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

Date of Decision : 8TH FEBRUARY, 2008

\+ **FAO(OS) 392/2007**

UNITED ENGINEERS (MALAYSIA) ESSAR PROJECTS LTD. ..... Appellant

Through : Mr. Ashok H. Desai, Sr. Adv. with Mr. Rishi Aggarwal, Mr. Mahesh Aggarwal, Mr. B.S. Shukla, Mr. S. Mittal, Mr. Akshay, Advocates

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA ..... Respondent

Through : Mr. Sandeep Sethi, Sr. Adv. with Mr. Ravi Singhania, Mr. Vikas Goel, Mr. R.N. Sharma, Mr.Santosh Pandey, Advocates

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versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA ..... Respondent

Through : Mr. A.S. Chandhiok, Sr. Adv. with Mr. Ravi Singhania, Mr. Vikas Goel, Mr. R.N. Sharma, Mr.Santosh Pandey, Mr. Mahesh Chibber, Advocates

CORAM:
HON'BLE MR. JUSTICE T.S. THAKUR
HON'BLE MS. JUSTICE VEENA BIRBAL

1. Whether reporters of local papers may be allowed to see the judgment? YES
2. To be referred to the Reporter or not? YES
3. Whether the judgment should be reported in the Digest? YES

Per Thakur, J :

Encashment of bank guarantees run into rough waters when amounts payable under the same are sizeable and the contractual relationship between the parties embittered by disputes. More often than not the party who has provided the bank guarantees takes a chance to stall the encashment by seeking judicial intervention undeterred by the fact that such intervention is limited to certain exceptional situations not always easy to establish. The present appeals arise out of a similar failed attempt on the part of the contractor appellant to prevent

encashment of the bank guarantees furnished by it. A Single Judge of this Court has by a well reasoned order repelled the contentions of the appellant that the encashment of the guarantees was likely to cause irretrievable damage to the appellant or that the appellant had made out a case on the ground of special equities in its favour to protect it against encashment. The appellant assails that order to canvass over again the very same contentions in a bid to persuade us to take a different view.

2. The appellant Joint Venture entered into a contract for the construction of two sections of National Highway No. 4 (NH-4) forming part of the Western Transport Corridor of the prestigious National Highway (Golden Quadrilateral) in the State of Karnataka. In Package 4 forming subject matter of the said Contract, the Joint Venture had to construct the Highway admeasuring 77 Kms. (4 lane) of the main carriage way in addition to service/side road with road fixtures, jewelery items etc. The total contract price for this package was over Two Hundred and Sixty Four Crores (Rs.2,64,87,23,756/- to be precise). Package 5 also forming subject matter of the same contract involved construction of the Highway over a length of 56 Kms. (4 lane) of the main carriage way with service/side road, jewelery items and road fixtures at a total contract price of Rs.200,91,94,490/-.

3. It is common ground that the appellant joint venture furnished to the respondent Highway Authority bank guarantees for a sum of Rs.79,46,45,899.56 in connection with the Package 4 and Rs.59,87,39,959/- in connection with Package 5. These bank guarantees comprised performance bank guarantees, retention money bank guarantees, machinery advance bank guarantees and mobilisation advance bank guarantees. The details of the bank guarantees when presented in a tabular form would be as under :

<u>PACKAGE 4</u>

S.No.	Category	Essar	UEM	Total
1	Performance BG	Rs. 12,97,81,465/-	Rs. 13,50,84,911/-	Rs. 26,48,72,376/-
2	Retention Money BG	Rs. 13,24,36,188/-	NIL	Rs. 13,24,36,188/-
3	Machinery Advance BG	Rs. 13,24,64,960/-	NIL	Rs. 13,24,64,960/-
4	Mobilisation Advance	Rs. 12,97,87,464/-	Rs. 13,50,84,911.56	Rs. 26,48,72,375.56
		Rs. 52,44,76,077/-	**Rs. 27,01,69,822/-**	**Rs. 79,46,45,899.56**

