

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

**%** Judgment reserved on: August 01, 2014

Judgment pronounced on: September 03, 2014

**+ O.M.P. No.557/2014 & I.A. No.10888/2014**

ABIR INFRASTRUCTURE PVT LTD ..... Petitioner  
Through Mr.Rajiv Nayar, Sr.Adv. with  
Mr.Kartik Nayar, Mr.Nikhil  
Rohatgi, Mr. Ayush Agarwal &  
Mr.Himanshu Gupta, Advocates

versus

TEESTAVALLEY POWER TRANSMISSION LIMITED & ORS  
..... Respondents  
Through Dr.Abhishek Manu Singhvi, Sr.Adv.,  
Mr.A.S.Chandhiok, Sr.Adv. &  
Mr.Sandeep Sethi, Sr.Adv. with  
Ms.Haripriya Padmanabhan,  
Mr.Sanyam Saxena, Mr.Aman  
Garg, Mr.Ritesh Kumar,  
Ms.Mallika Ahluwalia, Mr.Mayank  
Bamniyal & Ms.Aditi Tyagi, Advs.

**CORAM:  
HON'BLE MR.JUSTICE MANMOHAN SINGH**

**MANMOHAN SINGH, J.**

1. By the way of the present petition filed under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") the petitioner seeks to restrain respondent No.1 from invoking, and respondents No.2 and 3 from allowing any purported

encashment of the bank guarantees submitted by the petitioner to respondent No.1 pursuant to the contracts entered into between petitioner and respondent No.1.

2. The petitioner filed the petition under Section 9 of the Act being OMP No.557/2014 seeking to *inter alia* stay the invocation of the Bank Guarantees furnished by the petitioner to the respondent No.1 in terms of the Contract dated 22<sup>nd</sup> February, 2010 entered into between the parties. State Bank of India and State bank of Hyderabad are arrayed as respondents No.2 and 3 respectively, in this petition.

By order dated 16<sup>th</sup> May, 2014 it was directed that:

- (i) subject to the bank guarantees being kept alive;
- (ii) their encashment shall remain stayed in terms of prayer (a), (b) and (c) of the petition, till further orders.

3. It is submitted by the petitioner that the invocation of the Bank Guarantees is wrong, illegal and against the terms of the Contract and is fraudulent.

4. It is the case of the respondent No.1 that the Bank Guarantees have already been invoked and encashed and hence, the Petition has become infructuous as the relief sought for by the petitioner i.e. a stay on the invocation and encashment on the Bank Guarantees cannot be granted at this stage for the following reasons:

- (i) In terms of the Contract, the respondent No. 1 issued letters dated 14<sup>th</sup> May, 2014 to the bank/Respondent

- No.2 invoking the unconditional Bank Guarantees furnished by the petitioner. The respondent No. 1 confirmed the invocation by returning the original Bank Guarantees to the respondent No. 2 on 15<sup>th</sup> May, 2014.
- (ii) The respondent No. 2 honoured the invocation of the Bank Guarantees on 15<sup>th</sup> May, 2014 itself and issued demand drafts for a total amount of Rs.47.90 crores in favour of the respondent No. 1 at 4 PM towards the invocation of the Bank Guarantees.
  - (iii) On the same date (15<sup>th</sup> May, 2014), the respondent No. 1, after having received the Demand Drafts from the respondent No.2, deposited the same in its account at the Bank of Baroda in Hyderabad, and received copies of the pay-in slips as regards the same. Thus, the respondent No.2 had fulfilled its obligation in respect of the invocation of the unconditional Bank Guarantees by the respondent No. 1.
  - (iv) The order dated 16<sup>th</sup> May, 2014 records that the Bank Guarantees should be kept alive. However, since the bank guarantees were returned/cancelled in light of the demand drafts issued by the Respondent No. 2 on 15<sup>th</sup> May, 2014 itself, the directions passed vide the aforestated order have become infructuous.

- (v) It is settled law that in case of a bank guarantee, when the proceeds have been debited from the account out of which the payment is to be made, the same is said to be encashed. [as held vide order dated 08.05.2014 passed by this Court in ***Thiess Minecs India Pvt. Ltd. & Anr. v. NTPC Limited & Anr.***, being OMP No.522 of 2014].

5. The respondent No.1 (for short "TPTL") challenged the said order dated 16<sup>th</sup> May, 2014 by filing an appeal under Section 37 of the Act being FAO (OS) 250/2014. The said appeal was disposed of on 21<sup>st</sup> May, 2014 *inter alia* with certain directions. Relevant Paras 8 to 10 are reproduced hereunder:

"8. In view of the fact that by the date of the order under appeal the Demand Drafts were already issued, Dr. Abhishek Manu Singhvi, the learned Senior Counsel appearing for the appellant submitted that it would be in the interest of justice to direct that the sum of Rs.47.90 Crores covered by the Demand Drafts shall be kept in Fixed Deposit till an appropriate order is passed by the learned Single Judge. Shri Rajiv Nayar, learned Senior Counsel appearing for the respondent No.1 expressed no objection for the same.

9. Accordingly, there shall be a direction to the respondents 2 and 3 banks to remit the entire amount covered by the Demand Drafts in question to the Registrar General of High Court of Delhi forthwith, whereupon the same shall be kept in Fixed Deposit in the name of the Registrar General in the UCO Bank, High Court of Delhi branch. The amount covered by the Fixed Deposit as well as the interest accrued thereon shall be subject to the fresh order that may be passed by the learned Single Judge in OMP No.557/2014.

10. The learned Single Judge is requested to dispose of OMP No.557/2014 after hearing both the parties expeditiously, preferably before the closure of the Court for Summer Vacation.”

6. The matter was heard by this Court. The case of the petitioner as per the statement made in the petition is that under the contracts, it was the foremost obligation of respondent No.1 to provide/assist the petitioner in obtaining Right of Way (ROW) so as to enable the petitioner to carry out its obligations under the contracts, however respondent No.1 failed to do so and as a result of the same the contractual completion date of 16<sup>th</sup> October, 2011 has been consistently and continuously delayed and even till date performance under the contracts is not complete. By letter dated 27<sup>th</sup> January, 2014, petitioner called upon the respondent No.1 to comply with their obligations and to take necessary action at the earliest. The petitioner also informed respondent No.1 in the said letter and subsequent letters that petitioner’s equipments/manpower etc. has been idling due to unavailability of ROW, so petitioner be compensated for the losses suffered. The respondent No.1 had agreed to resolve the ROW issues and duly acknowledged the claims of the petitioner. However, till date, respondent No.1 despite acknowledging the claim has been evading such repeated demands of the petitioner.

7. It is stated that the petitioner called upon the respondent No.1 to complete their ROW and other obligations to ensure the completion of the project by October, 2014, however without addressing the issues, respondent No.1 on 14<sup>th</sup> May, 2014 invoked 8

out 9 bank guarantees furnished for separate works under the contracts.

8. It is averred in the petition that the respondent No.1 allegedly vide an alleged letter dated 9<sup>th</sup> May, 2014 (sent by e-mail on 15<sup>th</sup> May, 2014) fraudulently sought to contend that the petitioner was in default of the contract and gave 14 days time to the petitioner for curing the defects. However, despite granting 14 days time, respondent No.1 vide letter dated 14<sup>th</sup> May, 2014 had written to respondent No.2 to invoke the bank guarantees. Petitioner apprehends that the respondent No.1 would also invoke the bank guarantee with respondent No.3 in a fraudulent manner. Hence, the present petition has been filed.

In the reply to the petition, respondent No.1 has stated that the reliefs as prayed for in the present petition are infructuous as the Bank Guarantees have not only been invoked by respondent No.1 on a day prior (i.e. 15<sup>th</sup> May, 2014) to the filing of the petition (i.e. 16<sup>th</sup> May, 2014) but have also been encashed on the same date. The bank guarantees are unconditional against which no restrain order could be passed in terms of the settled law and it is contractual right of the respondent No.1 to invoke and encash the unconditional bank Guarantees.

