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IN THE HIGH COURT OF DELHI

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FAO No.400/2007

National Highways Authority of India Appellant
through: Mr. Sandeep Sethi, Sr. Advocate,
Mr. A.S.Chandiok, Sr. Advocate with
Mr. Kishan Kumar, Mr. Lakshay Sawhney,
Ms. Shikha Tandon and Mr. Amit Kumar,
Advocates

VERSUS

ELSAMEX-TWS-SNC JOINT VENTURE Respondent
through: Mr. Dushyant A.Dave, Sr. Advocate,
Mr. Rajiv Nayyar, Sr. Advocate with
Ms. Kiran Suri, Mr. Purvesh, Mr. Anirudh,
Ms. Aparna and Ms. Niharika, Advocates

DATE OF DECISION:

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28.04.2008

CORAM:

Hon'ble Mr.Justice Pradeep Nandrajog

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 judgment should be reported in Digest? Yes

: PRADEEP NANDRAJOG, J.

1. Yet another instance of an injunction being sought against a beneficiary who sought to enforce it's right under bank guarantee(s).

2. NH-5 in the State of Orissa from Km 136.5 to Km 199.141 has run into a road block. Excluding a stretch of 3.799 Km covering major bridges, the work of 4/6 lanning was

awarded by NHAI to ELSAMEX-TWS-SNC Joint Venture (hereinafter referred to as the contractor). The contract was awarded on 5.3.2001. 33 months was the completion time i.e. date of completion was 3.2.2004.

3. Under the contract the contractor was to furnish a performance guarantee and was entitled to receive mobilization advance and equipment advance but the same was to be secured under bank guarantees in favour of NHAI. 5 guarantees issued by various banks were submitted by the contractor favouring NHAI on various dates.

4. Work could not be completed within the completion period. On 19.8.2005 a supplementary agreement was executed modifying/substituting certain clauses of the original contract, contents whereof being not relevant for adjudication are not being noted.

5. The contractor justified delay on various factors not attributable to it, like non availability of land free from encumbrance, obstruction by local population, non completion of allied works by third parties etc. The contractor claimed escalation in prices of raw material consumed in the works and hence sought escalation in the price. NHAI denied the same. But the work continued without any consensus being reached.

6. The contract contained an arbitration clause. The

contractor invoked the same. On 23.11.2005 arbitration commenced with the constitution of the arbitral tribunal. The work continued because parties agreed that pending resolution of the dispute by the arbitral tribunal the same should continue.

7. The month of April 2006 was reached. The arbitral tribunal made no headway. The contractor stated that it had no funds to continue with the work. It claimed complete drying up of resources. To facilitate the completion of the work a temporary solution was found. NHAI agreed to advance money to the contractor by labeling the same 'Discretionary Advance'. On 2.5.2006 a supplementary agreement was executed under which the scheduled date of completion was shifted to June 2007 and additional discretionary advance was agreed to be paid. The discretionary advance was agreed to be secured in favour of NHAI by and under bank guarantees. The period of recovery of all advances was deferred.

8. Notwithstanding additional funds flowing to the coffers of the contractor from NHAI, the work progressed at a snails pace. According to the contractor the escalation in the price of raw material was far in excess of the advances received by it and hence the slow pace. The contractor constantly demanded price revision. On 5.9.2006 a high level

meeting was held in which it was noted that the engineer appointed to monitor the contract had recommended the estimated date of completion to be 31.12.2007 and that the arbitral tribunal had published an award in favour of the contractor allowing price escalation as per the award. In the meeting it was decided that every effort would be made to expedite the work and that NHAI would release additional funds as per schedule agreed. The schedule appended to the minutes of the meeting dated 5.9.2006 contemplated NHAI releasing Rs.24.1 crores as follows:-

A.	September 2006	Rs.10 crores
B.	January, Feb. and March 2007	Rs.2 crores each month
C.	April and May 2007	Rs.2.3 crores per month
D.	June 2007	Rs.1.9 crores
E.	July 2007	Rs.1 crores
F.	August 2007	Rs.60 lacs

9. NHAI did not make payment under the award published by the arbitral tribunal and challenged the same by filing objections under Section 34 of the Arbitration and Conciliation Act 1996. The said objections are still pending consideration on the original side of this court.

10. The contractor received further advances under the revised agreement as minuted on 5.9.2006 but claimed that

the price escalation was so sharp that even within the increased funds it could not complete the work. Needless to state as and when further payments were advanced by NHAI to the contractor, bank guarantees were submitted by the contractor in favour of NHAI. On 26.4.2007 another agreement, supplementing the existed agreement was executed between the parties. It was recorded therein that Rs.10 crores would be further advanced as discretionary advance to the contractor by NHAI out of which Rs.6 crores would be in the form of secured material and Rs.4 crores in the shape of cash shall be paid. It was further agreed that recovery of discretionary advances shall be deferred up to June 2007.

11. By April 2007, 24 bank guarantees came to be furnished by the contractor in favour of NHAI. Recorded in tabular form, a birds eye view of the guarantees would be:-

S.No.	Purpose	Bank Guarantee No.	Amount (in Rs.)
1.	Performance Security	31/2001	195185817
2.	Mobilization Advance	52/2004	48796455
3.	Mobilization Advance	53/2004	48796455
4.	Equipment Advance	134/2001	48800000

5.	Equipment Advance	176/2001	48800000
6.	Payment against Price Escalation	28/2004	4100000
7.	Payment against Price Escalation	11/2004	7550000
8.	Payment against Price Escalation	54/2006	7824050
9.	Payment against Price Escalation	92/2006	23485488
10.	Discretionary Advance	42/2004	48800000
11.	Discretionary Advance	43/2004	48700000
12.	Discretionary Advance	69/2004	5250000
13.	Discretionary Advance	239/2004	2600000
14.	Discretionary Advance	93/2006	8270859
15.	Discretionary Advance	151/2005	70000000
16.	Discretionary Advance	202/2005	30000000
17.	Discretionary Advance	154/2006	50000000
18.	Discretionary Advance	155/2006	50000000
19.	Discretionary Advance	52/2007	50000000
20.	Discretionary Advance	53/2007	50000000
21.	Discretionary Advance	0021707IFG000002	20000000

22.	Discretionary Advance	20/2004	5000000
23.	Discretionary Advance	46/2004	5830000
24.	Discretionary Advance	111/2005	4147000

12. By April, 2007 the forth discretionary advance totalling Rs. 10 crores which had been sanctioned on 27.3.2007 was utilized in the form of Rs.4 crores being released directly to the contractor and Rs.4.9 crores paid on 7.5.2007 to various parties who had supplied raw material to the respondent. Unfortunately, not much work was performed even after April, 2007. On 16.8.2007 the contractor wrote a letter informing the appellant : *now it has become impossible to further continue with the works unless NHAI makes escalation payments and consider revision of rates for the works carried out after the contract period.....*

13. There was a stalemate. The contractor feared that the bank guarantees may be invoked. Since the arbitral tribunal had already been constituted to decide the dispute pertaining to escalation an application was filed under Section 17 of the Arbitration & Conciliation Act praying to the arbitral tribunal that NHAI be restrained from invoking the bank guarantees.

