

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

Judgment reserved on: 29.11.2010

% **Judgment delivered on: 20.12.2010**

+ **O.M.P. 633/2010 & IA 14210 and 15795/2010**

EMAAR MGF CONSTRUCTION PVT LTD Petitioner

Through: Mr. P.V. Kapur, Sr. Adv.
(S.G. Solicitors)- Mr. Sunil Goel,
Dheeraj Singh, Sushil Bhartiya,
Aman Anand and Pranav Sapra,
Advocates

versus

DELHI DEVELOPMENT AUTHORITY & ORS Respondent

Through: Ms. Indira Jaisingh, ASG with Mr.
Ajay Verma and Ms. Sonam Anand,
Advocates
Mr. U.C. Mittal and Mr. Ankur Mittal
for R-3

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

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

J U D G M E N T

VIPIN SANGHI, J.

1. The petitioner has preferred the present petition under
Section 9 of the Arbitration and Conciliation Act, 1996 to seek an
interim order of injunction against the respondent no.1, DDA to stay

the effect and operation of the notice dated 16.10.2010 issued by it; to restrain the respondent no.1 from giving effect to the demand as raised in the said notice; to restrain the respondent no.1 from taking any steps pursuant to the notice dated 16.10.2010, and; to restrain the respondent No.1/DDA from invoking the three bank guarantees aggregating to ₹ 183.00 crores , as furnished by respondent No.2 State Bank of Patiala (who have furnished their guarantee for ₹ 33 crores being BG No. 5079408BG0000654) and respondent no.3, i.e. State Bank of India (who have furnished their Guarantee for ₹ 150 crores being BG No. 0480308BG0010173), to any extent whatsoever.

2. Corresponding injunction is sought against respondent nos.2 and 3 banks from encashing the aforesaid bank guarantees furnished by them at the behest of the petitioner in favour of respondent no.1, DDA.

3. The petitioner company is a real estate developer and claims to have undertaken various real estate development projects all over the country. The petitioner states that sometime in 2006, the respondent DDA invited bids for development and construction of Commonwealth Games Village on a parcel of land comprising 11 hectares adjacent to Akshardham Temple in NOIDA. The petitioner was shortlisted along with other 11 bidders, and eventually selected as the successful bidder. The construction of residential towers of the Commonwealth Games Village was to be undertaken on Public-Private

Participation (PPP) basis.

4. The parties entered into a Project Development Agreement (PDA) on 14.09.2007. This agreement contains an arbitration agreement in clause 17. The petitioner has filed the present petition under Section 9 of the Act by relying upon the said arbitration clause contained in the Project Development Agreement.

5. The petitioner claims to have made payment of earnest money of ₹ 80.25 crores and also an amount of ₹ 120.375 crores towards upfront fee. The petitioner also states that it appointed various consultants and architects to execute the project.

6. Under the terms of the agreement, "Project Completion Date" was defined to mean the date when all residential facility are completely developed in all respects (including landscaping), technically fit to be occupied and ready to use/livable, with no pending construction, unfinished work, construction equipments, debris, construction material etc. on the project site and certified in writing by the Monitory Committee. (Clause 1.1.20).

7. The petitioner, who acted as a project developer, was obliged to completely develop the project by 01.04.2010 (Clause 3.11). The date of completion of the Project is deemed to be the date when all Residential Apartments are completely developed and are technically fit to be occupied, including all other associated facilities and amenities

and a completion / occupancy certificate in this regard has been obtained from NDMC/MCD and DDA.

8. Under clause 3.1, the Project Developer was, inter alia, obliged to develop the residential facility at the project site within the time frames as set out in greater detail in Schedule III to the Agreement. Clause 3.1 reads as follows:

“3.1 The Project Developer shall undertake to develop the Project Site and construct such capacity of residential accommodation and meeting such specifications and requirements as are specified in greater detail in Schedule II to this Agreement. The Project Developer shall develop the Residential Facility at the Project Site within the time frames as set out in greater detail in Schedule III to this Agreement.”

9. Annex III/Schedule III contains the project milestones which the petitioner was obliged to attain. The same reads as follows:

Annex 3 PROJECT MILESTONE

A. Following are the Project Milestone to ensure timely completion of the Project.

Milestone No.	Milestone	Time from the date of signing of Project Development Agreement i.e. D- Day (estimated at July 15, 2007) including all holidays/Sundays
1	Foundation Work (including Plinth Level) upto Plinth Level for 50% Blocks and Mock Unit completion	D+120 days i.e. November 12, 2007

2	Structure work upto G+4 level, with associated electrical works + Foundation work including Plinth Level for rest of the books	D+240 days i.e. November 12, 2007
3	Structure Work upto terrace level, with associated electrical works and B.W. upto G+4 level	D+420 days i.e. September 7, 2008
4	Completion of brick work upto terrace level and internal plaster, flooring, etc. for 5 levels, with associated electrical works	D+600 days i.e March 6, 2009
5	Completion of flooring and finishing, with associated electrical works of all blocks all levels upto terrace level	D+780 days i.e. September 2, 2009
6	External finish of all blocks and all levels	D+840 days i.e. November 1, 2009
7	Completion of all electric work including lifts, E.S.S etc and completion of U.G.R./ Pump Rooms/ Lifts/ Pump Sets etc.	D+870 days i.e. December 1, 2009
8	Completion of all development work including landscaping	D+900 days i.e. December 31, 2009
9	Project Completion Date	April 1, 2010

Note: No exclusions, including time taken by DDA in giving approvals/ notifications, will be allowed to be considered in the calculation of time taken for the achievement of Project Milestone.

B. The liquidated damages amount to be paid by the Project Developer to DDA in case of non-achievement of each of the aforesaid Project Milestone shall be calculated as follows:

a. Rs.15,00,000 (Rupees Fifteen Lakhs Only) a day for each day of delay for the first fifteen (15) days of delay;

- b. Rs.25,00,000 (Rupees Twenty Five Lakhs Only) a day for each day of delay for the next fifteen (15) days of delay;
- c. Rs.50,00,000 (Rupees Fifty Lakhs Only) a day for each day of delay thereafter till the date of achievement of that Project Milestone or Termination Date, whichever is earlier.

I am also informed that the figure of ₹ 25 lacs set out in para B(b) as liquidated damages, stands reduced to ₹ 20 lacs, by agreement of parties.

10. Under clause 6 of the agreement, the petitioner was required to submit performance security for ₹ 400 crores in the form of unconditional bank guarantee(s) in accordance with the format specified in Schedule VI, from scheduled commercial bank acceptable to the respondent, DDA. Clause 6.2 of the agreement, inter alia, provides as follows:

"6.2 DDA shall have the rights to invoke the Performance Security as recourse in the Project Developer Event of Default including but not limited to on account of an event of non-compliance to the milestones or persistent delays by the Project Developer in implementing the Project, in accordance with the terms of the Performance Security.

Without prejudice to the aforesaid, DDA shall have the right to invoke the Performance Security under the following events:

- i. In case the Project Developer is unable to deposit the liquidated damages for delay in achieving any Milestone the said Performance Security shall be forfeited for an amount as computed under Schedule III.*
- ii. In case of default by the Project Developer in meeting the defects liability obligations mentioned under Clause 7 below, to the extent of Rs.5,00,00,000/-*

(Rupees Five crores only) in case of water-proofing defects and Rs.5,00,00,000/- (Rupees Five crores only) in case of other defects.

- iii. In case of default by the Project Developer in meeting the deficiency charges obligations mentioned under Clause 8.12.3 to the extent of Rs.5,00,00,000/- (Rupees Five crores only).*
- iv. In case of default by the Project Developer in meeting its obligations mentioned under Clause 8.14.2 below, to the extent of Rs.2,00,00,000/- (Rupees Two crores only).*

In the event DDA invokes the Performance Security, the Project Developer shall have to furnish a fresh Performance Security for the invoked amount from a scheduled commercial bank, failing which, the DDA shall be entitled to terminate this Agreement.

The performance security shall be returned in the following manner:”

11. The admitted position is that in terms of clause 6.2, the respondent/DDA, from time to time, partially returned the bank guarantees furnished as performance security and continued to retain the performance security of ₹ 183 crores. These performance bank guarantees are valid till 31.12.2010. Performance security of Rs.17 crores, apart from the aforesaid amount of Rs.183 crores, was also retained, to be returned in terms of clauses (d), (e) and (f) of clause 6.2

12. The petitioner states that there is no dispute between the parties that the petitioner achieved milestone nos.1 to 7 on time. Accordingly, the bank guarantees to the extent of ₹ 200 crores were returned by the respondent to the petitioner.