PACKAGE 5

S.No.	Category	Essar	UEM	Total
1	Performance BG	Rs. 9,84,50,530/-	Rs. 9,84,50,530/-	Rs. 19,69,01,060/-
2	Retention Money BG	Rs. 10,04,59,725/-	NIL	Rs. 10,04,59,725/-
3	Machinery Advance BG	Rs. 10,04,59,725/-	NIL	Rs. 10,04,59,725/-
4	Mobilisation Advance	Rs. 9,84,50,530/-	Rs. 10,24,68,919/-	Rs. 20,09,19,449/-
		Rs. 39,78,20,510/-	**Rs. 20,09,19,449/-**	**Rs. 59,87,39,959/-**

4. It is not in dispute that the bank guarantees were unconditional and encashable at the instance of the respondent Highway Authority. The bank furnishing the bank guarantees had undertaken to pay to the Highway Authority upon first written demand and without cavil or argument any sum or sums within the outer limits fixed in the guarantees without the Highway Authority being called upon to prove or to show grounds or reasons for the demand made by it. They also waived the necessity of the Highway Authority demanding the debt from the contractor before presenting its demand to the bank. The relevant portion of the performance bank guarantees furnished by the bank may be gainfully extracted at this stage :

> "*We undertake to pay you, upon your first written demand and without cavil or argument, any sum or sums within the limits of Rs.135,084,911.56 (Indian Rupees One Hundred Thirty Five Million Eighty Four Thousand Nine Hundred Eleven and Paise Fifty Six only) as aforesaid without your needing to prove or to show grounds of reasons for your demand for the sum specified therein.*
>
> *We hereby waive the necessity of your demanding the said*

> *debt from the Contractor before presenting us with the demand.*
>
> *We further agree that no change or addition to or other modification of the terms of the Contract or of the Works to be performed thereunder or any of the Contract documents which may be made between you and the Contractor shall in any way release us from any liability under this guarantee and we hereby waive notice of any such change, addition or modification."*

5. Similar provisions undertaking to pay unconditionally and without proof of any damage or loss appear in the remaining bank guarantees, six out of whom were guarantees to secure the amounts advanced by the Highway Authority to the Joint Venture for the performance of the contract.

6. The contracted works had to be completed by the Joint Venture by the 31st August, 2004. On account of certain bottlenecks and hindrance at the site of construction, the Joint Venture sought extension of 15 months period ending 30th November, 2005 in respect of Package 4 and 17 months period ending 31st January, 2006 in respect of Package 5. The Engineer upon consideration of the request recommended only 4 months extension of time ending 31st December, 2004 and referred the matter to the Highway Authority for its approval. The Engineer all the same invoked Clause 46.1 of the General Conditions of the Contract and pointed out to the Joint Venture that its progress of work at site was going slow. Aggrieved by the view taken by the Engineer, the Joint Venture referred the disputes regarding the determination of the extension of time and the alleged wrongful invocation of Clause 46.1 in respect of both the packages to the Dispute Adjudication Board (DAB) under the Contract who, in turn, granted 12 months extension of time up to 31st July, 2005 to the Joint Venture and set aside the notice for invocation of Clause 46.1 of the Contract stating that if a party was found entitled to extension, there was no invocation of Clause 46.1 for slow progress of work.

7. The contracted works were not, however, completed even during the extended period forcing the Joint Venture to seek a further extension of 8 months ending 30th April, 2006. The Joint Venture cited continued hindrance and obstruction at the site

as a justification for the extension sought by it. The Engineer recommended an extension up to 31st December, 2005 in terms of Clause 44 of the Contract despite which, the contracted works remained incomplete with the Joint Venture asking for further extension up to 30th June, 2006.

8. A review meeting was in the above backdrop held between the appellant Joint Venture, the Highway Authority and the Engineer in presence of the Union Minister of Road Transport. It was in the said meeting mutually agreed between the parties that the appellant would complete 60 Km of DBM and 25 Km of BC in respect of Package 4 and 50 Km of DBM and 15 Km of BC in respect of Package 5. According to the report of the Engineer, the Joint Venture failed to achieve those milestones. Notices and letters issued by the Engineer and the Highway Authority then followed in which the Joint Venture was accused of going slow with the completion of the contracted works.