14. It may be noted that on 5.8.2006 the arbitral tribunal had passed an award in favour of the contractor pertaining to one set of claims relating to escalation as per which approximately Rs.9.37 crores became payable by NHAI to the contractor. To put it differently, as per the award Rs.9.37 crores advanced by NHAI to the contractor under discretionary advance or under any other head would not be recoverable by NHAI and has to be adjusted for.

15. Vide order dated 25.10.2007 impugned in the instant appeal, the tribunal restrained NHAI from invoking or recovering any money under the bank guarantees. The finding by the arbitral tribunal is on the ground that special equities were shown entitling the contractor to a restraint order against the appellant.

16. Justifying a restraint order pertaining to the performance guarantee reason given by the arbitral tribunal is in para 11.2 of its order. It reads as under :-

'11.2. Thus the validity of this performance security is upto the end of the defect liability period of 12 months after completion of the work. The work under the contract is not yet completed. Therefore the AT holds that it is premature at this stage to encash the bank guarantee given as performance security.'

17. Pertaining to the bank guarantees at Sr. Nos.2, 3, 4 and 5 of the chart reproduced in para 11 above, the relevant

findings by the tribunal are as recorded in para 11.9 of the order which reads as under :-

'11.9. In the light of the above facts, the AT finds that, having entered into supplementary agreement on 26.4.2007 and having fully known the stage of work on that date and the fact that the work could not progress during the ensuing months, there is no justifiable reason for the respondent as per the provision of the supplementary agreement and the contract to encash the bank guarantee at this stage such an action would be premature.'

18. Pertaining to the remaining guarantees the reasons given by the arbitral tribunal may be crystallized as under:-

A. That an award had been published in favour of the contractor and that the issue of price escalation was pending further consideration before the arbitral tribunal and that the award pertaining to part period of escalation had not been set aside and was pending consideration before the court.

B. Dispute being a subject matter of consideration before the arbitral tribunal no emergent cause existed to invoke the bank guarantees and hence invocation thereof was not justified.

C. Under the last supplementary agreement, recovery of discretionary advances was deferred upto June, 2007 and the project engineer had recommended extension of time for completion of the contract upto 31.12.2007. That in April, 2007 when supplementary agreement was drawn on

26.4.2007 it was in the knowledge of all that monsoon period was round the corner and that meaningful work could commence only after the monsoon was over. Thus the contractor could not be blamed for slow progress of work after April, 2007.

D. That if bank guarantees were permitted to be encashed irretrievable harm would be caused to the claimants on account of the issuing banks liquidating collateral securities which would seriously impair the financial status of the contractor making it ineligible to participate in further tendering process and may even entail black listing of the contractor.

19. Shri Sandeep Sethi, learned Senior Counsel and Shri Amarjeet Singh Chandhiok, learned Senior Counsel who appeared for the appellant urged that entire process of reasoning of the arbitral tribunal is faulty and contrary to law. Learned counsel urged that it is settled law that a bank guarantee is independent of the main contract and enforcement of a claim under the guarantee has to be adjudicated upon with reference to the guarantee. Counsel urged that all the bank guarantees were unconditional, unequivocal and payable on demand, without protest or demur and hence unless it was pleaded and established that it was a

case of a fraud of an egregious nature or that the money would be lost by the contractor irretrievably, the only 2 known exceptions to enforce a bank guarantee payable on demand, no injunction could be issued against the appellant.

20. Per contra, Shri Dushyant A. Dave learned Senior Counsel who appeared for the contractor urged that the power of the arbitrators under Section 17 of the Arbitration & Conciliation Act, 1996 is wider than the power of a Court under Order 39 Rule 1 and or Rule 2 of the Code of Civil Procedure, in that, pending adjudication of an arbitration claim the arbitrators can pass any order as an interim measure. Counsel urged that where a prima facie case exists, as held by the Hon'ble Supreme Court in the decision reported as 1990 (Suppl.) SCC 727 Wander Ltd. & Anr. Vs. Antox India Pvt. Ltd., an injunction must issue.

21. On merits, to show a prima facie case Shri Dushyant A. Dave learned Senior Counsel for the contractor referred to various letters written by the engineer (an independent agency) appointed under the contract who recommended not only price revision but even extension of time to the contractor to urge that it would be most unjust if the contractor was compelled to honour the bank guarantees.

22. Shri Sandeep Sethi, learned Senior Counsel for NHAI

responded on the prima facie merits of the case by highlighting that the contractor having received further sum of Rs.10 crores in April, 2007 did no work in the months of April, May and June and hardly any work in the month of July and on 16.8.2007 notified the intention to abandon all works. Learned senior counsel highlighted, with reference to a letter dated 28.6.2007, that since November 2006 till April 2007 the monthly progress of work was virtually nil. Counsel pointed out that the said letter shows that as against an estimated value of work to be executed in said months in sum of Rs.41.34 crores, work worth only Rs.1.09 crores was executed. The letter dated 28.6.2007 is as under :-

'Date: 28th June 2007

To

Mr.A.K.Parthy,
Project Manager,
Elsamex-TWS-SNC JV,
Bidu Bazar,
Balasore

Sub: **Shorfall in achievement of committed schedule during May and June 2007**

Dear Mr.Parhy,

The table hereunder shows the month-wise miserable achievements against the schedule from November 2006 to April 2007. It was dismal during November 06 to January 07 and Nill from February 07 to April 07.

	Nov' 06	Dec' 06	Jan'07	Feb'07	Mar'07	Ap'07	Total
Scheduled (Rs. Crores)	2.84	5.27	7.55	8.30	8.67	8.71	41.34
Achieved (Rs. Crores)	0.49	0.48	0.12	0.00	0.00	0.00	1.09

Even then the 4th Discretionary Advance was sanctioned amounting to Rs.10.00 crores on 27th March 07 and out of which Rs.4.0 crores were issued to the Contractor on 26.04.2007 as cash and Rs.4.90 crores on 07.05.2007 in shape of materials. The Contractor committed before NJAI to close 13 gaps on NCW at a cost of Rs.4.00 crores and gave a programme to work on ECW for an amount of Rs.1.00 crore by June end. To our utter disappointment only one gap is closed on NCW and work to the tune of only Rs.26.26 lakhs on NCW and only Rs.44.19 lakhs on ECW by 27.06.2007 have been executed.'

23. As held by their Lordships of the Supreme Court in the decisions reported as 2002 4 SCC 105 Bhatia International Vs. Bulk Trading SA & Anr. and 2004 3 SCC 155 Firm Ashok Traders & Anr. Vs. Gurumukh Das Saluja & Ors. a court, under Section 9 of the Arbitration & Conciliation Act, 1996 and an arbitral tribunal under Section 17 of the said Act are empowered to pass interim orders in the nature of interim measure till disposal of a dispute before an arbitral tribunal. Their Lordships of the Hon'ble Supreme Court held that recourse to Section 9 or Section 17 requires status quo to be possibly maintained having regard to the fact that the parties

understood the workability of the agreement in a particular manner and that interim directions should normally precede findings of a prima facie case with further consideration of balance of convenience and irreparable injury.