13. The petitioner further states that at the Commonwealth Games Village, construction/development activity was being carried out by other agencies/corporations/contractors besides the petitioner, which included respondent no.1 DDA as well. The scope of work of the petitioner under the Project Development Agreement did not include all the construction/development work of the Commonwealth Games Village. Once the milestone no.7 had been achieved by the petitioner, the only thing that remained to be completed, on the part of the petitioner, was external landscaping and connection of intermediaries from the water/sewage lines and electrical connection after the main lines had been laid and completed by the respective agencies including the DDA, DJB, ECIL and BSES.

14. Insofar as the external landscaping work is concerned, the same included hard scape-consisting of road and pathways, and soft scape consisting of trees, shrubs, grass etc. The petitioner states that the external landscaping work could not be completed unless and until all the work of every agency including DJB, BSES, DDA etc. were completed.

15. It is claimed that these agencies were not working in tandem with each other. The petitioner states that under Schedule III, there was a period of only 30 days provided for achieving milestone no.8, after milestone no.7 had been achieved. The same could be achieved only if the other agencies had also completed their respective works.

The petitioner also states that it could not have carried out the landscaping work before the laying of the underground cable, water/sewage lines etc. by third party agencies had been done, as these agencies would otherwise have dug up the work done by the petitioner.

16. The petitioner states that it complied with all its obligations, which it could, for achieving the milestone no.8 by 01.03.2010 and made an application in the prescribed format on 29.03.2010 to the DDA for issuance of the completion certificate. It is stated that the respondent, DDA was also called upon to take over possession of the towers. However, the respondent no.1 failed to take over possession.

17. It is averred that respondent no.1 neither issued the completion certificate to the petitioner, nor refused the same within the specified period of 7 days as provided in the Project Development Agreement. On 03.09.2010, the respondent DDA requested the petitioner to provide certain documents to enable them to process the request of the petitioner for issuance of occupancy certificate. On the same day, without waiting for any further documents from the petitioner, the respondent no.1 issued a temporary occupancy certificate, and on the same day, it also issued the occupancy certificate in relation to the Commonwealth Games Village to the Organising Committee, wherein it was stated that the said occupancy certificate was being issued on the basis of statutory clearances. The

petitioner states that the factum of issuance of the occupancy certificate establishes that the project was completed and fit to be occupied.

18. The respondent no.1, by its letter dated 20.05.2010, alleged that the milestones had not been met by the petitioner within the time granted under the agreement, and threatened to levy liquidated damages on the petitioner on account of the said alleged default. By letter dated 09.06.2010, the DDA demanded liquidated damages of ₹ 13.45 crores from the petitioner alleging that there were defects and delays. The petitioner disputed the allegations of delays and defects.

19. The petitioner states that the respondent took over the possession of the towers constructed by the petitioner much after the date when they were completed. It is also stated that the respondent coerced the petitioner for extending the validity of the bank guarantees/performance securities. The petitioner claims that there was a lot of negative publicity for the Commonwealth Games Village in the media. However, after the intervention of Prime Minister's Office, the other agencies completed their respective obligations. The petitioner submits that the Commonwealth Games were held successfully, and the Commonwealth Village was occupied by thousands of athletes and officials without any complaints. The Commonwealth Games Village was highly appreciated by everyone, including the media, and the negative media reports turned positive.

The petitioner also relies on the letter dated 07.10.2010 addressed by the Lt. Governor of Delhi to the Prime Minister in support of its case that the petitioner was not guilty of breach of the agreement.

20. After the completion of the Commonwealth Games, the petitioner received a letter dated 16.10.2010 from the DDA on 20.10.2010. In this communication, the DDA alleged that the project had not been completed even till 16.10.2010. The DDA by this letter demanded liquidated damages amounting to ₹ 83.70 crores on account of the alleged delay in achieving of milestone nos.8 and 9. The DDA also threatened that, in case the said amount is not deposited by the petitioner, the performance bank guarantees submitted by the petitioner would be encashed to the extent of the aforesaid amount.

21. The petitioner sent a reply dated 20.10.2010 to the DDA denying that there was any delay in the achieving of any milestones and repudiated its liability. It was also alleged that the DDA was seeking to unjustly enrich itself, and that it was acting in an illegal manner.

22. The respondent DDA invoked the performance bank guarantees of the petitioner on 23.10.2010 for the entire amount of ₹ 183 crores, i.e. ₹ 150 crores from the State Bank of India and ₹ 33 crores from the State Bank of Patiala. The petitioner submits that, even without waiting for a week from the date of receipt of the letter

dated 16.10.2010 (which was received by the petitioner on 20.10.2010), the said bank guarantees have been invoked.

23. The petitioner submits that the respondent/DDA has played a fraud of an egregious nature on the petitioner by invoking the said bank guarantees, in as much as, even though nothing was lacking from the side of the petitioner, and the petitioner has fulfilled all its contractual obligations within the stipulated time, the two bank guarantees have been invoked by the DDA. This is despite the fact that it is respondent No.1/DDA and other agencies, who have not fulfilled their obligations within the stipulated time. The petitioner states that due to the delays and defaults of the DDA and the other agencies involved in the development work, *"the entire landscaping work, dependent on such performance by respondent No.1 and its other agencies, could not be completed in time"*. It is further submitted that respondent No.1, for its own breach, cannot levy any liquidated damages on the petitioner. It is yet to be determined as to who is in breach and in default. It is submitted that respondent No.1 has no right to invoke the bank guarantees for recovery of liquidated damages.

24. It is further submitted by the petitioner that the Occupancy Certificate in terms of the Delhi Building Bye-laws has been issued by the respondent/DDA. Therefore, it is not open to the DDA to contend that the project, or any part of it, is not complete. The petitioner

submits that respondent No.1 is entitled to retain the bank guarantees in the sum of ₹ 17 crores in terms of clause 6.2(d) (e) and (f) of the Project Development Agreement, including a guarantee of ₹ 5 crores towards performance security for rectification of defects. The petitioner submits that, even if there are any so-called defects in the works done by the petitioner, the same would not justify the invocation of the performance bank guarantees for the amount of ₹ 183 crores.

25. It is further argued that the invocation of the bank guarantees by the respondent/DDA has been done at the behest of the Ministry of Urban Development, Government of India. The petitioner has placed on record a letter dated 20th October, 2010 issued by the Ministry of Urban Development, Government of India to the Vice Chairman, DDA stating that the DDA may, inter alia, proceed to invoke the bank guarantees furnished at the instance of the petitioner. The petitioner submits that the DDA is an independent entity and it is the DDA which is a party to the Project Development Agreement. The Ministry of Urban Development, Government of India has no role to play in the matter and the invocation of the bank guarantees has been done, not on account of an independent application of mind by the DDA but, under the influence of the Ministry of Urban Development. It is argued that this also shows that the invocation of the bank guarantees is not bona fide but is fraudulent.

26. Learned Senior Counsel for the petitioner Mr.P.V.Kapur in his

submissions has argued that in their communication dated 16th October, 2010 the respondent/DDA had primarily made complaints of “defects” allegedly existing at the site. He submits that the respondent/DDA had sought to quantify the liquidated damages on account of the alleged non-completion of milestone Nos.8 and 9, and quantified the sum at ₹ 83.70 crores. In this communication, the demand made by the respondent/DDA was for deposit of ₹ 83.70 crores only, and it was stated that in case the amount is not deposited within seven days, *“the amount shall be realized after encashing the performance guarantee equal to the above amount.”* He, therefore, submits that, in any event, the invocation of the bank guarantees to the tune of ₹ 183 crores is wholly unjustified and fraudulent. He submits that a party who is aware of the fact that he is not entitled to recover the entire amount for which the bank guarantee has been furnished, but still proceeds to invoke the bank guarantee for the entire amount, acts fraudulently. He refers to the reply filed by the respondent/DDA in support of this submission. In their reply the DDA has given a “preliminary estimate” of the amount that the petitioner is allegedly liable to pay. The said “preliminary estimate” reads as follows:-

- | | | |
|-----|---|------------------|
| i. | Liquidated damages upto 15.10.10 | Rs.83.70 crores |
| ii. | Liquidated damages from 16.10.10 till 15.11.10 (filing of this Reply) (@ Rs.20 lakhs per day x 2) | Rs. 12.40 crores |

- iii. Liquidated damages from 16.11.10 @ Rs.20 lakhs per day x 2 till the completion of the project
- iv. Amount spent by Answering Respondent as payment to various authorities for different permissions/ services, which were otherwise the sole liability of Petitioner (provisional) Rs. 49.11 crores
- v. Amount spent by Answering Respondent to make the Project area operational for the Commonwealth Games (Provisional) Rs.20.80 crores
- v. Damages for loss of goodwill and reputation of Answering Respondent due to the acts, omissions and breaches of Petitioner. Being determined
- vi. Other damages and losses Being determined

27. He submits that the aforesaid estimate shows that as on the date of invocation of bank guarantees, i.e. 23rd October, 2010, admittedly, the amount of ₹ 183 crores was not due as liquidated damages, even if the computation made by the respondent DDA were to be accepted for the sake of arguments. He submits that even if the specific figures stated in the aforesaid tabulation are added up, the same fall short of ₹ 183 crores. He further submits that the Heads (v) and (vi) above are not even covered by the performance bank guarantees furnished at the behest of the petitioner.