It has been stated that though the time for completion of the project was extended time and again, there was inordinate delay on part of the petitioner in completing the project. Owing to same, respondent No.1 issued a letter dated 9<sup>th</sup> May, 2014 (although the same was sent by courier only on the evening of 14<sup>th</sup> May, 2014)

stating that petitioner has failed to meet the timelines as agreed for and also failed in completing the project despite several time extensions granted. There was no significant progress towards completion of the work.

9. It is argued by the respondent No.1 that the petitioner filed the petition one day after the demand drafts dated 15<sup>th</sup> May, 2014 were deposited in the Bank of Baroda, Hyderabad. It has been stated that respondent No.1 had filed a Caveat Petition in this Court as early in February, 2014, however still no copy of the petition was served upon respondent No.1. It was only in the morning of 16<sup>th</sup> May, 2014 when the petition was filed in the Court that the respondent No.1 was informed about the petition as he was not in town and could not appear in the Court due to such a short notice, however, by order dated 16<sup>th</sup> May, 2014 notices in the matter were issued and encashment of bank guarantees was stayed. Therefore being aggrieved by the said order, respondent No.1 filed an appeal on 19<sup>th</sup> May, 2014 against the said order. Vide its order dated 21<sup>st</sup> May, 2014, the Division Bench directed the matter for reconsideration and directed that the amount of the encashed bank guarantees be kept in Fixed Deposit in the name of Registrar General in the UCO Bank, High Court of Delhi branch, till further orders of this Court.

10. The following are the details of Bank Guarantees in question furnished by the petitioner:

| S No. | Number of Bank Guarantee and the Name of the Bank | Type Of Bank Guarantee                | Value of BG    | Amount Encashed |
|-------|---------------------------------------------------|---------------------------------------|----------------|-----------------|
| 1.    | 0910310BG0000163<br>SBI                           | BG Form for<br><u>advance payment</u> | 26,17,42,403/- | 8,83,85,339/-   |

|    |                                                         |                                          |                               |                                 |
|----|---------------------------------------------------------|------------------------------------------|-------------------------------|---------------------------------|
|    | (See page 97 of the petition)                           |                                          |                               |                                 |
| 2. | 0910310BG0000165<br>SBI<br>(See pg 110 of the petition) | BG for <u>advance payment</u>            | 11,22,79,862/-                | 76,78,053/-                     |
| 3. | 0910310BG0000160<br>SBI<br>(See pg 78 of the petition)  | <u>Performance Security Form</u>         | 5,49,74,199/-                 | 5,49,74,199/-                   |
| 4. | 0910310BG0000161<br>SBI<br>(See pg 84 of the petition)  | <u>Performance Security Form</u>         | 11,74,10,649/-                | 11,74,10,649/-                  |
| 5. | 0910310BG0000162<br>SBI<br>(See pg 90 of the petition)  | <u>Performance Security Form</u>         | 10,83,99,960/-                | 10,83,99,960/-                  |
| 6. | 0910310BG0000164<br>SBI<br>(See pg 103 of the petition) | <u>Performance Security Form</u>         | 3,67,24,953/-                 | 3,67,24,953/-                   |
| 7. | 0910311BG0001115<br>SBI<br>(See pg 117 of the petition) | BG for <u>release of Balance payment</u> | 3,65,00,000/-                 | 3,65,00,000/-                   |
| 8. | 0910311BG0000841<br>SBI<br>(See pg 125 of the petition) | BG for <u>release of Balance payment</u> | 2,90,00,000/-                 | 2,90.00,000/-                   |
|    |                                                         | <b>TOTAL</b>                             | <b><u>Rs.62,75,85,144</u></b> | <b><u>Rs.47,90,73,153/-</u></b> |

11. The petitioner submits that all the Bank Guarantees are conditional in nature. The invocation is not in terms of the Bank Guarantees. The encashment/disbursement of the Bank Guarantee amount cannot be allowed. The fraudulent invocation of the Bank Guarantees is further corroborated from the fact that the Cure Notice in respect of the Contracts was in fact given one day after invocation of the Bank Guarantees (i.e. on 15<sup>th</sup> May, 2014). After giving the petitioner a time extension till October 2014, by way of extension letter dated 4<sup>th</sup> July, 2013 and even by virtue of the second extension

letter dated 12<sup>th</sup> February, 2014, the respondent No.1 had already invited Bids and selected Tata as the Contractor for certain works. The Bids were in fact invited from 28<sup>th</sup> February, 2014 i.e. 16 days from the date of time extension and as such the respondent No.1's ulterior motives being the sudden invocation of the Bank Guarantees and the consequential termination is apparent. The said acts establish the sudden and complete *volte face* of the respondent No.1 and the *malafide* motive behind the invocation of the Bank Guarantees and the sudden termination of the Contracts.

12. During the pendency of present petition, the petitioner has also filed the application being I.A. No.10888/2014 under Order 6 Rule 17 CPC for amendment of petition. The matter is being decided after having considered even the amendment sought by the petitioner.

13. The matter came up for hearing before this Court when Mr. Rajiv Nayar, learned Senior counsel and Mr.Kartik Nayar, Adv. appeared on behalf of the petitioners and Dr. A.M. Singhvi, Mr. A.S.Chandiok and Mr. Sandeep Sethi, learned Senior counsel appeared on behalf of the respondents who have made their respective submissions on behalf of the parties.

14. The submissions advanced by Mr. Rajiv Nayar, learned Senior counsel for the petitioner can be summarised in the following manner:

- a) Firstly, learned Senior counsel for the petitioner has argued that all the bank guarantees which are subject matter of the encashment are conditional in nature and the encashment/disbursement of the bank guarantee amount is

contrary to the terms of the bank guarantee and cannot be allowed. He has argued that there are different terms which are provided in the respective bank guarantees which make them conditional in nature. It has been argued that the wordings of the bank guarantee which are different from the ones contained in the unconditional bank guarantee make them obvious that there are certain conditions laid down in the bank guarantees and upon fulfilment of the said conditions only, the bank guarantees can be put to encashment.

- b) Secondly, learned Senior counsel drawing the aid from the previous submissions has read over the terms and conditions provided in the bank guarantee No.0910310BG0000163 and 0910310BG0000165 which are for the sums of Rs.8,83,85,339 and Rs.76,78,053 respectively. The said terms read as under :

“2.9.2 It is submitted that the Bank Guarantee no. 0910310BG0000163 & 0910310BG0000165 for Advance Payment amounting to Rs. 8,83,85,339/- and 76,78,053/- respectively {aggregating to Rs. 9,60,63, 692/-} are completely conditional bank guarantees. The condition precedent for invocation of the aforesaid Bank Guarantees is reproduced hereunder;

*“....do hereby irrevocably guarantee repayment of the said amounts upon the first demand of the Employer without cavil or argument in the event that the Contractor fails to commence or fulfill its obligations under the terms of the said Contract, and in the event of such failure, refuses to repay all or part (as the case may be)*

of the said advance payment to the Employer.....”

As per the learned Senior counsel for the petitioner, the aforementioned bank guarantees are conditional in nature and are dependent upon the fulfilment of the following conditions:

- a) The failure of the petitioner to commence operations under the terms of the contract or
- b) The failure of the petitioner to fulfil its obligations under the terms of the contract and consequently.
- c) After such a failure (which implies a notice of the same to be sent to the contractor) there is a demand by the respondent of such advance money.
- d) Thereafter the petitioner refuses to repay such advance payment.

It has been argued that firstly none of the aforementioned conditions in the instant case gets attracted and even they are, still the due process provided in the bank guarantee prior to invocation of the said bank guarantee is not followed and as such the said invocation of the bank guarantees is vitiated.