24. The observations of the Hon'ble Supreme Court in the afore-noted 2 decisions which were strongly relied upon by Sh Dushyant A. Dave, learned Senior counsel for the contractor, in my humble opinion, cannot extend to consideration of bank guarantee for the reason, law relating to bank guarantees stands well crystallized. Further, as would be noted hereinafter the dispute between the parties is not whether the guarantees have been invoked in terms thereof but relates to recognized exceptions in law where notwithstanding a bank guarantee being enforced on its terms a court or a tribunal would still restrain the guarantor from paying under the guarantee.

25. I do not find anything in the language of Section 17 of the Arbitration & Conciliation Act, 1996 which confers a wider power on the arbitral tribunal to issue interim orders vis-a-vis the power of a court to issue interim injunctions either under Order 39 Rule 1 and 2 of the Code of Civil Procedure or Section 9 of the Arbitration & Conciliation Act, 1996.

26. Decisions pertaining to interim injunctions issued by

courts or by arbitral tribunals in relation to interim measures to be adopted in contractual disputes not involving a bank guarantee are wholly inapplicable when injunction against invocation or realization of money under a bank guarantee is in issue. The reason thereof is that pertaining to bank guarantees right to receive money conferred upon the beneficiary is as per the guarantee and if the guarantee is invoked in terms of the guarantee the beneficiary would be entitled to urge that nothing else other than consideration of the bank guarantee should go into the decision making process, hence the argument of the beneficiary to adopt the hands of policy would be very strong, nay indefeasible. But, as would be noted hereinafter, in equity, certain exceptions have been carved out by courts and issue has to be settled and decided only with reference to the said exceptions.

27. Since I am dealing with 24 bank guarantees I do not intend to reproduce the language of all 24 bank guarantees but note that each guarantee enjoins upon the issuing bank to pay under the respective guarantee the sum demanded by the beneficiary. I note that the guarantees specifically record that each guarantee is an unconditional bank guarantee. Some of the guarantees use the expressions '*without cavil or argument*', '*without any demur, reservation, contest, recourse*

or protest' etc.

28. A feeble attempt was made by learned Senior Counsel for the contractor to urge that since the guarantees made a reference to the principal contract, the guarantees were not to be read in isolation and that the same had to be read with reference to the main contract, meaning thereby, the defaults under the principal contract had to be kept in view.

29. The argument needs to be noted and rejected for the simple reason nearly all bank guarantees, which this Court has come across, in the recitals refer to it being executed pursuant to a condition under the main contract obliging the contractor to furnish bank guarantees drawn on nationalized or scheduled banks. A recital in the bank guarantee to the effect that it is being issued pursuant to a term in the contract requiring a bank guarantee to be furnished would not mean that all terms of the contract get embodied in the terms of the bank guarantee. Unless a condition of a contract is made an integral part of the operative part of a bank guarantee the same cannot be read as a condition of the bank guarantee.

30. Holding that each and every bank guarantee is an unconditional bank guarantee I proceed to discuss the law relating to injuncting the beneficiary from receiving under the bank guarantee.

31. The forensic battle fought at the bar centered on: what is the sweep of the expression *special equity* the span whereof entitles the guarantor to avoid payment under the guarantee.

32. 'Fraud', 'irretrievable injury' and 'special equity' are expressions found in a catena of judicial opinions penned by Learned and Honourable Judges and notwithstanding a plethora of case law on the subject, the debate goes on.

33. Where the guarantee is limited (on it's terms) we have no problem, for the enforcement of the guarantee has to be within the conditions (limitations) contained in the guarantee. But where a guarantee is couched in a language which makes it unconditional and the guarantor binds himself to give money to the beneficiary on demand, without demur or protest; and the guarantor is not even permitted to probe into the dispute between the parties, an area of fertile litigation has grown because most common law jurisdictions recognize primacy to justice as an integral part of law enforcement.

34. Though opinions on bank guarantees span half a century, since I do not intend to make a catalogue, I plunge mid-stream and commence my discussion with the celebrated decision of the Hon'ble Supreme Court reported as 1987 (2) *U.P.Coop.Federation Ltd. Vs. Singh Consultants & Engrs. (P)*

Ltd. I do so, as said decision has noted the prior landmark decisions on the subject and throws considerable light on what would be *special circumstances* or *special equity* justifying issuance of an injunction to restrain the bank from paying under the guarantee issued by it. I also note that the decision has been constantly followed in all later decision of the Hon'ble Supreme Court.

35. 2 guarantees in sum of Rs.16.5 lacs and Rs.33 lacs, being a performance guarantee and security for monies advanced respectively were the subject matter before the Hon'ble Supreme Court in an action for injunction. The operative part of the 2 guarantees, inter alia, provided as under:

(1st Guarantee)

“NOW, THEREFORE, the bank hereby guarantees to make unconditional payment of Rs.16.5 lacs (Rupees sixteen lacs fifty thousand only) to the Federation on demand at its office at Lucknow without *any further question or reference to the seller on the seller's failure to fulfil the terms of the sale on the following terms and conditions.*”

x x x x x x x x x x x x

(2nd Guarantee)

“Now, therefore, in consideration of the aforesaid advance of the said sum of Rs.33 lacs (Rupees thirty-three lacs only) to be paid by the PCF tot he seller as aforesaid the Bank hereby agrees and guarantees to make unconditionally immediate

payment to the Federation as its office at lucknow of the sum of Rs.33 lacs (Rupees thirty three lacs only) or any part thereof as the case may be, due to the PCF from the seller at any time on receipt of the notice of demand *without any question or reference* to the PCF *or to the* seller on the seller's failure to fulfil the terms of the said advance on the following terms and conditions."

36. Holding that the language of the 2 guarantees made it crystal clear that the guarantees were unconditional, the Hon'ble Supreme Court proceeded to note prior decisions and culled out the exceptions whereunder a Court would be justified in issuing an injunction restraining invocation or payment under an unconditional guarantee.

37. It was noted that the letter of credit has been developed over hundreds of years of international trade. It was most commonly used in conjunction with the sale of goods between geographically distant parties. That it was intended to facilitate the transfer of goods between distant and unfamiliar buyer and unknown customer. It was noted that it was difficult for a buyer to pay for goods prior to their delivery. The bank's letter of credit came into existence to bridge the gap. In such transactions, the seller (beneficiary) receives payment from issuing bank when he presents a demand as per terms of the documents. The bank must pay if the documents are in order and the terms of credit are satisfied. The bank

was not allowed to determine whether the seller had actually shipped the goods or whether the goods conformed to the requirements of the contract. Any dispute between the buyer and the seller must be settled between themselves.

38. The reason of the aforementioned opinion is obvious. The letter of credit is a contract. The bank promises to pay the 'beneficiary' – traditionally a seller of goods – on demand if the beneficiary presents whatever documents may be required by the letter. They are normally the only two parties involved in the contract. The bank which issues a letter of credit acts as a principal, not as agent for its customer, and engages its own credit. The letter of credit thus evidences an irrevocable obligation to honour the draft presented by the beneficiary upon compliance with the terms of the credit.

39. Their Lordships noted that whether it is a traditional letter of credit or a new device like performance bond or performance guarantee, the obligation of the guarantor (usually a bank) is the same.