28. Mr. Kapur submits that the Monitoring Committee constituted in terms of the agreement is the authority empowered to certify the completion of the works under the Project. Till date, the Monitoring

Committee has not returned a finding that there has been a delay on the part of the petitioner in achieving milestone Nos.8 and 9. In this regard, he refers to the minutes of the 31st meeting of the Monitoring Committee held on 6th May, 2010. In this meeting, the Monitoring Committee constituted a Sub Committee for assisting it in recording the Completion Certificate as per Clause 3.11 of the Agreement. This Sub-Committee has two representatives of the DDA and two representatives of the petitioner. He also refers to the minutes of the 32nd meeting of the Monitoring Committee held on 31st July, 2010. The Monitoring Committee clarified that the Sub Committee constituted, as aforesaid, had been formed to submit the report of completion on milestones 8 and 9 and not for recording completion certificate under Clause 3.11 of the Project Development Agreement. He also refers to the minutes of the 33rd meeting held on 25th October, 2010 to submit that the Sub-Committee did not meet due to preoccupation of the officers of the DDA. He submits that the 1st meeting of the Sub-Committee constituted, as aforesaid, was held on 28th October, 2010. Even on that date, the meeting remained inconclusive. By reference to letter dated 10th November, 2010 stated to have been issued by the petitioner to the respondent/DDA, the petitioner submits that it is the officers of the DDA who did not turn up for the meeting of the Sub Committee scheduled for 9th November, 2010. The submission of Mr.Kapur is that until and unless the date of achievement of milestone Nos.8 and 9 is finalized, it cannot be said that the petitioner has not

achieved the said milestones in time. Consequentially, respondent/DDA cannot invoke the performance bank guarantees as done by it.

29. Mr. Kapur submits that the respondent/DDA has never demanded any damages for loss of goodwill or loss of reputation or on any other account. No notice in this regard was issued to the petitioner prior to invocation of the bank guarantees. He, therefore, submits that the aforesaid tabulation prepared by the respondent is an afterthought to somehow come as close to figure of ₹ 183 crores as it could.

30. Mr. Kapur submits that the petitioner communicated the fraud being played upon by the respondent/DDA to respondent Nos. 2 and 3 banks on 23rd October, 2010. (I may note that the said communication is contained in the compilation of documents tendered in Court during the course of arguments). He, therefore, submits that the respondent Banks had notice of the fraud sought to be played by the respondent DDA upon the petitioners.

31. Mr. Kapur submits that to permit the respondent/DDA to encash the bank guarantees in question would also lead to irretrievable injustice to the petitioner inasmuch, as, under Clause 6.2 of the Project Development Agreement, in the event DDA invokes the performance security, the petitioner shall have to furnish a fresh

performance security for the invoked amount from a scheduled commercial bank, failing which, the DDA shall be entitled to terminate the agreement. Consequently, upon the invocation of the bank guarantee of ₹ 183 crores, the petitioner shall become obliged to furnish a fresh guarantee for the said amount and upon failure to do so, the agreement may be terminated by the DDA. He submits that if the agreement is terminated by the DDA, the petitioner would not be able to enforce its right to sell a part of the total number of flats developed by the petitioner on its own. He submits that the invocation of the bank guarantee would be highly unjust and will cause ruination to the petitioner. Mr.Kapur submits that the petitioner has been made a scapegoat by the respondent DDA for its own failure in carrying out its works and responsibilities in completing the works undertaken by it for holding Commonwealth Games.

32. Mr. Arvind Nigam, learned Senior Advocate has also made his submissions in support of the petition. He submits that under the Unified Building Bye-Laws, there is no such thing as “temporary”, “interim” or “conditional” Completion Certificate. He submits that once the Completion Certificate is granted, the same is final and conclusive of the fact that the building works have been completed in accordance with the sanctioned plans. He submits that the notice of completion of the works had been given on 29th March, 2010 and the respondent DDA had issued a so called temporary Occupancy Permit on 3rd

September, 2010. On the same day, the Occupancy Permit was issued by the DDA, valid till completion of Commonwealth Games, 2010. He submits that under Bye-Law 7.6 of the Unified Building Bye-Laws, the completion certificate is deemed to be granted after period of sixty days, unless the application seeking completion certificate is specifically rejected. He submits that in this case, the said application had not being rejected.

33. Mr. Kapur has relied upon the following decisions in support of his submissions:-

- (i) *Humboldt Wedag India Pvt. Ltd. v. Dalmia Cement Ventures Ltd.*, (2010) 4 Arb. L.R 11;
- (ii) *Regional Manager, Central Bank of India v. Madhulika Guru Prasad Dahir & Ors.*, AIR 2008 SC 3266;
- (iii) *Bhaurao Dagdu Paralkar v. State of Maharashtra & Others*, (2005) 7 SCC 605;
- (iv) *Hindustan Steelworks Construction Ltd. v. Tatapore & Co.*, AIR 1996 SC 2268.

34. Upon invocation of the aforesaid two bank guarantees on 23.10.2010 of ₹ 33 crores and ₹ 150 crores respectively issued by State Bank of Patiala and State Bank of India, on the same day, the State Bank of India issued two pay orders in faovur of the respondent DDA for ₹ 90 crores and ₹ 60 crores, and the State Bank of Patiala issued one pay order for ₹ 33 crores.

35. When the matter was taken up by this Court on 25.10.2010, the aforesaid position was brought to the notice of this Court. At that stage, the Court did not grant any interim injunction in respect of the pay order of ₹ 90 crores issued by State Bank of India. However, in respect of the pay order for ₹ 60 crores issued by State Bank of India and the pay order for ₹ 33 crores issued by State Bank of Patiala, the following operative order was passed:

“In case the said pay orders have already been encashed, it is made clear that there would be no interim order.

However, in case the pay order of Rs.33 crores has not been encashed and the amount not credited to the account of the respondent/DDA, status quo shall be maintained in respect thereof.

In relation to the pay orders issued by State Bank of India aggregating to Rs.150 crores, as aforesaid, in case the amounts have not been credited to the accounts of DDA, status quo shall be maintained in respect of the pay order for Rs.60 crores bearing no.764469 dated 23.10.2010. However, the pay order for Rs.90 crores may be encashed”.

36. Ms. Indira Jaisingh, learned Additional Solicitor General appearing on behalf of the respondent DDA, firstly, submits that this petition has become infructuous as the two bank guarantees issued by State Bank of India and State Bank of Patiala stood encashed on 23.10.2010 itself.

37. She submits that the encashment of the said bank guarantees meant that the proceeds were taken out of the bank accounts of the

petitioner, and the petitioners bank accounts were debited by the concerned bank. In support of her submission, she places reliance on an order dated 30.04.2010 passed by this Court in Cont. Case (C) No.281/2010, *ACG Hospitality Pvt. Ltd. v. R.K. Sharma & Anr.* In this case, when the matter was taken up for hearing in W.P. (C) No.696/2010, the Court had granted an interim injunction in favour of the petitioner by directing that in case the bank guarantee had not been encashed, the encashment of the guarantee be kept in abeyance till the next date of hearing. The writ petition was adjourned to 10.02.2010. On that date, counsel for the DDA as well as the counsel for the bank had submitted that the bank guarantee of the petitioner stand encashed. On the basis of these statements, the writ petition was dismissed as infructuous.

38. Thereafter, the writ petitioner preferred the aforesaid contempt case by placing reliance on the communication dated 16.02.2010 issued by the Bank to show that payment of invoked bank guarantee had been put in clearing on 13.02.2010, which would show that on the date of hearing, i.e. 10.02.2010, a false statement was made. The Court dismissed the contempt case as it was shown that the bankers cheque in favour of DDA had been prepared on 01.02.2010 by the bank, however, the same was cleared on 13.02.2010. The Court accepted the submission of the bank's counsel that on preparation of the bankers cheque, the bank guarantee stood

encashed.

39. I would have agreed with the aforesaid submission of learned ASG, had the order dated 25.10.2010 merely stated that "*in case the bank guarantees have already been encashed, it is made clear that there would be no interim order*". However, while passing the order dated 25.10.2010, I was conscious of the fact that so far as the petitioners bank accounts were concerned, they had already been debited on 23.10.2010, as respondent nos.2 and 3 banks had already prepared pay orders in favour of the DDA. Details of these pay orders were also recorded in my order dated 25.10.2010. Pertinently, I had directed that "*in case the said pay orders have already been encashed, it is made clear that there would be no interim order*".