- c) It has been argued by the learned senior counsel for the petitioner that it is not the respondents' case that the petitioner has failed to commence its obligations and the same is also not factually correct as the respondent's own case is that the petitioner has completed more than 50 % of the works. It has been argued that even if it assumed that there exists any such

case of the respondents that the petitioner has failed to fulfil the obligations contained in the contract, the said failure ought to have been pointed out to the petitioner and in the instant case the respondent issued the cure notice dated 15<sup>th</sup> May, 2014 post the invocation of the bank guarantees. The said invocation of the bank guarantees is vitiated by the prior notice which ought to have been given by the respondent No.1 to the petitioner and this also reflects the conduct of the respondent No.1 that the actions of the respondent No.1 are actuated by malafide and fraud without putting the petitioner to notice on the alleged breaches committed by the petitioner prior to the invocation of the bank guarantees.

- d) Learned Senior counsel for the petitioner has argued that the respondent No.1 has not made any demand of the money advanced to the petitioner nor there exists any refusal on the record to show that there was ever any money advanced to the petitioner. As such, it has been argued by the learned Senior counsel for the petitioner that none of the afore noted conditions provided in the bank guarantees are satisfied as there was neither a notice prior to invocation nor any demand coupled with the refusal and as such the invocation of the bank guarantees is required to be prevented by the Court as the invocation is clearly contrary to the conditions of the bank guarantees. It has been further argued by the learned Senior counsel for the petitioner that even the invocation letter does not state any fact of demand made by the respondent and/ or refusal there of or

the non fulfilment of the obligations on the part of the petitioner or anything connected with the same, thus, the invocation letter is also bad.

In support of the proposition that the conditions contained in the bank guarantee are to be strictly construed, learned Senior counsel for the petitioner has relied upon the judgment passed in the case of ***Hindustan Construction vs. State of Bihar***, (1999) 8 SCC 436.

- e) Learned Senior counsel for the petitioner has argued that as regards bank guarantees bearing No.0910311BG0000115 and 0910311BG0000841, the said two bank guarantees could only be invoked by the respondent No.1 in the event of the petitioner caused loss to the respondent No.1 or the petitioner was in breach/default that may result in loss being caused to the respondent No.1 and the said invocation is also against the express wordings of the said two bank guarantees. It has been argued by the learned senior counsel for the petitioner that the notice to cure (without even informing any breach) was sent after invocation of the Bank Guarantee and as such the invocation of the said two bank guarantees are also vitiated by the lack of proper notice to the petitioner and the invocation is thus fraudulent.
- f) As regards the other Bank Guarantees, it is submitted that the relevant condition in the Performance Bank Guarantees Nos. 0910311BG0000160, 0910311BG0000161, 0910311BG0000162, 0910311BG0000164 is the requirement of “*declaring the*

*Contractor to be in default under the Contract*". It is submitted that there is no provision in the Bank Guarantee which defines "default" and as the Contract is incorporated under the Bank Guarantee, the petitioner therefore could only be declared to be in "default" in accordance with Clause 36.2.2 of the GCC. Though the said clause 36.2.2 required a Notice to be sent to the petitioner to cure any purported defects, the same was never done by the respondent No.1 and as such the respondent No.1 cannot contend that that the invocation of the Bank Guarantee was done because the petitioner was in breach etc. as till date even Liquidated Damages had not been levied and time extensions had continuously been granted throughout the Contract (time extension had in fact been granted till October, 2014). It is submitted that no such notice was received by the petitioner prior to the invocation of the bank guarantees i.e. on 14<sup>th</sup> May, 2014 and the purported cure notice under Clause 36.2.2 was received by the petitioner only on 15<sup>th</sup> May, 2014. Therefore, it is submitted that the petitioner could not have been declared to be in default prior to the at least the expiry of the cure notice.

Learned Senior counsel for the petitioner have argued that though the bank guarantees stated by them are conditional in nature but in the event, it is assumed that there are not conditional in nature, still the respondent No.1 while invoking the bank guarantees have committed a fraud which vitiates the entire the transaction. The petitioner has demonstrated the fraud by

contending that the contract was granted on 18<sup>th</sup> November, 2009 for the period of 23 months and thereafter the extensions were granted by the respondent No.1 from time to time. It has been argued that it was obligatory upon the respondent No.1 to provide the Right of way to the petitioner and other statutory obligations, the works got delayed. It has been argued that as per the communication exchanged on 4<sup>th</sup> July, 2013, the respondent No.1 granted the extension of time upto October, 2014. However, by way of letter dated 12<sup>th</sup> February, 2014, the respondent No.1 unilaterally limit the extension of time to March, 2014 for the portion of the project and the same is disputed. It is thus argued that the respondent No.1 with *malafide* and fraudulent intention of terminating the contract has first issued the letter 12<sup>th</sup> February, 2014 and thereafter invoked the bank guarantees.

Learned Senior counsel for the petitioner has argued that there are communications where the respondent No.1 have acknowledged the responsibility of providing the Right of way and other clearances to the petitioner and has admittedly failed to procure the same. It is further argued that the respondent No.1 had in a pre-planned manner worked towards the termination of contract in the month of February, 2014 which is evident from the fact that the respondent No.1 awarded the project to M/s. Tata Projects Limited and thereafter called upon the petitioner to offload the works in the month of April, 2014. All this clearly reflects the mala fide and fraudulent conduct of the

respondent No.1 as per the submissions of the learned Senior counsel for the petitioner.

Learned Senior counsel for the petitioner has argued that even assuming that bank guarantees to be not conditional and also that the invocation of the bank guarantees is not fraudulent, still the special equities are in favour of the petitioner which is compelling reason for this Court to prevent the invocation of the bank guarantees by way interim orders from this Court. Learned Senior counsel for the petitioner argued that it is respondent No.1 who had given the extension of times under the contract without imposition of the liquidated damages and the total time period for extensions was almost of 3 years and as such the said period was 1.5 times the original period of the contract. It is argued that there are several emails and correspondences furnished by the petitioner which go on to demonstrate that the failures were on the part of the respondent No.1 to fulfil its obligations under the contract. It is the admitted position between the parties that the forest clearance has not been obtained for the whole project till date. Thus, the reasons for the delay in the progress of the work were not attributable to the petitioner but to the respondent No.1. The respondent in such a case cannot be allowed to encash the bank guarantees which will be allowing the respondent No.1 to take advantage of its own wrongs. As such, the special equities are in favour of the petitioner. Learned Senior counsel has also narrated certain facts which as per the

learned Senior counsel are special equities in favour of petitioner. The same are as follows :

- The respondent No.1 is only entitled to the liquidated damages under the contract and the bank guarantees can only be invoked in terms of clause 36.2.6 of the GCC and even the said amount would come under Rs.10 crores while the bank guarantees sought to be invoked were to tune of Rs.47.90 crores which will be unjustly enriching the respondent No.1.
- There is a dispute resolution mechanism by way of mutual consultation by referring the matter to the project manager which has been prescribed under clause 38 of GCC which has not been exercised prior to the invocation of the bank guarantees and as such the respondent No.1 is also in breach of the terms of the contract and cannot allowed to take benefit out of the said breach.
- No liquidated damages were ever deducted by the respondent No.1 against the extension of time granted earlier which clearly shows that the respondent No.1 was acknowledging the defaults and the respondent No.1 without examining the tenability of its claim as to the liquidated damages cannot be allowed to benefit out of the wrongs by way invocation of the bank guarantees
- The petitioner will suffer irretrievable injury because of the purported invocation, since the financial health of the

company will be severely affected and there is a possibility that the company may have to be wound up.

- The respondent No.1 itself acknowledged the claims of the contractor as late as on 12<sup>th</sup> May, 2014 which was 2 days prior to invocation of the Bank Guarantees.
- The involvement of Tata Projects Limited was done without information to the petitioner and even the work was being awarded to Tata Project Limited. No notice to cure the breaches or defects was ever sent by respondent No.1 prior to 15<sup>th</sup> May, 2014 by which time, the bids of Tata Projects Limited was opened which was done on 26<sup>th</sup> March, 2014.
- The notice to cure did not relate to termination of the entire contract and did not even mention any purported defects/breaches to cure, nevertheless the respondent No.1 sought to terminate the entire contract when earlier on 3<sup>rd</sup> April, 2014, the respondent No.1 was only keen to offload a part of the works. There were no other intervening circumstances between the said period warranting the termination of the entire contract.
- The notice to cure was not in terms of the clause 36.2.2 of the contract and the said notice was merely issued as formality though the said notice was required to make the petitioner aware of any breaches prior to the invocation of the bank guarantees but since it was issued after the encashment of the bank guarantees, the same was clearly fraudulent.