9. By its letter dated 24th December, 2006, the Highway Authority pointed out to the Joint Venture that it had been extremely slow and its performance was dismal in the completion of the contracted works despite the respondent having been able to clear most of the obstructions at the construction site. Shortly thereafter came a letter dated 28th December, 2006 by which the Joint Venture terminated the contract in a bid to discharge itself of the obligation to carry out any further works. This was followed by a notice dated 12th January, 2007 issued by the Engineer to the appellant under Clause 63.1 of the General Conditions of Contract alleging slow progress in the completion of the contract and recommending the termination of its services. The respondent Highway Authority by its letter dated 16th January, 2007 expelled the petitioner from the work site in exercise of its powers under Clause 63.1 of the General Conditions of Contract and intimated to the Joint Venture its intention to invoke the bank guarantees, forcing the Joint Venture to file OMP Nos. 32/2007 and 33/2007 for an injunction restraining the

former from doing so.

10. The petitions primarily proceeded on the basis that the invocation of the Bank Guarantees was unjust and inequitable as according to the appellant joint venture, the delay in the completion of the contracted works had occurred on account of a failure of the Highway Authority in removing the hindrance from the site of construction. The grant of extensions, argued the Joint Venture, were tantamount to an admission on the part of the Highway Authority that it had failed in the discharge of its contractual obligation, including the obligation of providing an unhindered site for execution of the works. The Joint Venture claimed that it had lived up to its commitment made in the joint meeting held before the Union Minister of Road and Transport and completed a substantial part of the work. It also contended that the bank guarantees could be encashed only during the subsistence of the contract between the parties and that since the same stood repudiated by the Joint Venture, the guarantees furnished by it were no longer available for encashment.

11. The petitions were opposed by the respondent Highway Authority who alleged suppression of material facts and documents which according to the respondent dis-entitled the Joint Venture from invoking the equitable jurisdiction of the Court. It was alleged that the Engineer's monthly progress report of December, 2005 completely falsified the Joint Venture's claim of achieving 100% progress in the completion of the contract. According to the Highway Authority, the Joint Venture had completed only 38.71 Kms. of main carriage way (out of 76 Km) in Package 4 and 37.70 km (out of 56 km) in Package 5 thereby achieving no more than 55% progress in completion of the work on the main carriage ways leaving other works untouched. It was also asserted by the Highway Authority that extensions were granted to the Joint Venture not on account of hindrances at the site of construction but with a view to somehow get the work completed keeping in

view its national importance. The extensions did not according to the Highway Authority absolve the Joint Venture of its obligation or liabilities arising out of the breach thereof. The plea of irreparable damage or irretrievable injury on account of the encashment of bank guarantees was also stoutly refuted.

12. Relying upon the decision of the Supreme Court in *U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd.* **(1988) 1 SCC 174** and *BSES (Now Reliance Energy Ltd.) v. Fenner India Ltd. and Another* **(2006) 2 SCC 728**, a learned Single Judge of this Court dismissed the petitions holding that encashment of a bank guarantee could be injuncted only in cases falling under four exceptional situations to the general Rule that a court does not interfere with the encashment of a bank guarantee which is an independent and distinct contract between the bank and the beneficiary. The Court further held on an appreciation of the material placed on record that despite the Highway Authority removing substantially the hindrances afflicting the site of work, the Joint Venture had owing to various factors squarely attributable to it viz. poor planning, financing, inefficient running of machinery and lack of requisite labour, failed to expedite the work of construction resulting eventually in the failure of the contract. The learned Single Judge further held that the hindrance at the construction site had been reduced by the Highway Authority to a mere 4.5 Km length in respect of Package 4 and 900 meters length in respect of Package 5 despite which the Joint Venture had failed to increase the pace of the progress and take up even the scrubbing and grubbing work of the side and service roads along the main carriage way. Relying upon the monthly progress reports filed by the Engineer in respect of the two packages, the learned Single Judge recorded the following findings of fact:

> *(i) That the hindrances and obstructions afflicting the site of construction were variable in nature and removed by the respondent on a timely basis.*
> *(ii) Although the respondent managed to clear the hindrances to a considerable extent, the petitioner could not complete the work of construction despite seeking*

several extensions of time.
(iii) That the performance of the petitioner was constantly evaluated and reviewed by the Engineer and the petitioner was regularly intimated of its shortcomings on account of poor planning, inadequate manpower and machinery, etc.
(iv) That despite constant reminders of its dismal performance, neither could the petitioner overcome its shortcomings nor could it expedite the work of construction.
(v)That, even otherwise if the hindrance area is to be excluded, the petitioner had failed to explain why no substantial work has been done by it on the site.