40. The "encashment" referred to by me in the order dated 25.10.2010 pertained to the encashment of the pay orders into the account of the respondent DDA. The purport of the said order was that if the monies covered by the bank guarantees/pay orders have already been credited to the account of the DDA, there would be no interim order. The aforesaid aspect becomes clear upon reading of the latter part of the order. The Court had clearly observed that "*in case the pay order of Rs.33 crores has not been encashed and the amount not credited to the account of the respondent/DDA, status quo shall be maintained in respect thereof*". A similar order was made in respect of the pay order of ₹ 60 crores issued by State Bank of India.

41. The aforesaid order was passed on 25.10.2010, whereas the pay orders had already been made and delivered to the DDA by the respective banks on 23.10.2010. It was, therefore, not clear at the time of passing of the order, whether the monies covered by the pay orders had, or had not, travelled into the account of the respondent DDA. I may note that on 25.10.2010, upon a query raised by the Court as to whether any advance notice of the petition had been served on the respondent DDA, the learned counsel for the petitioner had shown to the Court a copy of an email communication stated to have been issued to a standing counsel of DDA. Despite the said advance notice, there was no appearance on behalf of the DDA on 25.10.2010 before the Court. Therefore, the aforesaid aspect was not clarified before the Court. As it transpires, the pay orders had not been encashed into the account of the respondent DDA on 25.10.2010. I, therefore, reject the aforesaid submission of learned ASG. It cannot be said that the present petition has become infructuous, as the pay orders of ₹ 33 crores and ₹ 60 crores had not been encashed into the account of the respondent DDA on 25.10.2010.

42. During the course of hearing, another grievance raised by the learned ASG was that the respondent no.3 State Bank of India had acted in collusion and connivance with the petitioner. The grievance is that when there was a single bank guarantee of ₹ 150 crores issued by respondent no.3 State Bank of India, there was no justification for

making two pay orders of ₹ 90 crores and ₹ 60 crores. She submits that the State Bank of India should have prepared only one pay order of ₹ 150 crores in response to the invocation of the bank guarantee by the respondent DDA on 23.10.2010.

43. She had submitted that the respondent DDA had deposited both the pay orders issued by the State Bank of India for ₹ 90 crores and ₹ 60 crores simultaneously. However, only the pay order for ₹ 90 crores had been encashed and credited into the account of the respondent DDA, and the second pay order for ₹ 60 crores had not been encashed and credited into the account of the respondent DDA.

44. Upon the aforesaid grievance being raised, vide order dated 11.11.2010, this Court had directed the State Bank of India to file a specific affidavit to explain its conduct in issuing two pay orders for ₹ 90 crores and ₹ 60 crores upon invocation of a single bank guarantee of ₹ 150 crores, and also to explain as to how the pay order of ₹ 90 crores was credited into the account of the DDA, whereas the second pay order of ₹ 60 crores was not so credited, even though both of them had been deposited at the same time.

45. Sh. Dinesh Chandra Mamgain, the Chief Manager, State Bank of India, B.O. Overseas, STC Building, Janpath, New Delhi has filed his affidavit dated 16.11.2010 in compliance of the said order. So far as the aspect of issuance of two pay orders of ₹ 90 crores and ₹ 60 crores

is concerned, it is explained that the computer software of State Bank of India does not permit issuance of a single bankers cheque in excess of ₹ 99,99,999.99. Therefore, a single pay order for ₹ 150 crores could not have been issued. Accordingly, two pay orders for ₹ 90 crores and ₹ 60 crores were issued on 23.10.2010. It is further explained that the court order dated 25.10.2010 was served upon the State Bank of India on 25.10.2010 itself. By that time, neither of the aforesaid two pay orders had been cleared for payment in the normal course of business. Accordingly, upon receipt of the Court order, the State Bank of India had marked "*stop payment*" in respect of the bankers cheque/pay order of ₹ 60 crores, while the other bankers cheque/pay order for ₹ 90 crores was cleared in due course of banking business on 26.10.2010. It was further stated that the account of the respondent DDA was credited with the proceeds of the pay order of ₹ 90 crores on 26.10.2010. The respondent State Bank of India has, therefore, stated that it has acted in compliance of the court order dated 25.10.2010. It has further been disclosed that the amount of ₹ 60 crores is still lying outstanding in the bank office account, pending further instructions from this Court.

46. The affidavit filed by the Chief Manager, State Bank of India has not been disputed/controverted by the DDA. Therefore, the explanation furnished by State Bank of India is accepted and the grievance made by the respondent DDA in this regard is rejected.

47. The submission of the learned Additional Solicitor General Ms. Indira Jaisingh is that the petitioner had not completed the project within the specified time. She submits that in its communication dated 16.10.2010 the respondent/DDA had not only complained about the defects existing at the site but had specifically stated that *“the basement flooring at the places and waterproofing of the lift wells have not been completed till date.”* It was further stated in this communication that an amount of ₹ 83.70 crores *“....has become due to be paid to DDA on a/c of non-completion of milestone No.8 and 9.”* She submits that the contention of the petitioner that the only stand of the DDA is with regard to existing defects, and not with regard to non-completion of the work is incorrect.

48. She further submits that liquidated damages have been provided under the PDA in Annexure-3 as extracted hereinabove. These liquidated damages accrue on day-to-day basis. The respondent had earlier quantified the liquidated damages in its communication dated 9.6.2010 at ₹ 13.45 crores. Since then, with the passage of time and non-completion of the works under the Project Development Agreement, further liquidated damages had accrued and, consequently, on 16.10.2000 the respondent/DDA had made a demand of ₹ 83.70 crores. She submits that even thereafter, liquidated damages have been accruing at the rate indicated in Annex 3.

49. She further submits that under clause 1.1.20 of the Project

Development Agreement, the project completion date is required to be certified by the Monitoring Committee constituted under the said agreement. The Monitoring Committee has representatives of the petitioner, the respondent and independent members. The Monitoring Committee has till date not recorded the project completion date, even though, the project had to be completed by 1.4.2010. The Sub-Committee referred to by the petitioner, as per the petitioners own showing, is not concerned with the certification of the project completion date. She further submits that even the achievement of the 8th and 9th milestones as per Annexure-3 has not been recorded by the Monitoring Committee.

50. She submits that the petitioner has admitted the said position in its letter dated 20.10.2010. By reference to the tabulation filed by the petitioner as Annexure P-18 which tabulates the dates on which the towers were delivered to the DDA, she submits that Tower no.T-34 was delivered by the petitioner only on 24.07.2010, even as per its own showing. However, in terms of Annexure-3 of the Project Development Agreement, the same should have been delivered by 1.4.2010. She points out that in its rejoinder the petitioner admits that only the residential flats have been delivered by it, and that too belatedly. However, the definition of the expression "Project" contained in the Project Development Agreement is much wider to mean complete construction and development of the ready-to-use

residential facility at the project site (see clause 1.1.19). “Residential Facility” means all use, building blocks, common areas, parking base, roads, parks, landscaping etc. and other associated facilities like sewerage, water, power, internet, telephone arrangements etc. at the project site (see clause 1.1.22).

51. She submits that the temporary occupancy permit granted by the respondent/DDA on 3.9.2010 cannot be used by the petitioner to contend that the works under the project had been completed. She submits that perusal of the letter dated 3.9.2010 issued by the DDA granting temporary occupancy permit itself shows that according to DDA *“the completion certificate cannot be issued at this stage due to non-compliance of the provisions of the Building Bye-Laws, 1983”*. However, with a view to facilitate use and occupation of the flats during Commonwealth Games 2010, temporary occupancy permit was granted which was to remain valid till Commonwealth Games Village was handed back by the Organizing Committee after the Commonwealth Games, 2010. This communication made it clear that the temporary occupancy permit was being issued without prejudice to the show cause notice dated 22.7.2010 and the sealing-cum-demolition order dated 20.8.2010 issued under Sections 30 and 31 of the Delhi Development Act, 1957 and other communications issued in that regard. The issuance of temporary occupancy permit expressly did not create any right or basis whatsoever for processing of completion

certificate under clause 7.6 of the Building Bye-Laws.