As per the learned Senior counsel appearing for the petitioner, these are broadly the reasons which create special equities in their favour and warrants interim orders against the encashment of the bank guarantees.

15. The following are the decisions referred by the learned counsel for the petitioner in support of his submissions including his argument on special equities. The relevant parts referred are reproduced:-

- i) The Supreme Court in the case of ***Hindustan Construction v. State of Bihar***, (1999) 8 SCC 436 held that merely stating the words “unconditional” and “irrevocable” in the bank guarantee does not make the guarantee unconditional unless all the stipulations/conditions of the bank guarantee are satisfied. While observing a similar terms of a bank guarantee the Supreme Court held as under;

*“13. The Bank, in the above Guarantee, no doubt, has used the expression "agree unconditionally and irrevocably" to guarantee payment to the Executive Engineer on his first demand without any right of objection, but these expressions are immediately qualified by following:*

*...in the event that the obligations expressed in the said clause of the abovementioned contract have not been fulfilled by the contractor giving the right of claim to the employer for recovery of the whole or part of the Advance Mobilisation Loan from the contractor under the contract.*

*14. This condition clearly refers to the original contract between the HCCL and the defendants and postulates*

*that if the obligations, expressed in the contract, are not fulfilled by HCCL giving to the defendants the right to claim recovery of the whole or part of the "Advance Mobilisation Loan", then the Bank would pay the amount due under the Guarantee to the Executive Engineer. By referring specifically to Clause 9, the Bank has qualified its liability to pay the amount covered by the Guarantee relating to "Advance Mobilisation Loan" to the Executive Engineer only if the obligations under the contract were not fulfilled by HCCL or the HCCL has misappropriated any portion of the "Advance Mobilisation Loan". It is in these circumstances that the aforesaid clause would operate and the whole of the amount covered by the "Mobilisation Advance" would become payable on demand. The Bank Guarantee thus could be invoked only in the circumstances referred to in Clause 9 whereunder the amount would become payable only if the obligations are not fulfilled or there is misappropriation. That being so, the Bank Guarantee could not be said to be unconditional or unequivocal in terms so that the defendants could be said to have had an unfettered right to invoke that Guarantee and demand immediate payment thereof from the Bank. This aspect of the matter was wholly ignored by the High Court and it unnecessarily interfered with the order of injunction, granted by the Single Judge, by which the defendants were restrained from invoking the Bank Guarantee.*

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*1. As pointed out above, Bank Guarantee constitutes a separate, distinct and independent contract. This contract is between the Bank and the defendants. It is independent of the main contract between the HCCL and the defendants. Since the Bank Guarantee was furnished to the Chief Engineer and there is no definition of "Chief Engineer" in the Bank Guarantee nor is it provided therein that "Chief Engineer" would also include Executive Engineer, the Bank Guarantee could be*

*invoked by none except the Chief Engineer. The invocation was thus wholly wrong and the Bank was under no obligation to pay the amount covered by the "Performance Guarantee" to the Executive Engineer.*

*22. We have scrutinised the facts pleaded by the parties in respect of both the Bank Guarantees as also the document filed before us and we are, prima facie, of the opinion that the lapse was on the part of the defendants who were not possessed of sufficient funds for completion of the work. The allegation of the defendants that HCCL itself had abandoned the work does not, prima facie, appear to be correct and it is for this reason that we are of the positive view that the "special equities" are wholly in favour of HCCL."*

- ii) In ***Unit Construction Company Pvt. Ltd. v. Steel Authority of India & Anr.***, passed in GA No.2267/2009 and CS No.237/2009 decided on 30<sup>th</sup> March, 2012, the Calcutta High Court while dealing with a bank guarantee which required the beneficiary to demand the amounts prior to invocation of the bank guarantee held that as the invocation letter did not comply with such condition of the bank guarantee, the invocation was not in terms of the bank guarantee. The relevant extract reads as under :

*"15. From a reading of the Bank Guarantee dated 25.03.2009 it appears that the respondent No. 2 Bank, guaranteed payment in case of any breach by the petitioner of its obligation on receipt of -*

*a) the respondent No. 1's letter stating that the client has failed to pay the amount of Rs.1,80,00,000.00 (Rupees One crore eighty lacs only) due from him/them as price and other charges, and*

*b) pre - receipted claim for the said amount.*

*16. On a reading of the letter of invocation dated 21.08.2009 nowhere has it been stated that in terms of (a) above, the petitioner had failed to pay nor was the pre - receipted claim as in condition (b) enclosed with the letter of invocation. Therefore, on a careful reading of the letter dated 21.08.2009 the same is not in terms of the Bank Guarantee dated 25.03.2009 and warrants confirmation of the orders dated 24th August, 2009 and 9th September, 2009.*

*20. As the Bank Guarantee was conditional and the conditions not satisfied AIR (1996) SC 334 and AIR (1999) SC 3710 comes to the aid of the petitioner.”*

- iii) In ***Puri International (P) Ltd. v. National Building Construction Co. Ltd.*** (1997) 41 DRJ 592, this Court held failure of the beneficiary of the bank guarantee to state the pre-conditions of the bank guarantee in the invocation letter was against the terms of the bank guarantee and thereby the invocation was not in terms of the bank guarantee. The relevant extract of the judgment is reproduced hereunder :

*“(10) On careful consideration of the legal principles laid down by the aforesaid decisions I find that the principles laid down therein are applicable to the facts and circumstances of the present case. Relevant clauses of the present bank guarantee are similar to the one of those decided cases. In the present letter issued by the defendant No. 1 to the defendant No.2 seeking to invoke the bank guarantee there is also no averment that the amount claimed is due by way of loss or damage caused to or would be cause or suffered by the defendant No.1. Even it has not been stated that there is any breach of the contract by the plaintiff. Now under such circumstances there cannot be any other conclusion but to hold that the invocation of the bank guarantee by*

*defendant No.1 in the present case is not in accordance with the requirements of the bank guarantee. In U.P.State Sugar Corporation (Supra) it has been held that the bank giving such a guarantee is bound to honour as per its terms irrespective of any disputes raised by its customer. In my considered opinion the aforesaid observation of the Supreme Court would also mean that in case the bank guarantee is not invoked in accordance with the terms or the requirements of the bank guarantee no invocation and/or encashment of the same is permissible under the law. Accordingly, I hold that since the bank guarantees in question have not been invoked in accordance with the terms of the bank guarantees, Therefore, the bank guarantees cannot be permitted to be encashed.*

*(11) Since in the present case I have held that the bank guarantees have not been invoked as per terms mentioned in the bank guarantees, it is not necessary for me to consider the other issues raised by the plaintiff and also the question as to whether there was any fraud in the instant case and/or any case of irretrievable injury has been made out by the defendant No.1 or not.”*

- iv) In the case of **P.D. Alkarma Pvt. Ltd. v. Canara Bank**, 1998 (45) DRJ 423, this Court while observing that the though the bank guarantees stipulated to be unconditional, yet contained a condition which stipulated that the beneficiary ought to have stated the defaults (for which the bank guarantee had been furnished) prior to invocation of the bank guarantees which was not done and held the invocation to be bad and held special equities to be in favour of the petitioner therein. The relevant extract of the judgment is reproduced hereunder :-

*"6. The plaintiff's case, succinctly stated, is that a bank guarantee for Rs.20 lakhs was furnished by it to defendant no.2 for mobilization advance made by the said defendant in terms of the contract, which was utilised by it for procuring material worth over Rs.24 lakhs for executing the job; defendant no.2 failed to discharge its primary obligations like: (i) timely disbursement of mobilization advance, despite plaintiff's furnishing of bank guarantee of defendant no.1; (ii) making the site available despite repeated requests but assuring to do so all the while; and (iii) failure to get R beams casted, being pre-requisite for putting up contracted Aluminium Curtain Wall, which lapses on its part are admitted facts but the said defendant still, illegally purported to terminate the contract orally and sought to invoke the bank guarantee, which, if not stayed/restrained by injunction, would cause irreparable loss to it.*