13. The Court interpreted Clause 46.1 and 63.1 of the General Conditions of Contract and held that the Engineer had rightly invoked Clause 46.1 having regard to the default on the part of the Joint Venture in carrying out the contracted works with reasonable despatch. The Court found that the invocation of Clause 46.1 was in no way in conflict with the DAB Award dated 21st July, 2004. Relying upon the letters dated 11th December, 2006 and 12th January, 2007 from the Engineer to the Joint Venture, the Court recorded a finding that the Joint Venture had shown an extremely dismal pace of progress and was negligent in the completion of the contract despite hindrance free site having been made available to it for carrying out the work. The Court also repelled the contention that the Joint Venture would suffer irretrievable injury or that any special equities existed in its favour to justify an injunction against the invocation of the bank guarantees. The court declared that the bank guarantees being in absolute terms, the validity of their invocation did not depend on the existence or otherwise of any dispute between the Joint Venture and the Highway Authority.

14. We have heard learned counsel for the parties at considerable length and perused the record. The law relating to invocation of bank guarantees is fairly well-settled by a long line of decisions rendered by the Supreme Court. In UP Cooperative Federation Ltd. Versus Singh Consultants and Engineers (P) Ltd., **1988 (1) SCC 174**, the Apex Court referred extensively to English and Indian cases on the subject and declared that a guarantee must be honoured in accordance with its terms. The bank which gives the guarantee is concerned the least with the

relations between the supplier and the customer nor even with the question whether the supplier has performed his contractual obligation or not. So also the bank is not concerned with the question whether the supplier is in default or not. It must pay, according to the tenor of its guarantee, without proof or condition. Having said so, the court recognised two exceptions to that rule. The first exception covers cases where a clear fraud of egregious nature is committed which vitiates the underlying transaction is established. The second exception covers cases where an irretrievable injury shall be caused to the party furnishing the bank guarantee if an injunction against its encashment is not granted. This position was reiterated by their lordships in General Electric Technical Services Co. Inc. Versus Punj Sons (P) Ltd. & Another, **1991 (4) SCC 230,** Svenska Handelsbanken Versus M/s. Indian Charge Chrome and Others, **1994 (1) SCC 502** and The State Trading Corporation of India Ltd. Versus Jainsons Clothing Corporation and Another, **AIR 1994 SC 2778.**

15. In Larsen & Toubro Limited Versus Maharashtra State Electricity Board and Others, **1995 (6) SCC 68,** the Court ruled against injunctions prohibiting encashment of bank guarantees unless the case fell under one of the two exceptions, namely, fraud and/or irretrievable injury. The court held that there should be a prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Mere irretrievable injustice without prima facie cases of establishing fraud was of no consequence in restraining the encashment of bank guarantee, declared the Court.

16. In UP State Sugar Corporation Versus Sumac International Ltd., **1997 (1) SCC 568**, the question was once again examined by their lordships and the legal position reiterated upon a review of the case law on the subject.

17. The court summed up the legal position on the subject in the following words :-

"The law relating to invocation of such bank guarantees is

by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country. The two grounds are not necessarily connected, though both may coexist in some cases. In the case of U.P. Coop. Federation Ltd. V. Singh Consultants and Engineers (P) Ltd. which was the case of a works contract where the performance guarantee given under the contract was sought to be invoked, this Court, after referring extensively to English and Indian cases on the subject, said that the guarantee must be honoured in accordance with its terms. The bank which gives the guarantee is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contractual obligation or not, nor with the question whether the supplier is in default or not. The bank must pay according to the tenor of its guarantee on demand without proof or condition. There are only two exceptions to this rule. The first exception is a case when there is a clear fraud of which the bank has notice. The fraud must be of an egregious nature such as to vitiate the entire underlying transaction. Explaining the kind of fraud that may absolve a bank from honouring its guarantee, this Court in the above case quoted with the approval the observations of Sir John Donaldson, M.R. in Bolivinter Oil SA v. Chase Manhattan Bank (All ER at p352): (at SCC p.197)