52. She submits that the nation was faced with a serious situation due to delays and defaults on the part of the petitioner in failing to complete the project on time. There was immense adverse publicity for the DDA and for the nation as a whole in India, and abroad. The respondent/DDA had no option at that stage but to carry out some of the works which the petitioner was obliged to undertake under the Project Development Agreement. Thousands of athletes and officials who were scheduled to attend the Commonwealth Games, 2010 had to be put up in the Commonwealth Games Village, and it was necessary to issue the temporary occupancy permit even though the project was not completed by the petitioner. She places reliance on the photographs filed along with the reply of the DDA to show the state of affairs as existing at the site as on 7.8.2000. These photographs show that there was large scale collection of garbage/malba at the site which had not been cleared. No landscaping work had been undertaken and there was collection of water in the basement floors of the Apartment Blocks. She submits by reference to these photographs that the water had collected in the basement floors of the Apartment Blocks as the petitioner failed to carry out water proofing work and the said situation has continued even till after the conclusion of the games. Photographs taken as late as on 29th and 30th October, 2010 by the respondent DDA of the apartment blocks have been placed on record

in support of the aforesaid submission.

53. Ms. Jaisingh submits that the present is not a case of a fraud being played upon by the respondent/DDA upon the petitioner or the issuing banks. She submits that the existence of disputes between the parties with regard to the breach of the contract by one or the other party, and the invocation of the bank guarantee in said circumstances, does not tantamount to a fraud by the beneficiary. The allegations of the petitioner do not relate to a fraud committed by the DDA in the making of the bank guarantee or in its invocation. The allegation is merely that it is the DDA which is in default. She submits that the issue relating to default of one or the other party is an arbitral dispute. However, the right of the respondent/DDA to invoke the performance bank guarantee/security cannot be interdicted merely because the said issue has not been resolved as of now. She further submits that the fraud should pertain to the making of the bank guarantee. It is not even the petitioner's case that the said bank guarantees were obtained by the respondent by playing a fraud on the petitioner or respondents No.2 and 3 banks. She submits that neither respondent No.2 nor respondent No.3 have found the invocation of the bank guarantees in question to be fraudulent, and this is evident from the fact that they have honoured the said invocation and prepared pay orders in favour of the respondent/DDA for the amount of the bank guarantees and delivered the same to the DDA.

54. She submits that it is not even the petitioner's case that the project is complete as per the Project Development Agreement. Even if it is partially incomplete, it cannot be said that the same is complete.

55. With regard to the grievance of the petitioner that the bank guarantees had been invoked even prior to expiry of seven days from the date of receipt of the notice dated 16.10.2010, she submits that the respondent was justified in invoking the said guarantees upon receipt of the communication dated 20.10.2010 of the petitioner. In the said communication the petitioner had denied any liability whatsoever, and had even gone to the extent of demanding return of the bank guarantees. The petitioner did not admit any part of the liability towards liquidated damages or other damages, and repudiated the right of the respondent to impose liquidated damages and invoke the performance securities/bank guarantees. She also submits that the petitioner, from the very beginning, was in default and did not even have the resources to complete the works under the Project Development Agreement. The petitioner had been pleading that due to economic slowdown and the existing court cases they were not able to raise the required funds for the completion of the project by selling/booking their share of the apartments. They sought financial assistance from the respondent/DDA to complete the project. To bail out the petitioner and to ensure that the project is completed before the Commonwealth Games, 2010, the respondent/DDA had agreed to

purchase a large number of flats which fell to the share of the petitioner. She places reliance on the minutes of the meeting called by the Lt. Governor on 24.4.2009, where the decision to purchase the flats from the petitioner was taken. She further submits that disputes had arisen between the petitioner and its sub-contractors during the execution of the works, which also resulted in delays and defaults on the part of the petitioner.

56. Ms.Jaisingh submits that right to invoke the performance security is available to DDA upon the occurrence of an event of default. It is not limited only to the non-compliance of the milestones or persistent delays by the Project Developer in implementation of the project. It can be invoked for other reasons as well. She places reliance on language of Clause 6.2 in this regard which uses the expression *"including but not limited to"* while dealing with the reasons for which the Bank Guarantees may be invoked. The said right to invoke the performance security is not limited to the four specific instances mentioned in Clause 6.2 as extracted hereinabove as those instances are mere illustrations. She points out that under Clause 12.1 the failure to achieve completion within the time period set out under the agreement is an event of default.

57. Without prejudice to the aforesaid submissions, Ms. Jaisingh also submits that the bank guarantee of ₹ 150 crores issued by the State Bank of India could not have been successively encashed for

varying amounts. She submits that the DDA was, therefore, entitled to invoke the same for the entire amount of ₹ 150 crores, as invoking the said guarantee for a lesser amount would have resulted in the bank guarantee for the remaining balance amount lapsing.

58. She further submits that the balance of convenience is in favour of the DDA, as DDA is a statutory corporation and its solvency cannot be doubted. In case the petitioner succeeds in the arbitral proceedings that may be initiated between the parties, the respondent would restitute the amount. She further submits that so far as the petitioner is concerned, its bank accounts have already been debited and, therefore, no prejudice would be suffered by it if the amounts are credited to the account of the respondent/DDA. She further offered that this Court may subject the respondent/DDA to such terms and conditions as may be deemed just and equitable in relation to the amount covered by the bank guarantees.

59. In support of her submissions she has placed reliance upon the following decisions:-

- (i) *Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineering Works Pvt. Ltd.*, 1997 (6) SCC 450;
- (ii) *BSES Ltd. (Now Reliance Energy Ltd.) v. Fenner India Ltd. & Anr.*, 2006 (2) SCC 728; and
- (iii) *U.P. State Sugar Corporation v. Sumac International Ltd.*, 1997 (1) SCC 568

60. In his rejoinder, Mr. Kapur has submitted that since the bank guarantees in question are valid till 31.12.2010 and they can be invoked for an amount upto ₹ 33 crores and ₹ 150 crores respectively, the respondent/DDA is wrong in contending that if the said guarantees had been invoked for lesser amount, the same could not have been re-invoked in parts for the remaining balance amounts during their currency. He further submits that if that was the apprehension in the mind of the respondent/DDA, then the invocation of the bank guarantee of ₹ 33 crores furnished by the respondent No.2/Bank can not be explained, as the amount claimed in the communication dated 16.10.2010 was only ₹ 83.70 crores. He also submits that the learned ASG is not right in her submission that the fraud has to necessarily pertain to the making of the bank guarantee, and does not relate to its invocation. He further submits that the petitioner should not be required to furnish a fresh bank guarantee in terms of clause 6.2, as it would cause irretrievable injustice to the petitioner.

61. Having heard learned counsel for the parties, considered their respective submissions, and in view of the settled position of the law on the subject, I am of the view that the petitioner is not entitled to seek a restraint on the encashment of the bank guarantees in question for the amount of ₹ 183 crores, or to any other relief as prayed for.

62. I may first deal with the submission of learned ASG that the bank guarantees in question could not have been invoked partially and repeatedly, and that if a partial invocation had been resorted to by the respondent DDA, the same would have lapsed for the remaining balance amounts even before the expiry of the period of currency of the said guarantees.

63. On this submission being made, learned counsel for the respondent State Bank of India was asked by the Court to specifically take instructions as to the normal banking practice in such situations. Learned counsel for the State Bank of India has stated that a bank guarantee, unless there is a limitation contained in its terms that it could be invoked only once, could be invoked repeatedly during its currency, partially, so that the aggregate amount invoked by the beneficiary does not exceed the maximum amount payable under the bank guarantee.

64. A perusal of the bank guarantees in question dated 12.06.2008 (issued by State Bank of Patiala), the validity whereof was extended vide extension dated 27.09.2010; and the bank guarantee dated 11.06.2008 (issued by State Bank of India), the validity whereof was extended vide extension dated 27.09.2010 upto 31.12.2010, does not support the submission made by Ms. Jaisingh. The said bank guarantees, inter alia, state that the said banks *"do hereby unconditionally and irrevocably undertake to pay to DDA an amount*

not exceeding without any demur or merely on a demand in writing from DDA, received by the bank on or before stating that the amount claimed is due and payable by project developer. Any such demand received by the bank on or before shall be conclusive as regards the amount due and payable by the bank under this guarantee. However, the banks liability to this guarantee shall be restricted to an amount not exceeding". The bank guarantees further recite "our liability under this agreement shall not exceed" It further states *"we shall be liable to pay guaranteed amount or any part thereof only and only if you serve upon us a written claim or demanded on or before"*.

65. From the aforesaid language used in the bank guarantees in question, it cannot be inferred that there is any limitation therein that they could be invoked only once. The upper limit of the amounts for which these bank guarantees were furnished, have been indicated in the respective guarantees. Therefore, up to the upper limit/ceiling fixed in the said bank guarantees, the beneficiary could invoke the guarantees repeatedly during their currency, such that the total amount invoked/drawn on the bank guarantees does not exceed the upper limit/ceiling amount for which they are furnished.