*10. It would be appropriate at this stage to notice relevant stipulations in the bank guarantee, which are extracted below:*

*"We, the Canara Bank, H-54, Connaught Circus, New Delhi-110001, do hereby undertake to pay the amount due and payable under this guarantee without any demur, merely on demand from the Employer stating that the amount claimed is due to the Employer under the said agreement any such demand made on the said bank shall be conclusive as regards the amount due and payable by the said Bank under this guarantee and the said Bank agrees that the liability of the said Bank to pay the Employer the amount so demanded shall be absolute and unconditional notwithstanding any dispute or disputes raised by the Contractor and notwithstanding any legal proceedings pending in any court or tribunal relating thereto. However, our liability under this guarantee shall be restricted to an amount not exceeding Rs.20.00 Lacs (Rupees Twenty Lacs only).*

*We, the Canara Bank further agree that the Employer shall be the sole judge of and as to whether the said contractor has not utilised the said advance or any part thereof for the purpose of the contract and the extent of loss or damage, caused to or suffered by the Employer on account of the said advance not being recovered in full and decision of the Employer that the said Contractor has not utilised the said advance or any part thereof for the purpose of the said contract as to the amount or amounts of loss or damage caused to or suffered by the Employer shall be final and binding on us".*

*11. It would appear that the bank guarantee is an absolute one and irrespective of the existence of any disputes between the parties, it is invokable by the beneficiary as per stipulations therein.*

*15. Though the fact of defendant being under a heavy debt is disputed but issue of public notice by the bank is not denied in the written statement. During the course of hearing, a copy of the letter dated 9 August 1997, written by defendant no.2 to the bank asking it to remit the amount under the bank guarantee in question was placed on record and it was submitted that the invocation of bank guarantee is not in accordance with its terms, as it neither stated that the plaintiff has not utilised the mobilization advance nor indicated the amount of loss allegedly suffered by defendant no.2 to entitle it to invoke the bank guarantee. For all these reasons, it was submitted that encashment of bank guarantee maybe restrained.*

*24. The plaintiff has also placed on record sufficient material, in the form of various invoices issued by M/s. Hindalco Industries Ltd.; bill-wise details of aluminium procured, corresponding to drawings filed per Annexure P-1 (Colly.), which, prima facie, shows that it had procured fabrication material worth more than Rs.20 lacs, advanced by the defendant. In the light of this*

*material, over-emphasis of learned counsel for the defendant on the above extracted last part of the plaintiff's letter dated 29 May 1996, to the effect that it would start mobilising itself for the job only when the site is ready, renders it of no substance. It may not be out of place to mention that during the course of hearing it was suggested to learned counsel for the defendant that the purchased material stated to be lying at the premises of the plaintiff may be got inspected by the defendant and if deemed fit it could be released to the defendant for being used in the building under construction. It seems that the inspection was carried out because it was stated at the bar by learned counsel for the defendant that the material was not complete and it was on that plea that the defendant did not show any interest in the material. In this view of the matter, plaintiff's pleas of defendant's failures and fraudulent misrepresentation apart, to be dealt with on merits later in due course, when the plaintiff prima facie, seems to have utilised the entire mobilization advance for procuring the material for use on the defendant's building, as per the approved specifications, I feel that the plaintiff has successfully brought out special circumstances which are sufficient to make the present case an exceptional one justifying interference by restraining defendant no.2 from enforcing the bank guarantee in question. As a matter of fact having gained knowledge that the plaintiff has procured substantial material, even invocation of the bank guarantee after oral termination of the contract appears to be fraudulent. Bearing in mind all these factors, I find that special equities are in favor of the plaintiff and if the defendant is allowed to encash the bank guarantee in question, it would amount to irretrievable injustice to the plaintiff. I am, Therefore, satisfied that it is a fit case where defendant no.1 needs being interdicted from encashing the bank guarantee in question.*

*25. For the view I have taken, it is unnecessary to go into the pleas of fraud and improper invocation of the bank guarantee raised by the plaintiff, although the invocation of bank guarantee by defendant No.2's letter dated 9 August 1997, asking the bank- defendant No.1 to remit the amount under the bank guarantee, prima facie, does not appear to be in terms of the bank guarantee."*

- v) In the case of **Ansal Properties & Industries v. Union of India**, 1994 (29) DRJ 66, this Court while observing the need for stating the pre-conditions for invocation of the bank guarantee in the invocation letter held as under :-

*"11. It is thus clear that the invocation of the bank guarantee must be according to the terms of the bank guarantee. In the present case, both the bank guarantees clearly stipulate that amount of the bank guarantee shall be paid without any demur, merely on demand from the Government through the Financial Advisor and Chief Accounts Officer, Northern Railway, Kashmere Gate, Delhi stating that "the amount claimed is due by way of loss and damage caused to or would be caused to or suffered by the Government by reasons of any breach by the said Contractor of any of the terms or conditions contained in the said agreement or by reason of the said Contractor failure to perform the said Agreement. From this it is clear that the letter of invocation must include an averment that "the amount claimed is due by way of loss and damage caused to or would be caused to or suffered by the Government by reasons any breach by the said Contractor of any of the terms or conditions contained in the said agreement or by reason of the said Contractor failure to perform the said Agreement." From the letter invoking the bank guarantees, I, however, find that there is no averment that the amount claimed is due by way of loss or damage cause to or would be caused or suffered by the*

*Government. The only averment is that the plaintiff had failed to execute the contract as per terms of the contract. Since both the bank guarantees have not been invoked in accordance with the terms of the bank guarantees, the bank guarantees cannot be permitted to be encashed.”*

- vi) In the case of ***Nangia Construction India Ltd. v. International Airport Authority of India***, DRJ 1992 (22) 379, this Court while dealing with a similar bank guarantee as the ones in the present case which required the beneficiary to first raise a demand on the person furnishing the bank guarantee for recovery of the sums in lieu of which the bank guarantee was furnished held as under :-

*“(17) This letter is a clear admission to the fact that after adjusting the mobilisation advance from the Running Account Bill, only a sum of Rs.6,12,752.00 remained outstanding. Therefore, it was not justified on the part of the respondent Authority to invoke the bank guarantee to the full extent of Rs.17,98,244.00 . Hence, the invocation is not as per the term of the bank guarantee. The bank guarantee stipulates that the advance had to be recovered/adjusted from the bills of the contractor proportionately as the work proceeds. It was only when the authority failed to recover or adjust fully the advance then the authority could invoke the bank guarantee to the extent of the amount of the guarantee. This find support from the language of the bank guarantee where it is specifically mentioned that the claim made by the authority on the bank will be for the loss or damage caused to or suffered by reason of the authority not having been able to recover in full. Beside this view can be supported from the fact that original bank guarantee was for a sum of Rs.28,77,191.00 which was furnished*

on 10th July, 1990. To it own addendum, was issued on 28.8.1991 extending the bank guarantee up to 31st January, 1992 but amount of guarantee was reduced to the extent of Rs. 17,98,244.00. This was because by them from the running account bills an amount of Rs. 11 lacs approximately had been recovered. Hence it is apparent that the respondent could only invoke that much guarantee which had not been adjusted or recovered so far from the running account bills.