"The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear both as to the fact of fraud and as to the bank's knowledge. It would certainly not normally be

> *sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it charged" (emphasis supplied)*

18. The court explained that the fraud in order to constitute an exception justifying an injunction against encashment must be a fraud in connection with the bank guarantee. The High Court in that case had held that the termination of the contract by the appellant was contrary to the terms of the contract thereby making the invocation of the bank guarantee fraudulent. Their lordships of the Supreme Court did not approve of that line of reasoning and observed that the disputes between the parties relating to the termination of the contract could not make the invocation of the bank guarantee fraudulent. This is evident from the following passage:-

> *"Clearly, therefore, the existence of any dispute between the parties to the contract is not a ground for issuing an injunction to restrain the enforcement of bank guarantees. There must be a fraud in connection with the bank guarantee. In the present case we fail to see any such fraud. The High Court seems to have come to the conclusion that the termination of the contract by the appellant and his claim that time was of the essence of the contract, are not based on the terms of the contract and, therefore, there is a fraud in the invocation of the bank guarantee. This is an erroneous view. The disputes between the parties relating to the termination of the contract cannot make invocation of the bank guarantees fraudulent. The High Court has also referred to the conduct of the appellant in invoking the bank guarantees on an earlier occasion on 12/4/1992 and subsequently its withdrawing such invocation. The court has used this circumstance in aid of its view that the time was not of the essence of the contract. We fail to see how an earlier invocation of the bank guarantees and subsequent withdrawal of this invocation make the bank guarantees or their invocation tainted with fraud in any manner. Under the terms of the contract it s stipulated that the respondent is required to give unconditional bank guarantees against advance payments as also a similar bank guarantee for due delivery of the contracted plant within the stipulated period. In the absence of any fraud the appellant is entitled to realize the bank guarantees."*

19. In so far as irretrievable injury is concerned, the court applied the standard

laid down in Itek Corpn. Versus First National Bank of Boston, **566 Fed Supp 1210** and held that recovery of any amount from the party demanding the encashment of the bank guarantee was in that case a clear possibility thereby taking the case out of the second exception. In Itek Corpn.'s Case (supra), absence of a clear possibility of recovery of the money being paid under the guarantee to the party who had furnished the guarantee was taken as making out a case of irretrievable injury. The ratio in Itek Corp's case was approved by their Lordships in Svenska case (supra) in which the Court had vacated the injunction against encashment of the bank guarantee holding that the fact situation in that case was not similar to Itek Corpn.'s case as once the plaintiff was able to establish fraud and obtain a decree for damages by diminution in price there would be no problem for effecting recoveries in a a friendly country where the bankers or the suppliers are located. The court observed :

> *"The High Court was also in error in considering the questions of balance of convenience. In law relating to bank guarantees, a party seeking injunction from encashing of bank guarantee by the suppliers has to show prima facie case of established fraud and an irretrievable injury. Irretrievable injury is of the nature as noticed in the case of Itek Corpn. Here there is no such problem. Once the plaintiff is able to establish fraud against the suppliers or suppliers-cum-lenders and obtains any decree for damages or diminution in price, there is no problem for effecting recoveries in a friendly country where the bankers and the suppliers are located. Nothing has been pointed out to show that the decree passed by the Indian Courts could not be executable in Sweden."*

20. The above legal position was reiterated by the Supreme Court in BSES Ltd. (Now Reliance Energy Ltd.) Versus Fenner India Ltd. and Another, **2006 (2) SCC 728** where the law was summed up in the following words :-

> *"There are, however, two exceptions to this rule. The first is when there is a clear fraud of which the bank has notice and a fraud of the beneficiary from which it seeks to benefit. The fraud must be of an egregious nature as to vitiate the entire underlying transaction. The second exception to the general rule of non-intervention is when there are "special equities" in favour of injunction, such as when "irretrievable injury" or "irretrievable injustice" would occur if such an injunction were not granted. The*

> *general rule and its exceptions has been reiterated in so many judgments of this Court, that in U.P. State Sugar Corpn. v. Sumac International Ltd. (hereinafter "U.P. State Sugar Corpn.") this Court, correctly declared that the law was "settled"."*

21. It is in our opinion unnecessary to burden the judgment with any further references to decisions rendered by different courts including this court, as the legal position is authoritatively settled by the above decisions.