66. Therefore, the alternate submission of Ms. Jaisingh that the DDA had no option, but to invoke the entire amount of bank guarantee of ₹ 183 crores cannot be accepted. As pointed out by Mr. Kapur, if the

apprehension of the DDA was that partial invocation was not permissible in respect of the two bank guarantees in question, the DDA should have invoked only one bank guarantee issued by State Bank of India, which was for an amount of ₹ 150 crores, and there was no need to invoke bank guarantee issued by State Bank of Patiala for ₹ 33 crores.

67. I may now deal with the submission of Ms. Jaisingh that it is only a fraud in the making of the bank guarantee that would justify the grant of an injunction against its invocation, and that the fraud in the invocation of the bank guarantee would not justify the grant of injunction against its invocation. The aforesaid submission of Ms. Jaisingh is not supported by the case law placed on record. In **Hindustan Steel Works Construction Ltd.** (supra), the Supreme Court observed as follows:

“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.”

This argument has also been rejected by the Division Bench of this Court in **Humboldt Wedag India P. Ltd.** (supra) in paragraph 18. Therefore, the aforesaid submission of Ms. Jaisingh cannot be accepted, and is rejected.

68. The law with regard to enforcement of an irrevocable and unconditional bank guarantee payable on demand without demur, and the circumstances in which the courts may grant an injunction against the encashment of such a bank guarantee has been the subject matter of various decisions of the Supreme Court from time to time.

69. I may first refer to the decision of the Supreme Court in ***U.P. State Sugar Corporation v. Sumac International Limited***, 1997 (1) SCC 568. In this case, the appellant corporation entered into a contract with the respondent company for setting up a complete sugar plant. The contract contained the stipulation regarding time for completion of the work. The respondent was also required to furnish bank guarantees for due delivery and for advance price to be paid by the appellant to the respondent. The guarantees were irrevocable in nature, payable by the guarantor to the appellant beneficiary on demand, without demur. It was provided that the appellant shall be the sole judge of whether, and to what extent, the amount had become recoverable from the respondent, or whether the respondent had committed any breach of the terms of the agreement. The bank guarantee further provided that the right of the appellant to recover from the guarantor any amount shall not be affected or suspended by reason of any disputes that might be raised by the respondent as regard its liability or on the ground that proceedings were pending before any tribunal/arbitrator/court with regard to such dispute.

70. The contract was terminated by the appellant on the ground of the respondents failure to complete the work within the time granted under the contract as extended. The appellant also invoked the bank guarantees furnished by the respondent. The respondent filed a petition under section 20 of the Arbitration Act, 1940 for appointment of an arbitrator and also filed applications for interim relief under section 41(b) of the Arbitration Act, 1940 to seek stay against encashment of the bank guarantees. The Civil Judge dismissed the application, but in revision, the High Court allowed the same and granted injunction restraining the appellant from enforcing the bank guarantee. The Supreme Court allowed the appeal preferred by the beneficiary, UP State Sugar Corporation.

71. The Supreme Court in this decision referred to its earlier decisions and observed as follows:

*“12. The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to 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.* [(1988) 1 SCC 174] 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 approval the observations of Sir John Donaldson, M.R. in *Bolivinter Oil SA v. Chase Manhattan Bank* [(1984) 1 All ER at p.351].

“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.”

This Court set aside an injunction granted by the High Court to restrain the realisation of the bank guarantee.

13. The same question came up for consideration before this Court in *Svenska Handelsbanken v. Indian Charge Chrome* [(1994) 1 SCC 502]. This Court once again reiterated that a confirmed bank guarantee/irrevocable letter of credit cannot be interfered with unless there is established fraud or irretrievable injustice involved in the case. Irretrievable injury has to be of the nature noticed in the case of *Itek Corpn. v. First National Bank of Boston* [566 Fed. Supp. 1210]. On the question of fraud this Court confirmed the observations made in the case of *U.P. Coop. Federation Ltd.* and stated that the fraud must be that of the beneficiary, and not the fraud of anyone else.

14. **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.** In that case an exporter in USA entered into an agreement with the Imperial Government of Iran and sought an order terminating its liability on stand by letters of credit issued by an American Bank in favour of an Iranian Bank as part of the contract. The relief was sought on account of the situation created after the Iranian revolution when the American Government cancelled the export licences in relation to Iran and the Iranian Government had forcibly taken 52 American citizens as hostages. The US Government had blocked all Iranian assets under the jurisdiction of United States and had cancelled the export contract. The Court upheld the contention of the exporter that any claim for damages against the purchaser if decreed by the American Courts would not be executable in Iran under these circumstances and realisation of the bank guarantee/letters of credit would cause irreparable harm to the plaintiff. This contention was upheld. To avail of this exception, therefore, exceptional circumstances which make it impossible for the guarantor to reimburse himself if he ultimately succeeds, will have to be decisively established. Clearly, a mere apprehension that the other party will not be able to pay, is not enough. In *Itek* case there was a certainty on this issue. Secondly, there was good reason, in that case for the Court to be *prima facie* satisfied that the guarantors i.e. the bank and its customer would be found

entitled to receive the amount paid under the guarantee.”
(emphasis supplied)

72. The Supreme Court also quoted from its decision in ***State of Maharashtra v. National Construction Company***, 1996 (1) SCC

735 the following passage:

“The rule is well established that a bank issuing a guarantee is not concerned with the underlying contract between the parties to the contract. The duty of the bank under a performance guarantee is created by the document itself. Once the documents are in order the bank giving the guarantee must honour the same and make payment ordinarily unless there is an allegation of fraud or the like. The courts will not interfere directly or indirectly to withhold payment, otherwise trust in commerce internal and international would be irreparably damaged. But that does not mean that the parties to the underlying contract cannot settle the disputes with respect to allegations of breach by resorting to litigation or arbitration as stipulated in the contract. The remedy arising ex contractu is not barred and the cause of action for the same is independent of enforcement of the guarantee.”

73. After referring to the aforesaid decision, the Supreme Court, in para 16, observed as follows:

“16. 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.”

74. Pertinently, in ***UP State Sugar Corporation*** (supra), the appellant/beneficiary was a sick industrial company in respect of which a reference was pending before the Board For Industrial and Financial Reconstruction (BIFR) under the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA). It was contended that if the appellant were to encash the bank guarantees and receive the amounts, and the respondent were to eventually succeed in the arbitration proceedings, it may still not be able to realize its claim from the appellant. The Supreme Court, however, rejected the said submission by observing that the mere fact that a reference under SICA is pending before the BIFR is not sufficient to bring the case in the ambit of “irretrievable injustice” exception. The Supreme Court held that merely because the case of the appellant was before the BIFR, it could not be presumed that the appellant will, in no circumstance, be able to discharge its obligations. The Supreme Court further held that this was not a situation of the kind envisaged in the case of ***Itec Corporation***, where there was no possibility of recovery of any amount from the purchaser.

75. A comparison of the terms of the bank guarantee considered by the Supreme Court in the case of ***UP State Sugar Corporation*** (supra), with the terms of the bank guarantees in question (as extracted herein above) shows that there is marked similarity between

them. In the present case as well, the bank guarantees in question are unconditional and irrevocable and the respective banks have undertaken to pay to the DDA without any demur, merely on a demand in writing from DDA, stating that the amount claimed is due and payable by the petitioner project developer. The banks have further undertaken to pay the amounts under the bank guarantees in question notwithstanding any dispute raised by the petitioner in any manner whatsoever. The banks have clearly held out in their respective guarantees that their liability under the guarantees is absolute, unconditional, unequivocal and irrevocable.

76. A perusal of the petition and the submissions of the learned senior counsels for the petitioner shows that the petitioner's primary grievance is that the default has been on the part of the DDA and other agencies which had led to the present situation, and that the respondent DDA is unfairly seeking to put the blame on the petitioner and making the same as a ground for invocation of the bank guarantees. This is a dispute arising under the PDA, which would have to be determined in arbitration. The invocation of the bank guarantee by the DDA, merely because the petitioner raises the aforesaid disputes, cannot be said to be fraudulent. On their very terms, the bank guarantees do not require the respondent nos.2 and 3 banks to, in any way, get embroiled in the claims and counter claims of the parties with regard to the breach of the PDA by one or the other party.