(18) In view of these submissions made at the bar, the question for consideration is whether having already recovered/adjusted a substantial amount of the advance from the running bills of the petitioner, could the authority invoke the guarantee to the fullest extent? The guarantee in law is in fact given by the parties for an object and purpose namely, that the beneficiary may recover the amount easily from the guarantor without undergoing the botheration. But the guarantee is not a mean to be used. for enrichment. When the purpose of the guarantee is fulfilled the beneficiary cannot invoke the guarantee. Take for example, if instead of Rs.22 lacs, the total amount of Rs.28 lacs had been recovered from the running bills, could the authority still invoke the bank guarantee after having already recovered the advance as stipulated in the guarantee? The answer would naturally be in the negative. The liability of the petitioner under the guarantee is to the maximum extent of the amount mentioned therein, but that does not mean that the authority can invoke to the fullest extent the amount of the bank guarantee and also recover the amount from the running bills. This would tent amount to taking double benefit which is not permissible under law.”

- vii) This Court in the case of **ISCO Track Sleepers Pvt. Ltd. v. Delhi Airport Metro Express Pvt. Ltd.**, OMP No. 702 and 704 of 2013 decided on 4<sup>th</sup> June, 2013 granted

injunction against the invocation of Bank Guarantees as the cure notice was sent subsequent to invocation of Bank Guarantees and lacked in particulars. It was observed as under :

*“33. At the midst of hearing in both the matters, respondent No. 1 has filed three documents in OMP No. 702/2013. One of them is a copy of letter dated 21st January, 2012 issued by respondent No. 1 to the petitioner. Learned counsel appearing on behalf of respondent No. 1 has tried to explain that the said letter is sent in view of Clause 7.5 of the Contract which discloses the breaches and defects to cure. In view of the order dated 17th January, 2014 passed by Hon'ble Mr. Justice Vipin Sanghi in OMP No. 695/2013, the interim orders passed in the present petition are liable to be vacated.*

*34. The contention of the learned counsel for respondent No. 1 is refuted by the learned counsel for the petitioner who states that the alleged letter is not disclosing the specific breaches and the defects to cure under Clause 7.5 of the Contract and no advantage can be derived by respondent No. 1 in order to invoke the bank guarantee.*

*35. After having gone through the said letter, I am of the view that the submission of the petitioner, to some extent, is correct. In case, the said letter is read carefully, it is stated in the said letter that respondent No. 1 inspected over 1,30,000 rail clips of which around 2600 are detected as having failed and they need to be replaced. In the said letter, respondent No. 1 has asked the petitioner to send at least 5000 more rail clips and make available experts for inspection. The said letter is not a notice strictly under Clause 7.5 of the Contract rather the petitioner was requested to supply certain clips etc.....*

*(iii) Admittedly, no such notice was received by the petitioner at the time of invoking of bank guarantee. However, it appears that in the letter of invocation, it was mentioned that due to several breaches committed by the petitioner under the contract, the respondent No. 1 is invoking the bank guarantee issued by the respondent. Clause 7.1 mandates that the respondent No. 1 is entitled to call upon the performance bank guarantee in terms of Clause 7.5 (a) to (c). There is no cogent evidence produced by the respondent No. 1 in this regard strictly as per Clause 7.5.....*

*39. From the entire gamut of the matter and settled law on the aspect, these cases are not a case of keeping the bank guarantee alive but these cases are of wrong invocation by the respondent. Therefore, this Court at this stage is not inclined to dismiss the petitions and vacate the interim orders. Even in reply, the following statement was made by respondent No. 1: "If the petitioner aggrieved to the invocation by the said bank guarantee, appropriate remedy available to the petitioner is to approach the arbitral tribunal".*

*The interim order shall continue during the arbitration proceedings unless it is modified and vacated by the Arbitral Tribunal on the petition filed by the respondent either on the basis of facts available or change of circumstances....."*

viii) In the case of **Satluj Jal Vidyut Nigam Ltd. v. Jaiprakash Hyundai Consortium**, AIR 2006 Delhi 239, this Court has held that the Bank Guarantees cannot be invoked against the terms of underlying agreement. The relevant portion is reproduced as under :

*"24. Faith and reliance upon the integrity of standby payment is vital for international as well as national commercial activities. Therefore a non-interventionist*

*approach has been adopted by the Courts. But the question which we have to answer is that what should be the approach if the issuer is about to make payment to the beneficiary in circumstances where the beneficiary has no ground to make a documentary demand or is doing so in contravention of its agreement with the third party contained in the underlying transaction. In TTI Team Telecom International Ltd. and Anr. v. Hutchison 3G UK Ltd. [2003] EWHC 762 : [2003] 1 ALL ER 914 the Court held :*

*A performance bond may assume the characteristics of a guarantee, especially, if not exclusively, in building contracts, where the beneficiary must show, as a prerequisite for calling on the bond, that by reason of the contractor's non-performance he has sustained damages."*

- ix) Even in the case of **Continental Construction Ltd. v. Satluj Vidyut Nigam Ltd.** 2006 (1) Arb LR 321, this Court while dealing with the meaning and purpose of the term "extra-ordinary special equities" for the purpose of invocation of bank guarantees held as under :

*Extraordinary Special Equities---*

*"15. The learned counsel appearing for the respondents contended that a case of 'irretrievable injustice or injury' would be a case as described by the Supreme Court in the case of U.P. State Sugar Corporation v. Sumac International Ltd. (1997) 1 SCC where the Supreme Court discussed the expression irretrievable injustice and injury while discussing the case of Itek Corporation v. First National Bank of Boston 566 Fed Supp 1210, and the present case itself would be a case of special equities or a case which can be placed on identical footings. According to the respondent in no other case, the Court could grant an injunction. This obviously would not be a correct approach of law. If the Supreme Court in its various judgments*

has referred to this case under distinct heads, they cannot be treated in law to be synonymous or interchangeable with each other. The expression special equity would necessarily be not a case of irretrievable injustice or injury. There may be cases which are not similar to that of U.P. State Sugar Corporation (supra). As is obvious, the Supreme Court itself granted injunction in number of other cases which were not having identical circumstances to that case. The law can hardly be guided by stagnated principles. The law must be interpreted and its application would depend on changed circumstances and affairs prevailing in the field of the relevant law. Case of special equities would constitute a class in itself and in all circumstances they may not be the cases of irretrievable injustice/injury. The applicability of law has to depend upon the facts of each case and the hidden and obscure would be brought to light of reason and it would render them clearer by application of established principles to the facts of such case. The highest court of the land has laid down the above classes of exception repeatedly, and each one of them should be understood and permitted to operate in its own field. The principle of law do not command anything in vain. The role of interpretation of statute verba cum effectual accipienda sunt, the maxim of interpretation of statute is equally applicable to the dictum of law. The present case would squarely fall in the class of cases of 'exceptional special equities'. The judgment of this Court in the case of Hindustan Construction Company Ltd. (supra) would be applicable to the present case as it satisfies the basic essentials of ratio descendi. –

Court can look into the underlining contract-

“17. The court certainly cannot go into the merits of the disputes, nor pendency of disputes would be a relevant consideration before the Court, while deciding the application for such relief. But, it may not be a sound argument of law to say that the Court cannot even look into the underlining contract to examine whether the bank guarantee has been encased as per its terms or is not a result of fraud or an act falling in the

classification of irretrievable injustice or injury or exceptional special equities. In the case of *Hindustan Construction Company Ltd. (supra)*, the Supreme Court stated that where the bank guarantee is unconditional and unequivocal in terms and recite that amount would be paid without demur or objection, irrespective of dispute, the bank guarantee being an independent contract it will be obligatory on the part of the bank to pay on demand to the beneficiary. It was stated as a principle of law that the terms of the bank guarantee are extremely material and should be invoked strictly in terms of such guarantee, free of fraud or irretrievable injury being caused to the guarantor/Contractor. Making reference to the terms of the bank guarantee, the Supreme Court held while relying upon the terms of the main contract held that a case of special equities was found to be in favor of the Contractor and an injunction order was passed restraining encashment of bank/performance guarantee. In that case, specific reference was made to the terms of the main contract as well as bank guarantee, as the terms of the bank guarantees referred to the obligations under the Contract for its due performance.”