40. One exception to the rule of absolute independence of a bank guarantee was thereafter noted. It was traced to the opinion of Shientag J. in a case in U.S.A. reported as Sztejn Vs. J.Henry Schroder Banking Corpn. 31 NYS 2d 631.

41. The year was 1941. Injunctions against payments

under letters of credit were not issued by courts. Mr. Szejn had wanted to buy quality bristles from Indian and struck a deal for a quantity with an Indian seller. Payment was secured to the seller by means of a letter of credit which provided that upon receipt of appropriate documents the bank would pay for the shipment. Somehow Mr. Szejn discovered that the shipment made was crates of worthless rubbish. He went to the bank with a request not to pay and received a response that being a letter of credit it was an independent undertaking of the bank and hence it must pay. Mr. Szejn went to Court. He sought an injunction against the issuing bank to restrain it from paying under the letter of credit. He made, prima facie, good his allegations that as against the contracted goods i.e. bristles, worthless material and was shipped. Noting a fraud in the transaction the Court issued an injunction against payment.

42. In U.P.Coop.Federation's case their Lordships noted that exception of fraud created by Shientag J. had been subsequently accepted by Courts in England. See: (1) Hamzen Milas & Sons. v. British Imex Industries Ltd. (1958) (2) QBD 127), (ii) R.D. Harbottle Mercantile) Ltd. & Anr. v. National West Minister Bank Ltd. (1977 (2) All E. 862), (iii) Edward Owen Engineering Ltd. v. Barclays Bank International Ltd. (1978 (1)

All E.R. 976); and (iv) UCM (Investment) v. Royal Bank of India (1982) (2) All E.R.720. The last case is of the House of Lords where Lord Diplock in his speech said (at p.725):

“The whole commercial purpose for which the system of confirmed irrevocable documentary credits has been developed in international trade is to give to the seller an assured right to be paid before he parts with control of the goods and that does not permit of the any dispute with the buyer as to the performance of the contract of sale being used as a ground of non-payment or reduction or deferment of payment.

To this general statement of principles as to the contractual obligations of the confirming bank to the seller, there is one established exception: that is, where the seller, for the purpose of drawing on the credit, fraudulently presents to the confirming bank documents that contain, expressly or by implication, material representations of fact that to his knowledge are untrue. Although there does not appear among the English authorities any case in which this exception has been applied, it is well established in the American cases, of which the leading or 'landmark' case is *Sztejn Vs. Henry Schroder Banking Corpn.* This judgment of the New York Court of Appeals was referred to with approval by the English Court of Appeal *Edward Owen Engineering Ltd. V. Barolays Bank International Ltd.* though this was actually a case about a performance bond under which a bank assumes obligations to a buyer analogous to those assumed by a confirming bank to the seller under a documentary credit. The exception for fraud on the part of the beneficiary seeking to avail himself to the credit is a clear application to the *maxim ex trupi cause non oriture* or if plain English is to be preferred, 'fraud unravels all', the courts will not allow their process to be used by a dishonest person to carry out a fraud.”

43. I may only add that exception of fraud has been

codified in Sections 5-114 of the Uniform Commercial Code.

44. Can an injunction be issued upon a plea that the beneficiary has not supplied the goods as per contract? Law on the subject was thereafter noted by their Lordships in U.P. Coop. Federation's case. It was noted that this question arose before the Court of Appeal in England in Hamzon Melas & Sons Vs. British Imex Industries Ltd. 1985 (2) Q.B.D. 127, wherein it was held the principle was that commercial trading must go on the solemn guarantee either by the letter of credit or by bank guarantee or irrespective of any dispute between the contracting parties whether or not the goods were upon contract.

45. With reference to the decision of the House of Lords reported as United City Merchants (Investment) Ltd. & Ors. Vs. Royal Bank of Canada & Ors. viz-a-viz a plea of fraud in invoking the guarantee and a plea of goods not being upto contract, their Lordships summarised as under:-

“The whole commercial purpose for which the system of confirmed irrevocable documentary credits had been developed in international trade was to give the seller of goods an assured right to be paid before he parted with control of the goods without risk of the payment being refused, reduced or deferred because of a dispute with the buyer. It followed that the contractual duty owed by an issuing or confirming bank to the buyer to honour the credit notified by him on presentation of apparently confirming documents by the seller

was matched by a corresponding contractual liability on the part of the bank to the bank to the seller to pay him the amount of the credit on presentation of the documents. The bank's duty to the seller was only vitiated if there was fraud on the part of the seller."

46. Their Lordships noted that the irretrievable injustice was also a ground on which an injunction could be issued. The decision of Lord Denning M.R. reported as Elia & Rabbath (Trading as Elia & J. Rabbath Vs. Massas & Ors. 1966(2) Lloyd's List Law Reports 495 was noted where an injunction was issued to prevent irretrievable injustice.

47. In my opinion, being relevant for clarification of the issue raised in the instant case being decided by me, the peculiar facts; the reasons for the opinion and expression used in Elia's case need to be noted. In that case the first defendants' Greek motor vessel 'Flora M' was chartered by Lebanese charterers for carriage of plaintiffs' cargo (consigned to Hungary) from Bairut to Rijeka. Discharge was delayed at Rijeka and Ship owners exercised lien on cargo in respect of demurrage. Third defendant bank put up guarantee in London in favour of second defendant (first defendants' London agents) to secure release of cargo. There was a claim by Yugoslavians to distrain on goods, involving ship in further delay and master of Flora M, on lifting original lien,

immediately exercised another lien in respect of extra delay (which was raised when Hungarian buyers put up 2000). Two years later, shipowners claimed arbitration with charterers to assess demurrage for which first lien was exercised and claimed to enforce guarantee. Plaintiff claimed declaration that guarantee was not valid and injunction to restrain shipowners or their agents from enforcing guarantee. First and second defendants appealed against granting of injunction by Blain, J. It was held by the Court of Appeal that it was a special case in which the Court should grant an injunction to prevent what might be irretrievable injustice. Lord Denning, M.R., observed that although the shippers were not parties to the bank guarantee, nevertheless they had a most important interest in it. If the Midland Bank Ltd., paid under this guarantee, they would claim against the Lebanese bank who in turn would claim against the shippers. The shippers would certainly be debited with the account. On being so debited, they would have to sue the shipowners for breach of their promise express or implied, to release the goods. Lord Denning, M.R., further posed the question were the shippers to be forced to take that course? Or can they shortcircuit the dispute by suing the shipowners at once for an injunction? He further observed at page 497 of the Report that this was a

special case in which injunction should be granted. Lord Denning, M.R. went on to observe that there was a prima facie ground for saying that on telex messages which passed (and indeed, on the first three lines of the guarantee) the shipowners promised that, if the bank guarantee was given, they would release the goods. He further observed that the only lien they had in mind at that time was the lien for demurrage. But would anyone suppose that the goods would be held for another lien? It can well be argued that the guarantee was given on the understanding that the lien was raised and no further lien imposed and that when the shipowners, in breach of that understanding imposed a further lien, they were disabled from acting on the guarantee.