22. The only question that arises for consideration in the light of the above legal position is whether the appellant has made out a case for issue of an injunction against the encashment of the bank guarantees on the ground of fraud or irretrievable injury and whether any special equities exist in its favour to call for an injunction as prayed for.

23. In fairness to Mr. Desai, senior counsel for the appellant, we must mention that no attempt was made by him to bring his case under the first exception of the guarantee being vitiated by fraud. All that was argued was that since serious disputes as to the cause for the delayed execution of the work had arisen between the parties, the invocation of the bank guarantees would cause irreparable injury to the appellant. Neither in the petitions under Section 9 nor in any document or in the memo of appeal has any assertion been made by the appellant to the effect that the transactions underlying the bank guarantees or the guarantees themselves were vitiated by any fraud. We have in that view no hesitation in affirming the finding recorded by the learned single Judge that the case of the appellant did not fall under the first exception covering cases involving fraud. We may, while parting with this aspect, mention that the encashment of the bank guarantee has not been assailed by the appellant on the ground of any procedural failure. The bank guarantees are in any case unequivocal and unambiguous in their language and being independent and distinct contracts between the bank and the respondent beneficiary both the parties are bound by the same.

24. That brings us to the question whether the appellant has made out a case for

injunction on the ground of irretrievable injury to it and whether special equities if any exist to justify the intervention of the court. The very same question has been addressed by the learned single Judge before whom it was argued that an irretrievable injury would be caused to the petitioner by encashment of the bank guarantees as the banks would upon payment of the amount initiate recoveries against the petitioner thereby bringing its business to a stand still.

25. It was also contended that the encashment of the bank guarantees would result in undue enrichment of the respondent thereby justifying interference by the court with the process of encashment. Both these contentions were however repelled by the learned single Judge and in our opinion rightly so. Firstly because the question of irretrievable injury has to be of the kind referred to in Itek Corpn.'s case and Svenska's case (supra). Just because the banks would start recovery proceedings against the appellant, does not bring the case close to the fact situation in which the decision in Itek Corpn.'s Case (supra) was delivered. What is important is whether the appellant would have no remedy to recover the amount paid under the bank guarantees from the respondent beneficiary. In Itek Corpn.'s case (supra), the case of irretrievable injury was made out on account of the near impossibility of recovery of the amount from the beneficiary of the guarantee. No such case has been either pleaded or can be countenanced in the fact situation of this case. We say so because it is not the case of the appellant that if the arbitral award eventually holds the appellant entitled to recover either entirely or in part, the amount covered by the bank guarantees, it would be difficult, leave alone, impossible for the appellant to do so. The respondent beneficiary of the bank guarantees is a statutory corporation wholly financed and controlled by the Government of India. It is in its very nature an instrumentality of the Government of India. The question of amounts held payable to the appellant becoming unrecoverable for any reason does not arise qua such an agency with tremendous resources. Just because the appellant foresees recovery proceedings against it by

the bank, who has furnished the bank guarantee, does not lend any support to its claim for injunction nor can the appellants case be equated with situations in which the courts have forbidden encashment on the ground of irretrievable injury.

26. That brings us to the question whether any special equities have been established by the appellant to justify the grant of an injunction against the encashment of the guarantees. The burden of the case argued on behalf of the appellant consistently has been that the delay in the execution of the work was on account of hindrances at the construction site. The appellant's version is that but for the hindrances it would have completed the works as it had taken the necessary steps for an early completion of the contracted works. That position has been disputed by the respondents on the basis of the documents placed on record especially the reports of the engineer. The engineer has by its letter dated 26th July, 2006 comprehensively brought out how the hindrances at the site of construction have been reduced to a mere 4.5 Kms length in respect of the Package IV and 900 metres in respect of Package V. The said letter has been referred to and extracted in extenso by the learned Single Judge. Also relevant are the monthly progress reports filed by the engineer in respect of both the packages, portions whereof have been noted by the learned Single Judge while recording a finding of fact that even when the respondents had cleared hindrances to a considerable extent, the petitioner could neither complete the work nor expedite its completion. These findings are, in our view, perfectly justified in the light of the material on record and in the absence of any allegation of mala fides against anyone connected with the preparation of the monthly progress reports or the supervision of the contracted works at site. That being so, the argument that encashment of the bank guarantees even when the appellant was not at fault for the delay in the execution of the works needs notice only to be rejected. The performance of the appellant and its deficiencies and shortcomings are summed up in the engineer's letter dated 12th January, 2007, the relevant portion whereof reads as under :