- x) This Court in ***Hindustan Construction Co. Ltd. v. Satluj Jal Vidyut Nigam Ltd.*** (2006) 1 Arb LR 16 has held that if the parties in the contract have agreed to an internal adjudication procedure, the parties ought to respect it in letter and spirit and invocation of bank guarantees against such procedure was not tenable and therefore special equities existed for injuncting the invocation of the Bank Guarantees. The relevant Para is reproduced hereunder :

“25..... Once the parties have opted for providing of an internal determinative forum or adjudicative mechanism, then it is obligatory and is expected from

each one of them that they shall not only abide by such terms but would honour the decision of such Forum in its spirit and substance. The parties should essentially abide by these terms and should not disrespect or hinder or cause to hinder the result of such determination. The conduct of a party in this regard would be a relevant factor to be considered by the court, while deciding such interim applications. The expression 'extraordinary special equities' or 'irretrievable injustice/injury' are not defined expressions. They are to have such connotation and meaning as may be justified with reference to the facts and circumstances of each case. The court has to give such construction which would avoid reduncing, hardship or even repugnancy. The clauses of the agreement between the parties would have to be construed in their simple language so as to implement the essence of the contract. There is no doubt that court has to look into the terms of the bank guarantee and letter of invocation primarily for the purposes of deciding the fate of a prayed injunctive relief. The undue influence and pressure caused by the respondents on the applicant in extracting extensions, undertakings may not be completely proved on record at this stage of the proceedings, but this is a relevant factor to determine the extent of irretrievable injustice/injury to which the applicant would be exposed, if the encashment of the bank guarantee is permitted. There is an apparent attempt on the part of the respondents to frustrate the findings recorded by the internal determinative adjudicating machinery i.e. CMD's findings as well as the finding of DRB, as afore-referred. Once these findings are against the respondents and it has been held that the applicant is entitled to extension of period, it will be more than unfair to permit the respondents to invoke the bank guarantees at this stage of the proceedings. The cumulative effect of the above analysis of the case is that the respondents have not invoked the bank guarantees in terms of the clause, the action of the respondent in

*insisting upon encashment of bank guarantees is bound to cause irretrievable injustice and injury to the applicants, who otherwise have a case of special equities in their favor. ....*

*26. For the reasons afore-stated, this petition under Section 9 of the Arbitration and Conciliation Act, 1996 is allowed. The respondents are hereby restrained from invoking or encashing the Bank Guarantees.....subject to the condition that the applicants would keep the above mentioned bank guarantees alive and would not discharge the same without specific leave of the Court, or the Arbitral Tribunal, as the case may be. However, in the facts and circumstances of the case, parties are left to bear their own costs."*

*...a demand under the performance guarantee can only be made when "the seller has failed or refused to fulfill his obligations under the contract". The seller's demand or refusal is a condition precedent to the buyer making a demand. An assertion to that effect is implied in a demand made by the buyer. In circumstances where it can be said that the buyer has no honest belief that the seller has failed or refused to perform its obligation, a demand by the buyer in my view is a dishonest act which would justify a restraint order.*

*26. In our considered opinion, a performance guarantee which was to be invoked in terms of the contract of guarantee but the same is being sought to be invoked not in terms of the agreement but for something which is alien to the agreement would be unconscionable and would lack in bona fides. The sum and substance of the argument of the learned counsel for the respondent was that the call was made in bad faith. We agree with the submission. Hence, we uphold the impugned order to the extent it relates to passing of the injunction order in favor of contractor and against the department against encashment of bank guarantees in question."*

16. In view of the aforementioned submissions advanced by the learned senior counsel for the petitioner, it has been prayed that this Court should confirm the interim orders granted on 16<sup>th</sup> May, 2014 till the pendency of the arbitration proceedings.

17. The respondent No.1 has also provided a chart containing the details of bank guarantee and encashed amount handed over to the respondent No.1 which is reproduced as under :

|                      | Bank Guarantee No | Issue Date | Valid Upto | BG Amount    | Encashed Amount | Remark                     | Clause                                                                                                                                                                                                                                                                                                                                                                                                                   |
|----------------------|-------------------|------------|------------|--------------|-----------------|----------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b><u>TYPE I</u></b> |                   |            |            |              |                 |                            |                                                                                                                                                                                                                                                                                                                                                                                                                          |
| a)                   | 0910310BG0000160  | 12-Mar-10  | 21-Jan-15  | 5,49,74,199  | 5,49,74,199     | Performance Bank Guarantee | ...do hereby irrevocably guarantee payment to you up to Rs..... i.e., ten percent (10%) of the Contract Price until ninety (90) days beyond the Defect Liability Period, i.e., upto and inclusive of .....<br><br>We undertake to make payment under this Letter of Guarantee upon receipt by us of your first written demand signed by your duly authorized officer declaring the Contractor to be in default under the |
| b)                   | 0910310BG0000161  | 12-Mar-10  | 21-Jan-15  | 11,74,10,649 | 11,74,10,649    |                            |                                                                                                                                                                                                                                                                                                                                                                                                                          |
| c)                   | 0910310BG0000162  | 12-Mar-10  | 21-Jan-15  | 10,83,99,960 | 10,83,99,960    |                            |                                                                                                                                                                                                                                                                                                                                                                                                                          |
| d)                   | 0910310BG0000164  | 12-Mar-10  | 21-Jan-15  | 3,67,24,953  | 3,67,24,953     |                            |                                                                                                                                                                                                                                                                                                                                                                                                                          |

|    |                  |                      |           |                     |                     |                                                       |                                                                                                                                                                                                                                         |
|----|------------------|----------------------|-----------|---------------------|---------------------|-------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|    |                  |                      |           |                     |                     |                                                       | Contract and without cavil or argument any sum or sums within the above named limits, without your need to prove or show grounds or reasons for your demand and without the right of the Contractor to dispute or question such demand. |
|    |                  | <b>Sub Total (A)</b> |           | <b>31,75,09,761</b> | <b>31,75,09,761</b> |                                                       |                                                                                                                                                                                                                                         |
|    | <b>TYPE – 2</b>  |                      |           |                     |                     |                                                       | .... do hereby undertake and agree to indemnify and keep                                                                                                                                                                                |
| e) | 0910311BG0001115 | 25-Nov-11            | 31-Dec-14 | 3,65,00,000         | 3,65,00,000         | BG for release of Balance Payment i.e Retention Money | indemnified the Beneficiary from time to time, to the extent of Rs..... against any loss or damage costs, charges and expenses                                                                                                          |
| f) | 0910310BG0000841 | 20-Aug-11            | 19-Feb-15 | 2,90,00,000         | 2,90,00,000         |                                                       | caused to or suffered by or that may be caused to or suffered by the Beneficiary by reason of any breach or breaches by the Contractor of any the terms and conditions contained in the                                                 |

|  |  |  |  |  |  |
|--|--|--|--|--|--|
|  |  |  |  |  |  |
|--|--|--|--|--|--|

said Contracts to unconditionally pay the amount claimed by the Beneficiary on demand and without demur to the extent aforesaid.