48. The expression that it was a special case in which the Courts should grant an injunction to prevent what might be irretrievable injustice caught the eye of their Lordships of the Supreme Court. Sabyasachi Mukharji J. (as his Lordship then was), in para 16 of the decision in U.P. Coop. Federation's case noted that Lord Denning M.R. treated this as a very special case and in a later decision he expressed his views on this matter. In para 19, his Lordship noted the view of Lord Denning M.R. in the opinion reported as Edward Owen Engineering Ltd. Vs. Barclays Bank International Ltd. 1978 (1)

All. E.R. 976.

49. The facts of Edward Owen's case were that English suppliers entered into a contract with Libyan buyers to supply goods to them in Libya. The contract was subject to a condition precedent that the plaintiffs would arrange for a performance bond or guarantee to be given, for 10% of the contract price, guaranteeing performance of their obligations under the contract. Accordingly, the plaintiffs instructed the defendants, their bankers to give on their behalf a performance guarantee for the sum of £50,203. Acting on those instructions the defendants requested a bank in Libya to issue a performance bond to the buyers for that sum, and promised the Libyan bank that they would pay the amount of the guarantee on first demand, without any conditions or proof. The Libyan bank issued a letter of guarantee for £50,203 to the buyers. The contract between the plaintiffs and the buyers provided for payment of the price of the goods supplied by a confirmed letter of credit. The letter of credit opened by the buyers was not a confirmed letter of credit and did not, therefore, comply with contract. Because of that non-compliance the plaintiffs repudiated the contract. Although it was the buyers who appeared to be in default and not the plaintiffs, the buyers nevertheless claimed on the guarantee

given by the Libyan bank who in turn claimed against the defendants on the guarantee they had given. The plaintiffs issued a writ against the defendants claiming an injunction to restrain them from paying any sum under the performance guarantee. A judge granted the plaintiffs an interim injunction in the terms of the injunction claimed by the writ but subsequently another judge discharged the injunction. The plaintiff appealed to the court of appeal. Lord Denning M.R. held that the justice was right in discharging the injunction and reiterated that the bank must honour its commitment.

50. Thus, in para 24 of the decision in U.P.Coop. Federation case, Hon'ble Mr. Justice Sabyasachi Mukherjee clarified that it appears that special equities (circumstances) mentioned therein i.e. in Elia & Rabbath's case may be a situation where the injunction was sought for to prevent injustice which was irretrievable in the words of Lord Denning M.R. In para 28, his Lordship categorically opined :

“It is not the decision that there should be a prima facie case. In order to restrain the operation either of irrevocable letter of credit or of confirmed letter of credit or of bank guarantee, there should be serious dispute and there should be good prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Otherwise the very purpose of bank guarantees would be negated and the fabric of trading operation will get jeopardised.”

51. As I humbly understand, the ratio of law culled out in U.P. Cooperative Federation Ltd. case, is that the bank must pay under an unconditional guarantee; with the exception, if prima face case is made out that element of fraud exists on the part of the beneficiary or if there exists a special equity in the form of preventing irretrievable injustice then alone an injunction may be issued. Further, fraud has to be of an egregious nature and not a dispute that goods supplied are not as per contract.

52. Thus, prima facie, only 2 exceptions are recognized. Firstly, fraud and secondly to prevent irretrievable injustice. The expression 'a special case' or 'a special equity' qualifies the prevention of irretrievable injustice and is not a third or a distinct head. If it is, then the special case or equity has to be akin to or a variant of irretrievable injustice.

53. Jainsons Clothing Corporation had a back to back contract with STC for supply of 3000 MT of B Grade Basmati Rice which had to be exported by STC to Abu Dhabi Municipality. Jainsons had furnished a bank guarantee (issued at its request by its banker), relevant clause whereof was as under :-

“That the Bank hereby irrevocably and unconditionally guarantee to the Corporation

that in the event of any failure/default for whatever reason on the part of M/s Jainsons Clothing Corporation in performing all or any of its obligations under the said contract and/or the export contract and the L/C established thereunder and as may be amended from time to time, the Bank shall pay to the Corporation forthwith on Corporation's first demand an amount of Rs.11,70,000 (Rupees Eleven lakhs Seventy thousand only) being approximately 5% of the contract value of the export. The payment shall be made by the Bank to the Corporation without any demur, protest or contestation and without any reference to supplier notwithstanding any dispute(s) whatsoever pending between the Corporation and the buyer. A certificate of the Corporation that supplier has defaulted in the fulfilment of its obligations shall be sufficient for the purpose of filing claim on the Bank under the guarantee and the same shall be final, conclusive and binding on the Bank. The bank shall forthwith pay to the Corporation the amount claimed by the Corporation up to the amount guaranteed herein. In case Bank fails to pay the amount claimed by the Corporation within 15 days of the date of demand of the Corporation, then the bank shall also be liable to pay to the Corporation interest @ 22.75% per annum from the date of Corporation demand up to the date of actual payment and the guarantee amount shall stand enhanced to the extent of the interest thus due and payable by the Bank."

The guarantee was issued in terms of clause 17 of the contract between Jainson and STC which was as under:-

"17. Bank Guarantee – The supplier shall within three days of the signing of this contract furnish to the STC a bank guarantee from a scheduled bank for an amount of Rs.11,70,000 (Rupees Eleven lakhs Seventy thousand only) which is equivalent to 5% value of the contract as per the proforma attached hereto as Annexure III for the performance of its obligations under this

contract and the export contract. The bank guarantee should be made valid up to 22-7-1985. In the event of supplier's failure to perform any of its obligations under the back-to-back contract and/or the export contract, STC shall without prejudice have the right to claim eventual damages, be entitled to invoke the bank guarantees and forfeit the amount realised thereunder. Supplier's liability and on account of their failure to fulfil their obligations will not be restricted up to the value of the bank guarantee to be furnished by supplier."

Jainsons sought an injunction to restrain the issuing bank from making payment under the guarantee stating that STC had cancelled the principal contract with Abu Dhabi Municipality and hence it was a case of fraudulent invocation of the bank guarantee.

54. Noting that the bank guarantee was unconditional and its enforcement was not hedged with or conditional upon the performance of the principal contract and that there was no fraud in the execution of the contract between Jainson and STC, in the decision reported as 1994(6) SCC 597 STC Vs. Jainsons Clothing Corporation & Anr. their Lordships of the Hon'ble Supreme Court held that the exception carved out in the decision in U.P.Coop. Federation Ltd. case i.e. fraud of an egregious nature and irretrievable injustice were the only 2 recognized exception and thus on the occurrence of the events mentioned in the bank guarantee it becomes enforceable and

that disputes in the performance of the contract does not give rise to a cause to seek an injunction from enforcing the guarantee.