77. I had the occasion to deal with the law on the subject in **CDS Money Exchange Bureau Pvt. Ltd. v. Thomas Cook & Others**, 2007 (95) DRJ 369. In this case, the buyer had got the documentary credit furnished in favour of the seller. The analysis of the law on the subject contained in the said decision may usefully be reproduced:

“21. The law with regard to grant or refusal of injunction on encashment of bank guarantees, at the instance of the party at whose behest the bank guarantees have been issued, is well settled. In Federal Bank Ltd. v. V.M. Jog Engineering Ltd. and Ors. (2001) 1 SCC 663 the Hon'ble Supreme Court, after reviewing the earlier decisions, observed that courts ought not to grant injunction to restrain encashment of bank guarantees or letters of credit. There are, however, two exceptions to this rule, viz, fraud and irretrievable damage. The contract of bank guarantee or letter of credit is independent of the main contract between the seller and the buyer. In case of an irrevocable bank guarantee or letter of credit, the buyer cannot obtain injunction against the final payment on the ground that there was a breach of the contract by the seller. The bank is to honour the demand for encashment if the seller prima facie complies with the terms of the bank guarantee or the letter of credit, namely, if the seller produces the documents enumerated in the bank guarantee or the letter of credit. If the bank is satisfied on the basis of the documents that they are in conformity with the list of documents mentioned in the bank guarantee or the letter of credit and there is no discrepancy, it is bound to honour the demand of the seller for encashment. It is not permissible for the bank to refuse the demand on the ground that the buyer is claiming that there is a breach of contract. This obligation of the bank under the documents has nothing to do with any dispute as to breach of contract between the seller and the buyer.

22. The Supreme Court also observed that in order to obtain injunction against the issuing bank, it is necessary to prove that the bank had knowledge of the fraud. Hon'ble Supreme Court relied on the observations of Kerr, J. in R.D. Harbottle (mercantile) Ltd. v. National Westminster Bank Ltd. (1978) QB 146 : (1977) 2 All ER 862 to state that

irrevocable Letters of Credit are "the lifeblood of international commerce" and also observed:

Except possibly in clear cases of fraud of which the banks have notice, the courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration.... Otherwise, trust in international commerce could be irreparably damaged.

Quoting from the several other English decisions, the Hon'ble Supreme Court observed:

Denning M.R. stated in Edward and Owen Engg. Ltd. v. Barclays Bank International Ltd. that "the only exception is where there is a clear fraud of which the bank had notice". Browne, L.J. said in the same case: "but it is certainly not enough to allege fraud, it must be established and in such circumstances, I should say, very clearly established". In Bolivinter Oil S.A. v. Chase Manhattan Bank All ER at p. 352, it was said

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 'before the injunction is vacated.

Thus, not only must "fraud" be clearly proved but so far as the bank is concerned, it must prove that it had knowledge of the fraud. In United Trading Corporation S.A. v. Allied Arab Bank it was stated that there must be proof of knowledge of fraud on the part of the bank at any time before payment."

78. In the facts as pleaded by the parties, it cannot be said that the fraud pleaded by the petitioner is an established fraud, or even a prima facie established fraud to the knowledge of the issuing bank. It

certainly cannot be said to be a fraud of an egregious nature, i.e. a fraud which can be said to be outstandingly bad or shocking.

79. The same issue rose before the Supreme Court in **BSES Limited** (supra). On a reading of para 2 of the said decision, I am reminded of the submission made by Mr. Kapur that the invocation of the bank guarantee is not in good faith and that the petitioner has been made a scapegoat by the DDA. Para 2 of the decision reads as follows:

“2. This is one more instance of an injunction being sought against a beneficiary seeking to enforce his/her rights under a bank guarantee, albeit with a novel averment that “lack of good faith” or “enforcing with an oblique purpose” constituted further exceptions to the general rule against intervention.”

80. In this case, the appellant and the respondent entered into a “wrap-around agreement”, under which the respondent undertook to perform the contractual obligation of the appellant in relation to the contract awarded to it by M/s Godawari Sugars Ltd. on a turn key basis. Clause 4 of the agreement provided that in case of any material breach of any or all the contracts, BSES shall have the right to embark upon the retentions and encashment of bank guarantees of all the contracts. The bank guarantees were encashed and the respondent invoked the arbitration agreement contained in the work/purchase orders.

81. A petition under section 9 of the Act was preferred to seek a declaration that the appellant shall not be entitled to invoke the bank guarantees. Eventually, the matter travelled to the Supreme Court. The Supreme Court, inter alia, held as follows:

"26. Accordingly, we are prima facie not satisfied that performance had been duly and satisfactorily certified. Under the terms of the "wrap-around agreement", the appellant was entitled to encash all or any of the bank guarantees for breach of the first respondent's obligations under any one of the contracts. In our view, it is the case of the appellant that there was no satisfactory performance of the contract, as a result of which, the appellant was justified in encashing the bank guarantee concerned. Indeed, as per the terms of the bank guarantee itself, the appellant is the best judge to decide as to when and for what reason the bank guarantees should be encashed. Further, it is no function of the second respondent Bank, nor of this Court, to enquire as to whether due performance had actually happened when, under the terms of the guarantee, the second respondent Bank was obliged to make payment when the guarantee was called in, irrespective of any contractual dispute between the appellant and the first respondent. Indeed, in similar circumstances, this Court in General Electric Technical Services Co. Inc. v. Punj Sons (P) Ltd., [(1991) 4 SCC 230] held:

"The Bank must honour the bank guarantee free from interference by the courts. Otherwise, trust in commerce internal and international would be irreparably damaged. It is only in exceptional cases that is to say in case of fraud or in case of irretrievable injustice, the court should interfere. ... The nature of the fraud that the courts talk about is fraud of an 'egregious nature as to vitiate the entire underlying transaction'. It is fraud of the beneficiary, not the fraud of somebody else."

29. There is no dispute that arbitral proceedings are pending. In fact, we were shown that one of the disputes referred to arbitration is whether the bank guarantees are null and void. Further, one of the substantive prayers in the arbitration made on behalf of the first respondent, is to make an award declaring the four bank guarantees unenforceable, illegal, void and liable to be discharged. Further, there is also a prayer for permanent injunction to restrain the appellant from encashing the bank guarantees. Therefore, since this prayer is already pending before the Arbitral Tribunal, we see no situation of "irretrievable injustice" if, at the present moment, the appellant is allowed to encash the bank guarantees. For justice can always be rendered to the first respondent, if it

succeeds before the arbitrators. Nor do we see any special equity in favour of the first respondent, when there is in fact a dispute that performance was prima facie not satisfactory, which enabled the appellant to encash all or any of the four bank guarantees.” (emphasis supplied)

82. In the light of the aforesaid decision, the submission of Mr. Kapur that neither the monitoring committee, nor the sub-committee have till date returned a finding with regard to the attainment of milestone nos.8 and 9, is neither here nor there. The respondent banks, under the terms of their respective guarantees, are not concerned as to whether or not the said milestones have, in fact, been achieved or not. Even if they have been achieved, as contended by the petitioner, the invocation of the bank guarantees would not tantamount to playing a fraud of an egregious nature by the respondent DDA either upon the petitioner or the respondent banks. The respondent DDA has been left to judge as to when, and for what reasons, the bank guarantee should be invoked. It is not the function of the respondent banks or even of this Court to enquire as to whether due performance of the contractual obligations had actually taken place or not, as, under the terms of the guarantees, the respondent banks are obliged to make payment when the guarantee is called in, irrespective of any contractual disputes between the petitioner and the respondent no.1.

83. The submission of Mr. Kapur that the invocation of the bank guarantees for Rs.183 crores is fraudulent because the respondent had

itself quantified its liquidated damages @ Rs.83.70 crores in its communication dated 16.10.2010 also has no merit. Firstly, the said communication shows that the demand for Rs.83.70 crores as liquidated damages was made not only on account of defects, but on account of non completion of the project.

84. As pointed out by the learned ASG, the liquidated damages were arising on a day to day basis in terms of Annex III Schedule III to the Project Development Agreement. The performance security could be invoked by the DDA under clause 6.2, upon the occurrence of an event of default. The exercise of the right to invoke the performance security was not limited to an event of non compliance of the milestones or persistent delays by the project developer in the implementation of the project. The contract merely recites, as an instance, that the performance security may be invoked, if the project developer is unable to deposit the liquidated damages for delay in achieving any milestone for the amount as computed under Schedule III. Apparently, the communication dated 16.10.2010 was issued by the DDA to the petitioner in the light of clause 6.2(i). However, the respondent was entitled to invoke the said performance security to claim not just the liquidated damages, but all other amounts that it may claim.

85. The submission of Mr. Kapur that the DDA, on the date of invocation of the performance security, was not entitled to recover the

sum of Rs.183 crores, by reference to the tabulation set out in the reply of the DDA, misses the point that the said performance security could be invoked upon occurrence of an event of default. The amount that could be recovered from the said performance security was not limited merely to the liquidated damages provided under the contract. Even according to the petitioner, the delay in the completion of the project (for which the petitioner holds the respondent DDA and other agencies responsible) had indeed resulted in negative publicity for the organizers including the respondent DDA. If, in the estimation of the DDA, it was entitled to invoke the entire performance security furnished by the petitioner, that is the business/commercial decision of the DDA, with which the Court cannot interfere in these proceedings. As the bank guarantees in question are unconditional; the banks have undertaken to make payment of the amounts demanded unconditionally; without any demur; without getting embroiled in the disputes between the parties (including the dispute as to whether the respondent DDA should have limited the invocation of the bank guarantees in question to claim only the liquidated damages claimed to have been suffered as on the date of the invocation), the court cannot go into these aspects in these proceedings. That decision has to be left to the wisdom of the DDA, as the parties have so agreed. If, eventually, the arbitral tribunal finds that the invocation of the bank guarantees was not partly, or wholly, justified, the arbitral tribunal can

always direct restitution of the amount with or without interest and/or damages.