"ICT : 362 : KKK : 397
Mr. A.V. Sinha *12th January, 2007*
Member (Technical)
National Highway Authority of India
G5 &6, Sector 10, Dwarka
New Delhi-110 075

Subject: *Western Transport Corridor, Tumkur – Haveri Construction Packate 4 : Chitradurga to Harihar Section of NH4 in Karnakata state : Notice under clause 63.1*

Dear Sir,

The Contract Agreement for the execution of works for Rehabilitation and Upgradation of Chitradurga – Haveri sectin (Km 207 to Km 284) in the State of Karnataka was signed on the 16th day of January, 2002 between National Highway Authority of India (The Employer) and M/s. United Engineers (Malaysia) – Essar Projects Limited, Joint Venture (The Contractor).
The date of commencement of works for this package was 01/3/02 and the same had to be completed by 31/8/04. It will be seen that to complete the works in time an average monthly progress asking rate would be 3.3%. However, the contractors need time for mobilization and time is also lost due to bad weather, holidays/festivals and other reasons and therefore an average monthly progress asking rate of 4% was required to successfully complete the works in time. Whereas, the demonstrated progress of the contractor has been consistently much lower, as would be seen from the average monthly progress achieved since the year 2002. The same is given here under for your ready perusal.

a). 2002- No progress
b). 2003 – 1.1%
c). 2004 – 1.5%
d). 2005 – 1.45%
e). 2006 – 1.1%

The performance of the contractor has suffered due to the poor site organization, shortage of materials, lack of planning and professional pride to do a job well. The shortcomings and deficiencies of the contractor have been repeatedly brought to their notice during meetings at various levels and through letters. However, all these had little effect and contractor continued to perform poorly, achieving only 69.5% physical progress upto the end of December, 2006.

The completion date for the works had been extended upto 31st December, 2005 and further extension of time has been recommended upto 31st December, 2006, which is under active consideration of the authorities. The contractor has failed to show any sense of urgency to speed up the progress and complete the works even by the recommended extended time. Therefore, under the provision of clause 46.1 of the conditions of the contract, a notice was last served on the Contractor vide our

letter No. ICT : 362 : KK : 10914 dated 11 December, 2006, to demonstrate clearly improved rate of progress within 28 (twenty eight) days of the receipt of the notice. It is sad that even this had no effect on the contract and practically hardly any works is being carried out. In fact the work has been virtually stopped and only 0.06% work has been done in last 28 days, after the issue of notice. Non availability of basic inputs like diesel and bitumen for days shows complete lack of responsibility and will of the contractor to fulfill his contractual obligation. As 'Engineer', it is my considered view tht there is no hope of contractor taking appropriate steps to improve their performance. Having exhausted all contractually available means to make the contractor perform and seeing no chance of the contract works beign completed in near future and persistent attitude of the contractor to continue harping on its claims and other issues, action under clause 63.1 of the conditions of the contract by the employer is strongly recommended. (emphasis supplied)

With regards,

Yours truly,
Sd/-
(K.K. Kapila)
Project Director & Engineer
CMD – ICT Pvt. Ltd."

27. In the light of the above and the finding recorded by the learned single Judge with which we entirely agree, there is no basis for holding that the encashment of the bank guarantees was justified or that there were any special equities in favour of the appellant making the encashment of the bank guarantees unjustified or unreasonable or onerous. There is no merit in these appeals which fail and are hereby dismissed with costs assessed to Rs.10000/- in each case.

T.S. THAKUR, J.

VEENA BIRBAL, J.

FEBRUARY 08, 2008
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