55. In its decision reported as 1995 (4) SCC 515 N.T.P.C. Vs. Flowmore Pvt. Ltd. & Anr. the Hon'ble Supreme Court revisited the law on the subject. 2 performance guarantees and 3 guarantees to secure the mobilization advance, all 5 being unconditional and payable on demand, were the centre of the dispute. The main contract having an arbitration clause, the dispute was pending adjudication before an arbitral tribunal. S.T.C. invoked the bank guarantees pending arbitration. Flowmore sought injunction urging 2 pleas. That main dispute was pending adjudication before the arbitral tribunal and hence status quo should be maintained. Secondly invocation was fraudulent. Repelling both contentions, it was held that pendency of arbitration proceedings was an irrelevant factor and that fraud had to be of an egregious nature so as to vitiate the entire underlying transaction while irretrievable injustice had to be of a kind arising in a situation land in Itek Corpn Vs. First National Bank of Boston 566 Fed Supp 1210. Finding none, the injunction granted by the High Court was vacated.

56. That takes me to the decision in Itek Corporation's

case. The facts were that in April of 1977, Itek entered into a contract with the Imperial Government of Iran to manufacture certain high-technology optical equipment. The contract price was \$22,500,000. By the terms of this contract, the Imperial Government was required to make an advance payment to Itek of \$4,500,000. Itek, in turn, was obliged to provide security for this advance in the form of four bank guarantees, each in the amount of \$1,125,000, issued by Bank Melli and naming the Imperial Ministry of War as beneficiary. Itek was further required to furnish a bank guarantee in the amount of \$2,250,000, issued by Bank Melli in favour of the Imperial Ministry of War as security for the good performance of its contractual obligations. As a condition to issuing the guarantees, Bank Melli required Itek to supply standby letters of credit in its favour, issued by an American bank, with amounts and terms paralleling those of its own guarantees. Itek complied with this condition by providing five letters of credit issued by FNBB and naming Bank Melli as beneficiary. Each of these standby letters of credit stated that payment would be conditioned on receipt of an authenticated cable stating that Bank Melli had been required to make payment under its corresponding guarantee to the Imperial Ministry of War and that it was airmailing to FNBB a signed statement to

that effect. Of the five original letters of credit issued by FNBB, three remained outstanding as of January 1980, when the suit was brought. These were S-14555, issued and outstanding in the amount of \$2,250,000; S-14588, issued in the amount of \$1,125,000 and outstanding in the amount of \$70,753; and S-14559, issued and outstanding in the amount of \$1,125,000. The contract between Itek and the Imperial Government of Iran provided that in the event of *force majeure*, including the cancellation of Itek's export license covering the equipment, either party would be entitled to inform the other of the event constituting *force majeure* and, after three months, to cancel the contract by written notice. Upon cancellation, the parties would clear their account and release all guarantees and letters of credit. From April of 1977 through the end of 1978, work on the contract apparently proceeded without incident. An independent American company monitored the progress of the work performed by Itek and gave Itek consistently high praise for its efforts. By February 10, 1979, the value of Itek's performance amounted to \$20,300,000; and payments to Itek totalled \$11,100,000. In early 1979, Iran underwent a revolution. Ultimately, the head of the Imperial Government, Shah Riza Pahlevi, was driven into exile, and was succeeded in power by the religious leader Ayatollah Ruhollah Khomeini.

The Islamic Republic of Iran was established, and the Imperial Ministry of War was replaced by the Ministry of National Defense. On April 30, 1979, the State Department cancelled the export license for the equipment to be manufactured by Itek under the contract. Two weeks later, on May 15, 1979, Itek notified the Iranian authorities of the occurrence of *force majeure*, and requested consultations in accordance with the terms of the contract. On August 20, 1979, representatives of Itek met in Iran with officials of the Ministry of National Defense to discuss the occurrence of *force majeure* and the status of the contract obligations. At this meeting, Itek's representatives also presented the Iranian participants with copies of unpaid invoices that had accumulated since February 1979, and a summary of the account under the contract. On November 3, 1979, the United States Embassy in Teheran, Iran was forcibly taken over and 52 American citizens were taken hostage. In response to the crisis, President Carter on November 14, 1979 declared a national emergency and, by Executive Order No.12170, "blocked" all Iranian assets subject to the jurisdiction of the United States. Shortly thereafter, the Treasury Department promulgated regulations to implement the Presidential directive that all assets be blocked. These regulations prohibited the transfer of any property subject to

the jurisdiction of the United States in which Iran had any interest whatever, except as authorized by license or regulation. The regulations specifically authorized payment by United States banks on letters of credit issued in favour of an Iranian entity, provided the payments were made into blocked accounts in domestic banks. At the same time, nothing in the regulations precluded any person for whose account a standby letter of credit was opened or any other person from contesting the legality of the demand from the Iranian entity or from raising any other legal defense to payment. On December 6, 1979, Itek sent to the Ministry of National Defense further written notice advising of the occurrence of *force majeure*, and again requesting consultations. No response was received to this communication. The suit was filed on January 9, 1980. Itek pleaded that prevailing circumstances in Iran created a serious risk that unwarranted and fraudulent demands would be made upon the letters of credit then outstanding with FNBB. Itek sought temporary and permanent relief in the form of an order enjoining FNBB from honoring any demand on the letters of credit, without first giving Itek five days notice. 9.1.1980 the Court entered a temporary restraining order requiring three days notice prior to payment, and after hearing on January 18, 1980, a preliminary injunction was entered to the same effect.

In February and March of 1980, Bank Melli requested extension of two of the outstanding letters of credit. In the alternative, Bank Melli requested immediate payment in full. Itek directed FNBB to refuse both the requests for extension and payment, on grounds that the contract had been cancelled and the letters of credit securing the advance payment had been cleared.

57. Itek sought an injunction restraining FNBB from making any payment on the letters of credit. Holding in favour of Itek it was held:

“In commercial litigation, the question whether the plaintiff is likely to suffer irreparable injury may be cast in terms of whether the plaintiff has available a legal remedy adequate to compensate it for its injuries. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312, 102 S.Ct. 1798, 1803, 72 L.Ed.2d 91 (1982). Though I accept that Itek's ultimate damages, absent an injunction, are susceptible to reasonable estimation, I do not find that this alone establishes an adequate remedy at law. As I stated in an earlier opinion in this matter, “the fact that its damages may be reasonably calculable will provide Itek with little consolation in the event those damages ultimately prove uncollectable.” *Itek Corporation v. First National Bank of Boston*, 511 F.Supp.1341, 1348 (D.Mass.1981). Nothing has occurred to change my view that “if [FNBB] were to make payment on the letters as demanded, Itek's only recourse would be a lawsuit against the Iranian Government,” 511 F.Supp. at 1349, or that on the present record, this cannot be viewed as an “adequate” remedy.”