86. I may now deal with the judgments relied upon by Mr. Kapur in the course of his arguments. In **Humboldt** (supra), the Division Bench of this Court examined the various precedents on the subject of invocation of bank guarantees/letters of credit and reiterated the position that the fraud claimed to have been perpetuated by the beneficiary upon the petitioner and the bank must be of an egregious nature, meaning that the fraud should lead to gross injustice which shakes the conscience of the Court, and that the fraud should be known to the parties and the concerned bank. In this case, the respondent beneficiary had cancelled the contract partly, and kept the other part in abeyance. The terms of the bank guarantee, inter alia, provided that the bank would pay the amount provided that the beneficiary confirms to the bank at the same time in writing that the supplier (at whose instance the bank guarantee had been furnished) had not fulfilled all or any of his contractual obligations as stipulated in the contract, including but not limited to, delivery of the agreed quantity and/or the shipment of the product on the date agreed upon with the purchaser. It further provided that *“the liability of the bank as contained herein shall automatically get reduced proportionately to the value of such parts of the product (including all machineries and equipments) that may have been successfully delivered as certified by*

the purchaser based on which the advance or on account amount paid by the purchaser have been adjusted in the corresponding invoices of the supplier raised with respect to the contract”.

87. The beneficiary/purchaser cancelled the order placed upon the supplier. The reason for the cancellation was stated to be the unforeseen financial crisis across the world, leading to difficulties in financial closures of projects. Despite the aforesaid, the purchaser respondent no.1 sought to invoke the bank guarantee by stating “*we confirm that the supplier has not fulfilled its contractual obligations*”. The Division Bench, in view of the aforesaid position, observed “*prima facie, therefore, it was incorrect and fraudulent for respondent no.1 to state to its banker/respondent no.2 that the appellant had not fulfilled its contractual obligation*”.

88. The fact situation in the case in hand, as already discussed, is starkly different from that dealt with by the Division Bench in **Humboldt** (supra). The issue as to who is in breach of the contract, and other related issues are matters which would need determination by the arbitral tribunal. Prima facie, it cannot be said that the petitioner is not in breach of the agreement. It certainly cannot be said that the invocation of the bank guarantee is a result of a fraud perpetrated by the DDA on the petitioner and the banks of an egregious nature, meaning that the fraud would lead to gross injustice which shakes the conscience of the Court. The decision in **Humboldt**

(supra) therefore, does not advance the case of the petitioner. I may note that in paragraph 17 of its decision, upon analysis of the various case laws, the Division Bench also conclude *“that there is no room for debate that the courts are not to interfere with the encashment of the letter of credit or the bank guarantee unless the case falls within the purview of the exceptions laid down by the Apex Court. The first exception which has been carved out by the courts is that the fraud perpetrated must be of egregious nature meaning that the said fraud would lead to gross injustice which shakes the conscience of the court and the said fraud should be known to the parties and the concerned bank. If the said fraud is manifest or evident, the court can restrain the encashment of the bank guarantee”*.

89. Mr. Kapur has relied upon **Regional Manager, Central Bank of India** (supra) to emphasise that the conduct of the respondent, DDA in invoking the bank guarantee for the entire amount of Rs.183 crores is fraudulent, as, even according to it, liquidated damages suffered by it were to the tune of Rs.83.70 crores. The Supreme Court in this case in paragraph 13 observed that:

“13.

He who comes to the Court with a claim based on falsity and deception cannot plead equity nor the Court would be justified to exercise equity jurisdiction in his favour. An act of deliberate deception with a design to secure something, which is otherwise not due, tantamount to fraud. Fraud is a conduct either by letter or words, which induces the other person or authority to take a

definite determinative stand as a response to the conduct of the former either by words or letter.”

90. I cannot appreciate the relevance of the decision in **Regional Manager, Central Bank of India** (supra). I have already held, prima facie that it cannot be said that the respondent has played a fraud of an egregious nature either upon the petitioner or the respondent bank. Consequently, in my view, this decision has no bearing in the facts of this case. For the same reason, the decision in **Bhaurao Dagdu Paralkar** (supra), has no relevance.

91. Mr. Kapur has relied upon **Hindustan Steel Works Corporation Ltd.** (supra). However, this decision does not advance the case of the petitioner, except to the extent that it holds that the demand made 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.

92. The submission of Mr. Kapur that it would cause irretrievable injustice to the petitioner, if the bank guarantees are permitted to be encashed in their entirety, as the petitioner would then be obliged to provide fresh guarantees for the equivalent amount of Rs.183 crores, or to face termination of the contract under Clause 6.2 of the PDA, has no merit. The irretrievable injustice, the Supreme Court holds, should of the kind dealt with in the case of **Itek Corporation**. That was a

case, where, if the letter of credit had been permitted to be encashed, would have made it impossible for the plaintiff to seek restitution because of the hostility between United States of America and the State of Iran, as a result of 52 American citizens being hostages by the Iranian Government. The US Government had blocked all Iranian assets under the jurisdiction of United States and had cancelled the export contracts. The Court upheld the contention of the American exporter that any claim for damages against the Iranian purchaser, even if decreed by the American Courts, would not be executable in Iran under these circumstances and realization of the bank guarantees/letter of credit would cause irreparable harm to the plaintiff. Reference may also be made to the quotation extracted herein above from the decision in ***U.P. State Sugar Corporation*** (supra).

93. The respondent, DDA is a statutory corporation and there can be no doubt that in case the petitioner succeeds in establishing its claims before the arbitral tribunal, the respondent DDA would be in a position to retribute not only the amount of the bank guarantees, if and when directed, either in full or in part, but also to pay the damages, if any, levied upon it. Therefore, it cannot be said that merely because the petitioner would be required to furnish fresh bank guarantees to the tune of Rs.183 crores upon encashment of the bank guarantee in question, the petitioner would suffer irretrievable injustice. The

enforcement of the contractual obligation against a party would not, normally amount to “irretrievable injustice”.

94. The submission that as the completion certificate had been issued, the respondent is precluded from claiming that the project was incomplete has absolutely no merit. A perusal of the communication dated 03.09.2010 issued by the DDA shows that in the opening line itself, it was stated that *“the completion certificate cannot be issued at this stage due to non-compliance of the provisions of the Building Bye Laws, 1980 as already communicated to you earlier”*. The temporary occupancy permit was granted only to facilitate the use and occupation of the flats during the Commonwealth Games, 2010. This was done due to the extraordinary situation, as the nation was faced with the prospect of not being able to successfully hold the games as thousands of athletes and officials who would participate in the games could not have been accommodated, had the games village complex not been granted the temporary occupancy permit.

95. I also find no merit in the submission of Mr. Kapur that the invocation was at the behest of the Ministry of Urban Development and that the DDA has not applied its own independent mind. Merely because the DDA may have kept the Ministry of Urban Development informed of the status and may have called for its advice, it does not mean that the decision to invoke the bank guarantees in question is not that of the DDA. Eventually, it is the DDA, who is the beneficiary

under the guarantees, who has invoked the guarantees. The respondent Banks are not required to go behind these letters of invocation to find out, whether or not, these have been issued at the behest of another entity.

96. The submission that even seven days time was not granted by the respondent in its communication dated 16.10.2010 also does not have any merit. The petitioner in its communication dated 20.10.2010 had sought withdrawal of the letter dated 16.10.2010 issued by the DDA and had also sought release of its bank guarantees. After the stand of the petitioner had become known to the respondent DDA, that the petitioner was not willing to deposit the amount of Rs.83.70 crores, there was no need for the DDA to wait any further for the expiry of the week, and there was nothing to prevent the DDA to invoke the bank guarantees in question on 23.10.2010 itself.

97. The other reliefs prayed for by the petitioner are also not made out as the petitioner has not even pressed for them, and the petitioner has not been able to establish a prima facie case in its favour.

98. For all the aforesaid reasons, I find no merit in this petition and dismiss the same. It is, however, made clear that no observation made by me in this order shall come in the way of either party at the time of determination of the their *inter se* disputes, claims and counter claims through arbitration.

Parties are left to bear their respective costs.

(VIPIN SANGHI)
JUDGE

DECEMBER 20, 2010
sr