be said that any case for grant of injunction on the principle of special equities or irretrievable injustice exists. Besides, if one were to apply the law, as stated in para 72 of ***Svenska Handelsbanken***, in the absence of a *prima facie* sustainable allegation of fraud, injunction against invocation of unconditional BGs cannot be granted even if special equities in the form of irretrievable injustice are found to exist.

130. Special equities, in any case, have to partake of the character of irretrievable injustice. The court is empowered to injunct the invocation of an unconditional bank guarantee by applying the consideration of special equities only if it is necessary so to do in order to prevent irretrievable injustice. The finding of the learned

Arbitral Tribunal that permitting invocation of the BGs would result in irretrievable injustice and irreparable prejudice to the respondent is unsupported by any material on record, and constitute the mere *ipse dixit* of the learned Arbitral Tribunal. In arriving at the said finding, the learned Arbitral Tribunal has not taken into consideration the assertions to the contrary, contained in para 151 of the reply filed by the appellant to the Section 17 application of the respondent.

131. The merits of the claims of the respondent against the appellant are totally foreign to the aspect of stay of invocation of the BGs. Neither could the learned Arbitral Tribunal, nor can this Court, delve into the various covenants of the contract, to examine whether the invocation of the BGs by the appellant was justified, or even whether the stage for invocation had arisen.

132. The impugned order of the learned Arbitral Tribunal is, therefore, liable to be set aside.

<u>Re. other contentions advanced by Mr. Agrawal</u>

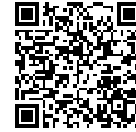
133. Detailed and copious arguments were advanced by Mr. Agrawal on the merits of the disputes between the parties. He took me through several communications in which the respondent had alleged that, owing to defaults on the part of the appellant, as well as other unavoidable circumstances, including the COVID-19 pandemic, it had become impossible for the respondent to complete the contract within the originally contracted period. This, he submits, was an issue which was under active consideration by the parties, who were engaged in

the process of examining whether the time for completion of contract could be extended. He also sought to claim the benefit of the DOE OM dated 12 November 2020, submitting that, applying the said OM, the respondent was entitled to reduction of the quantum of the PBGs from 10% to 3% of the contract value.

134. Though Mr. Venugopal has traversed the submission of Mr. Agrawal regarding the merits of the dispute, and has submitted that it was the respondent which had not been able to complete the progress in time owing to its own fault, no occasion arises for me to return any finding on this aspect, given the limited nature of the controversy.

135. The notice of termination dated 6 July 2022 clearly finds the respondent to be at fault throughout. This is an aspect which, nonetheless, is under consideration by the learned Arbitral Tribunal and, in the event of the learned Arbitral Tribunal holding in favour of the respondent, the respondent would always be in a position to recover the amounts credited to the account of the appellant consequent on encashment of the BGs. Any expression of opinion by this Court on these aspects would not only be completely foreign to the dispute at hand, but would also be pre-emptive of the legitimate exercise of jurisdiction by the learned Arbitral Tribunal.

136. Insofar as the claim for reduction of the BGs amount from 10% to 3% of the contracted price is concerned, as Mr. Venugopal correctly points out, this principle would not apply where arbitration was contemplated.



137. The word "contemplate" is wide in its scope and ambit. It would not be possible to hold, on facts, that arbitration was not in contemplation between them. The parties were unquestionably at issue on the rights and liabilities of each towards the other. It is difficult, therefore, to hold that arbitration was not contemplated at the time when the BGs were invoked.

138. Besides, this again is an issue which cannot impact the decision of this Court on the correctness of the impugned order. The impugned Order does not even advert to the DOE OM dated 12 November 2020. Besides, what was in consideration before the learned Arbitral Tribunal – and is under consideration before this Court – was whether the invocation of the BGs, as sought by the appellant, could be injuncted. It has again to be remembered in this context that a BG constitutes a bilateral contract between the bank and the beneficiary, i.e. the appellant. On the satisfaction of the conditions envisaged by the BGs, the banks were bound, contractually, to honour the BGs.

139. Mr. Agrawal has sought to contend that the failure, on the part of the appellant, to reduce the BG amount from 10% to 3% itself constituted special equities in favour of the respondent, justifying injunction against invocation of the BGs. Given the understanding of the expression "special equities" as contained in the various decisions of the Supreme Court, this contention cannot be accepted. Special equities could be said to exist only where invocation of the BGs would result in irretrievable injustice to the respondent. I have already found

that no such case of irretrievable injustice can be said to exist. The inaction of the appellant in reducing the BGs from 10% to 3% of the contracted value cannot, therefore, constitute “special equities”, as legally envisaged as a ground on which invocation of the BGs could be injuncted. At the highest, this may be a ground available to the respondent to be urged in the arbitral proceedings, while seeking restitution at a later stage. No final opinion needs to be expressed on this issue.

140. Suffice it to state, however, that it cannot be said at this stage, *prima facie*, that the respondent is entitled to the benefit of the DOE OM dated 12 November 2020 or that the appellant had defaulted in not extending the said benefit to the respondent.

141. It is clarified, however, that this observation is only for the purpose of examining the merit of the contention of the respondent predicated on the DOE OM dated 12 November 2020 as a ground to justify injuncting invocation of the BGs and is not dispositive of the issue.

Conclusion

142. For all the above reasons, I am of the opinion, with greatest respect to the learned members of the Arbitral Tribunal, that the impugned decision to stay the invocation of the PBGs, ABG and RBGs furnished by the respondent to the appellant, pending disposal of the arbitral proceedings, is not sustainable on facts or in law.

Inasmuch as it is contrary to the law laid down by the Supreme Court, this Court has no option but to interfere.

143. Resultantly, the impugned order is quashed and set aside. The stay of invocation of the BGs furnished by the respondent to the appellant, as granted by the impugned order, stands vacated.

144. In parting, this Court records its appreciation for the manner in which Mr. Saurav Agrawal presented the case, though pitted against the senior and venerated Mr. Venugopal. He argued with unruffled confidence and poise and, if he was not ultimately successful in steering his client's cart up the hill, it was only because the hill was too steep, and not owing to any want of effort on his part.

145. The appeal stands allowed in the aforesaid terms, with no order as to costs.

146. Let a copy of this judgment be provided *dasti* and e-mailed to learned Counsel for both sides today itself.

C. HARI SHANKAR, J

SEPTEMBER 17, 2024
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