58. In an action for injunction relating to 14 bank

guarantees of 4 kinds; (i) to secure Mobilization Advance; (ii) to secure the Security Amount; (iii) to secure the Funds Advanced by Hindustan Steelworks Construction Ltd.; and (iv) to secure Due Performance, the High Court granted an injunction qua the guarantees except the guarantees under head No.(iii) in favour of the contractor Tarapore & Co. holding that on facts special equity or special circumstances were shown justifying grant of an injunction. Reason given by the High Court was that till the arbitrator decided the dispute the claim under the bank guarantees (qua which injunction was issued) had not yet been crystallized. Reversing the decision of the High Court, in the decision reported as 1996 (5) SCC 34 Hindustan Steelworks Constructions Ltd. Vs. Tarapore & Co. it was held:

“14. The High Court also committed a grave error in restraining the appellant from invoking bank guarantees on the ground that in India only a reasonable amount can be awarded by way of damages even when the parties to the contract have provided for liquidated damages and that a term in a bank guarantee making the beneficiary the sole judge on the question of breach of contract and the extent of loss or damages would be invalid and that no amount can be said to be due till an adjudication in that behalf is made either by a court or an arbitrator, as the case may be. In taking that view the High Court has overlooked the correct position that a bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction and the primary contract between the person at whose instance the bank guarantee is given and

the beneficiary. What the High Court has observed would be applicable only to the parties to the underlying transaction or the primary contract but can have no relevance to the bank guarantee given by the bank, as the transaction between the bank and the beneficiary is independent and of a different nature. In case of an unconditional bank guarantee the nature of obligation of the bank is absolute and not dependent upon any dispute or proceeding between the party at whose instance the bank guarantee is given and the beneficiary. The High Court thus failed to appreciate the real object and nature of a bank guarantee. The distinction which the High Court has drawn between a guarantee for due performance of a works contract and a guarantee given towards security deposit for that contract is also unwarranted. The said distinction appears to be the result of the same fallacy committed by the High Court of not appreciating the distinction between the primary contract between the parties and a bank guarantee and also the real object of a bank guarantee and the nature of bank's obligation thereunder. Whether the bank guarantee is towards security deposit or mobilisation advance or working funds or for due performance of the contract if the same is unconditional and if there is a stipulation in the bank guarantee that the bank should pay on demand without a demur and that the beneficiary shall be the sole judge not only on the question of breach of contract but also with respect to the amount of loss or damages, the obligation of the bank would remain the same and that obligation has to be discharged in the manner provided in the bank guarantee. In *General Electric Technical Services Co. Inc. v. Punj Sons (P) Ltd.* while dealing with a case of bank guarantee given for securing mobilisation advance it has been held that the right of a contractor to recover certain amounts under running bills would have not relevance to the liability of the bank under the guarantee given by it. In that case also the stipulations in the bank guarantee were that the bank had to pay on demand without a demur and

that the beneficiary was to be the sole judge as regards the loss or damage caused to it. This Court held that notwithstanding the dispute between the contractor and the party giving the contract, the bank was under an obligation to discharge its liability as per the terms of the bank guarantee. *Larsen and Toubro Limited v. Maharashtra State Electricity Board* and *Hindustan Steel Workers Construction Ltd. v. G.S. Atwal & Co. (Engineers) Pvt. Ltd.* were also cases of work contracts wherein bank guarantees were given either towards advances or release of security deposits or for due performance of the contract. In both those cases this Court held that the bank guarantees being irrevocable and unconditional and as the beneficiary was made the sole judge on the question of breach of performance of the contract and the extent of loss or damages an injunction restraining the beneficiary from invoking the bank guarantees could not have been granted. The above referred three subsequent decisions of this Court also go to show that the view taken by the High Court is clearly wrong.”

59. Referring to the decision in *U.P. Coop. Federation* case, it was reiterated the fraud and special equity in the form of irretrievable injustice were the only recognized exceptions justifying granting an injunction (Refer para 18 and 23).

60. I may hasten to add that the decision in *Hindustan Steelworks Construction Ltd.* case, has, vide para 18 clarified the ambit of what constitutes a fraud justifying granting an injunction. It was clarified as under:-

“It may be pointed out that fraud which is recognised as an exception is the fraud by one of the parties to the underlying contract and which

has the effect of vitiating the entire underlying transaction. A demand by the beneficiary under the bank guarantee may become fraudulent not because of any fraud committed by the beneficiary while executing the underlying contract but it may become so because of subsequent events or circumstances. We see no good reason why the courts should not restrain a person making such a fraudulent demand from enforcing a bank guarantee.”

61. Thus, a dispute on merits; a claim that some money has been recovered under running bills; that matter was pending adjudication before the arbitrators are all irrelevant factors while considering a claim for injunction pertaining to a bank guarantee.

62. In the decision reported as 1996 (5) SCC 450 Ansal Engineering Projects Ltd. Vs. Tehri Hydro Development Corpn. it was held that a serious dispute on the question as to who committed the breach of the contract and whether the amount is due and payable by the contractor till the arbitrator declares the award are not circumstances, much less exceptional, justifying granting an injunction to restrain the bank from paying under the guarantee.

63. A slightly discordant note was struck in the decision reported as 2002 (10) SCC 508 State of Haryana Vs. Continental Construction wherein the Hon'ble Supreme Court did not interfere with an injunction order passed by the High

Court noting that the dispute was pending adjudication before the arbitrator. However in the decision reported as 2006(2) SCC 728 BSES Ltd. Vs. Fenner India it was observed:

“We are afraid that the short order in *Continental Construction Ltd.* appears to have been made on the narrow facts of that case and does not constitute a precedent binding us. Moreover, as mentioned earlier, a line of judgments of this Court have long settled the law relating to the invocation of bank guarantees.”

64. In the decision reported as 1997(6) SCC 450 Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Work P. Ltd. it was held that special circumstance of irretrievable injury means a circumstance which makes it impossible for the guarantor to reimburse itself by way of restitution. In the decision reported as 1997(1) SCC 568 U.P.State Sugar Corporation Vs. Sumac International Ltd. the fact that the beneficiary was a sick company and that a scheme for its revival was pending consideration before BIFR under Sick Industrial Companies (Special Provisions) Act 1985 was held not to be a circumstance showing that money would be irretrievably lost if the claim ultimately went in favour of the contractor. Referring to the decision in Itek Corporation case and the law pertaining to injunction claims qua bank guarantee, it was observed:

“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.

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On the question of irretrievable injury which is the second exception to the rule against granting of injunctions when unconditional bank guarantees are sought to be realised the court said in the above case that the irretrievable injury must be of the kind which was the subject matter of the decision in the *Itek Corpn.* Case.

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Before us, however, in the course of argument, the learned advocate for the respondent urged for the first time in this case there would be irretrievable injustice to the respondent if the bank guarantees are allowed to be realised because the appellant is a sick industrial company in respect of which a reference is pending before the board for industrial and financial reconstruction under the Sick Industrial Companies (Special Provisions) Act, 1985. The respondent contends that even if it succeeds before the arbitrator it will not be able to realise his claim from the appellant. The mere fact that a reference under the Sick Industrial Companies (Special Provisions) Act, 1985 is pending before the Board, is, in our view, not sufficient to bring the case in the ambit of the “irretrievable injustice” exception. Under the scheme of the said Act the board is required to make such inquiry as it may deem fit for determining whether any industrial company has become a sick industrial company. Under Section 16 (4) where the board deems it fit to make an inquiry or to cause an inquiry to be made in this connection, it may appoint one or more persons to be special directors for safeguarding the

financial and other interests of the company or in the public interest. Under Section 17 after making an inquiry, if the Board is satisfied that a company has become a sick industrial company, the Board may then decide, by an order in writing, whether it is practicable for company to make its net worth exceed the accumulated loses within a reasonable time. If this is practicable, then the Board shall give such company the opportunity to make its net worth exceed the accumulated loses. Under Sub-Section (3) of Section 17 if the Board decides that this is not practicable within a reasonable time, it may adopt measures specified in Section 18 and provide for a scheme for appropriate measures in relation to that company. There can, therefore, be no presumption that the company will, in no circumstance, be able to discharge its obligations.

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Under Section 22 on which the respondent relies, where in respect of an industrial company, an inquiry under Section 16 is pending, or any scheme under Section 17 is under preparation or a sanctioned scheme is under implementation or when an appeal under Section 25 is pending, then no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or the appointment of a receiver in respect thereof can be proceeded with; and no suit for the recovery of money or for the enforcement of any security against the industrial company shall lie or be proceeded with except with the consent of the Board or, as the case may be, the Appellate Authority. The respondent contends that its right to realise its claim, of established, would be affected by reason of Section 22 of the said Act. There is no material before us to show that the appellant company cannot make its net worth positive. NO scheme has been framed under the said Act so far. Even under Section 22 there is no absolute bar against any suit for the recovery of money. The suit cannot be proceeded with except with the consent of the Board of the Appellate Authority.

Therefore, in an appropriate case, the Board or the Appellate Authority is entitled to give its consent to such a claim being proceeded with. This is not a situation of the kind envisaged in the case of *Itek Corpn.* where there was no possibility whatsoever of recovery of any amount from the purchaser.”

65. In the decision reported as *BSES Ltd. Vs. Fenner India Ltd.* 2006 (2) SCC 728 'lack of good faith' and/or 'enforcing with an oblique purpose' were arguments brought into aid to urge that if a bank guarantee was invoked for an oblique purpose or invocation lacked in good faith, exceptional circumstance existed justifying granting an injunction. Decision of the Court of Appeal in Singapore reported as *Samwoh Asphalt Premix Pte. Ltd. Vs. Sum Cheong Piling Pte. Ltd.* (2002) 1 SLR 1 was considered.

66. The Court of Appeal in Singapore held that where a bank guarantee was invoked as a 'bargaining chip' or as a 'deterrent' or in an 'abusive manner' it would amount to calling a guarantee for an oblique purpose, justifying the issuance of an injunction.

67. Refusing to go for the bite, in *Femur India's* case the Hon'ble Supreme Court held:

We are afraid that in the face of the law succinctly laid down in *U.P.Coop. Federation* and reiterated in numerous judgments of this Court referred to earlier, we are unable to accept the wide proposition of law laid down in the foreign judgments cited by Mr. Sorabjee. Whatever may

be the law, as to the encashment of bank guarantees in other jurisdictions, when the law in India is clear, settled and without any deviation whatsoever, there is no occasion to rely upon foreign case-law."

68. The legal position which can be summarized would be that a bank guarantee is an independent contract between the bank and the beneficiary and disputes pertaining to bank guarantees have to be resolved de-hors the terms of the main contract between the parties or disputes relatable to the main contract between the parties. Where a bank guarantee is a conditional guarantee invocation thereof would have to be in strict conformity with the conditions on which the guarantee is issued. In such a case an injunction can be granted against payment under the bank guarantee if it is found that the condition upon which the guarantee was issued has not been complied with or met. But where the guarantee is unconditional and/or the bank has agreed to make payment without demur or protest, on the beneficiary invoking the bank guarantee the bank is obliged to honour the same for the reason like letters of credit, a bank guarantee if not honoured would cause irreparable damage to the trust in commerce and would deprive vital oxygen to the money supply and money flow in commerce and transaction which is necessary for economic growth. Disputes pertaining to the main contract

cannot be considered by a court when a claim under a bank guarantee is made and the court would be precluded from embarking on an enquiry pertaining to the prima facie nature of the respective claim of the litigating parties relatable to the main dispute. The dispute between the parties to the underlying contract has to be decided at the civil forum i.e. a civil suit if there exists no arbitration clause in the contract or before the arbitral tribunal if there exists an arbitration clause in the contract. Pendency of arbitration proceedings is no consideration while deciding on the issue of grant of an interim injunction. That certain amounts have been recovered under running bills and have to be adjusted for is of no concern in matters relating to invocation of bank guarantee. That there are serious disputes on questions as to who committed the breach of the contract are no circumstances justifying granting an injunction pertaining to a bank guarantee. Plea of lack of good faith and/or enforcing the guarantee with an oblique purpose or that the bank guarantee is being invoked as a bargaining chip, a deterrent or in an abusive manner are all irrelevant and hence have to be ignored. There are only 2 well recognized exceptions to the rule against permitting payment under a bank guarantee. The same are :-

A. A fraud of egregious nature;

B. Encashment of the bank guarantee would result in irretrievable harm or injustice of an irreversible kind to one of the parties.

69. The irretrievable harm or injustice of an irreversible kind must relate to a situation akin to the one found in Itek Corporation's case or of the kind or in Elia & Rabbath's case (supra).

70. There is no separate third exception of a special equity justifying grant of an injunction to restrain the beneficiary from receiving under an unconditional bank guarantee and if there exists any third exception of a special equity the same has to be of a kind akin to irretrievable injustice or putting a party in an irretrievable situation.

71. I thus eschew any reference to the merits of the respective claims of the parties before the arbitral tribunal. Indeed, the arbitral tribunal could not have proceeded to consider the issue under Section 17 of the Arbitration & Conciliation Act by predicated the discussion on the merits of the claim of the contractor. The reasons given by the arbitral tribunal pertaining to the performance guarantee while injunction invocation thereof are indeed perverse. Admittedly, the contractor has not completed the work. Admittedly, the performance guarantee is an unconditional guarantee.

Admittedly, the contract stipulated period is over. Whatever be the substantive disputes between the parties pertaining to who is in the breach of the contract, the performance guarantee is invocable on its terms.

72. Pertaining to the other guarantees the only issue which needs consideration is the impact of an arbitral award in favour of the contractor under which approximately Rs.9.37 crores have been found as the entitlement of the contractor. The award is under challenge by NHAI under Section 34 of the Arbitration & Conciliation Act, 1996. If the award is upheld, NHAI would have to give adjustment of said amount to the contractor. Unfortunately for the contractor their Lordships of the Hon'ble Supreme Court in Hindustan Steel Works case (supra) held that merely because certain amounts were recovered from the running bills towards mobilization advance would not justify grant of an injunction to restrain the beneficiary from realizing the money under an unconditional bank guarantee issued to secure the mobilization advance. Further, their Lordships held that merely because the contractor had to recover certain amounts under the running bills would have no relevance to the liability of the guarantor to pay under the guarantee. Meaning thereby issue of adjustments have not to be gone into while deciding on the

question relating to unconditional bank guarantees.

73. The appeal is accordingly allowed. Impugned order dated 25.10.2007 passed by the learned Arbitral Tribunal is quashed. Respondent's application under Section 17 of the Arbitration & Conciliation Act is dismissed.

74. Since the respondent has the benefit of an injunction in its favour which stands vacated today, to enable the respondent to avail further remedies as per law, operation of the present order is suspended for a period of 3 weeks from today.

75. No costs.

April 28, 2008
MM

(PRADEEP NANDRAJOG)
JUDGE