We the State Bank of India, further agree that the Beneficiary shall be the sole judge of and as to whether the said Contractor has committed any breach or breaches of any of the terms and conditions of the said Contracts and the extent of loss, damage, costs, charges and expenses caused to or suffered by or that may be caused to or suffered by the Beneficiary on account thereof and the decision of the Beneficiary that the said Contractor has committed such breach or breaches and as to the amount or amounts of loss, damage,

|                      |                  |                      |           |                    |                    |                    |                                                                                                                                                                                                                                                                                |
|----------------------|------------------|----------------------|-----------|--------------------|--------------------|--------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|                      |                  |                      |           |                    |                    |                    | costs charges and expenses caused to or suffered by or that may be caused to or suffered by the Beneficiary from time to time shall be final and binding on us.                                                                                                                |
|                      |                  | <b>Sub Total (B)</b> |           | <b>6,55,00,000</b> | <b>6,55,00,000</b> |                    |                                                                                                                                                                                                                                                                                |
| <b><u>TYPE-3</u></b> |                  |                      |           |                    |                    |                    |                                                                                                                                                                                                                                                                                |
| g)                   | 0910310BG0000163 | 12-Mar-10            | 31-Dec-14 | 15,85,05,417       | 8,83,85,339        |                    | ....do hereby irrevocably guarantee repayment of the said amounts upon the first demand of the Employer without cavil or argument in the event that the Contractor fails to commence or fulfill its obligations under the terms of the said Contract, and in the event of such |
| h)                   | 0910310BG0000165 | 12-Mar-10            | 31-Dec-14 | 2,80,69,966        | 76,78,053          | Advance Payment BG |                                                                                                                                                                                                                                                                                |

|  |  |                            |  |                     |                     |  |                                                                                                         |
|--|--|----------------------------|--|---------------------|---------------------|--|---------------------------------------------------------------------------------------------------------|
|  |  |                            |  |                     |                     |  | failure, refuses to repay all or part (as the case may be) of the said advance payment to the Employer. |
|  |  | <b>Sub Total (C)</b>       |  | <b>18,65,75,383</b> | <b>9,60,63,392</b>  |  |                                                                                                         |
|  |  |                            |  |                     |                     |  |                                                                                                         |
|  |  | <b>Grand Total (A+B+C)</b> |  | <b>56,95,85,144</b> | <b>47,90,73,153</b> |  |                                                                                                         |

18. Dr. Abhishek Manu Singhvi, Mr.A.S. Chandhiok, Mr. Sandeep Sethi learned Senior counsel appearing on behalf of the respondents have made their submissions which can be outlined in the following manner:

- a) Firstly, Dr.Singhvi argued that the bank guarantees in the instant case have already been invoked and encashed and as such the petition has become infructuous. It has been argued that that the respondent No.1 issued letters to the respondent No.2 bank invoking the unconditional bank guarantees furnished by the petitioner. The respondent No.1 confirmed the invocation by returning the original bank guarantees to the respondent No.2 on 15<sup>th</sup> May, 2014. The respondent No.2 honoured the invocation of the bank guarantees on 15<sup>th</sup> May, 2014 and issued demand

drafts for a total sum of Rs.47.9 crores in favour of respondent No.1 at 4 PM towards such invocation. The respondent No.1 on 15<sup>th</sup> May, 2014 deposited the said demand drafts in its account at Bank of Baroda in Hyderabad and received the copies of pay in slips as regards the same, the respondent No.2 had fulfilled its obligation in respect of the invocation of the unconditional bank guarantees by the respondent No.1. It is thus argued that the in view of the events as narrated by the respondents', since the bank guarantees have already been cancelled/returned by issuance of the demand drafts, the invocation of the bank guarantees has already been effected and the interim directions passed on 15<sup>th</sup> May, 2014 have already been infructuous.

Dr. Singhvi in order to substantiate the submission relied upon the judgment passed in the case of ***Thesiss Minecs India Pvt. Ltd. vs. NTPC Limited and Anr.*** (Single Bench) decided on 1<sup>st</sup> July, 2014 in OMP No. 630/2014 wherein it has been held that the when the proceeds arising out of the bank guarantee have been debited from the account out of which the payment is to be made, the same is said to be encashed. Dr. Singhvi thus submitted that since the bank guarantees are already encashed in the eyes of law, no further interim directions are called for and the interim order passed on 15<sup>th</sup> May, 2014 is required to be vacated.

- b) Secondly, Dr. Singhvi argued that the terms of bank guarantee are unconditional in nature and this Court should not interfere with the invocation of the bank guarantee in view of the

extremely limited scope of the interference as per the well settled law by Supreme Court and this Court in the cases involving invocation of unconditional bank guarantees. Dr. Singhvi has read over the terms of the bank guarantees and construed them to mean that the said bank guarantees are unconditional in nature. Essentially, Dr. Singhvi divided the bank guarantees into three types by way of wordings of the bank guarantees which reads as under:

**“Type 1:** “...do hereby ***irrevocably guarantee*** payment to you... We undertake to make payment under this Letter of Guarantee upon receipt by us of your first written demand signed by your duly authorized officer declaring the Contractor to be in default under the Contract and ***without cavil or argument*** any sum or sums within the above named limits, ***without your need to prove or show grounds or reasons for your demand and without the right of the Contractor to dispute or question such demand.***” [BGs at Page 78, 81 and 87 of the Petition] **[NOTE: The Petitioner has admitted these BGs to be unconditional]**

**Type 2:**“....do hereby undertake and agree to indemnify and keep indemnified the Beneficiary from time to time, to the extent of Rs..... against any loss or damage costs, charges and expenses caused to or suffered by or that may be caused to or suffered by the Beneficiary by reason of any breach or breaches by the Contractor of any the terms and conditions contained in the said Contracts ***to unconditionally pay the amount claimed by the Beneficiary on demand and without demur*** to the extent aforesaid.

We the State Bank of India, further agree that ***the Beneficiary shall be the sole judge of and as to whether the said Contractor has committed any breach or breaches of any of the terms and conditions of the said Contracts*** and the extent of loss, damage, costs, charges and expenses caused to or suffered by ... and the ***decision of the Beneficiary that the said Contractor has committed such breach*** or breaches and as to the amount or amounts of loss, damage, costs charges and expenses caused to or suffered by or that may be caused to or suffered by the Beneficiary from time to time ***shall be final and binding on us***". [BGs at Page 113 and 126 of the Petition] **[NOTE: The Petitioner has admitted these BGs to be unconditional]**

**Type 3:** "...do hereby ***irrevocably guarantee repayment of the said amounts*** upon the first demand of the Employer ***without cavil or argument*** in the event that the Contractor fails to commence or fulfill its obligations under the terms of the said Contract, and in the event of such failure, refuses to repay all or part (as the case may be) of the said advance payment to the Employer."

Dr. Singhvi argued that the type 1 and type 2 bank guarantees are clearly unconditional in nature and hence the invocation of them cannot be restrained in any manner. As regards, type 3 Bank Guarantee, it has been argued that the same is also unconditional in nature as the wordings "in the event that the contractor fails" ought to be appreciated in their context and the same is decision/understanding of the respondent No.1 who is to invoke the guarantee and not the

banker. The reasons provided by Dr. Singhvi for the type 3 bank guarantee to be also unconditional are as under:

- It has been argued that the type 3 bank guarantee is also unconditional in as much as while construing the terms of the said bank guarantee, clause 9.2.2 of the contract is required to be kept into mind which clearly provides that the petitioner would furnish the advance payment in the form of unconditional bank guarantees. The intention of the parties was always that the bank guarantees be unconditional.
- It is contended that the invocation of the bank guarantee is not dependent upon any dispute between the parties. Thus, merely the fact that the petitioner disputes the position that there are breaches on their part nowhere come in the way of the respondent No.1 from invocation of the bank guarantee once it is the belief of the respondent No.1 that the bank guarantee is required to be invoked.
- It is well settled principle of law that the bank is in no position to decide the breach on the invocation of an unconditional bank guarantee. Thus, if the bank guarantees are not conditional in nature as per the understanding of the parties in clause 9.2.2 of the contract, the breach for the purposes of invocation is the discretion/decision of the respondent No.1 which would suffice for the banks as the banks cannot decide the said question.

- The order dated 16<sup>th</sup> May, 2014 also records that the bank guarantees are unconditional in nature.

In view of the said reasons, Dr. Singhvi argued that this Court should proceed to infer all the bank guarantees are unconditional in nature.

In order to buttress his submissions, Dr. Singhvi relied upon the following judgments:

- ***UP Coop. Federation Limited v. Singh Consultants and Engineers (P) Ltd***, (1988) 1 SCC 174 wherein the Supreme Court has held that the invocation of the unconditional bank guarantee is not dependent upon any disputes relating to the terms of the contract.
- ***Mahatma Gandhi Sahakra Sakkare Karkhane v. National Heavy Engineer Coop Ltd***, (2007) 6 SCC 470 and ***Himadri Chemicals Industries Ltd v. Coal Tar Refining Company***, AIR 2007 SC 2798 in support of the proposition that the bank guarantee cannot be prevented to be enforced on the ground that the conditions contained in the agreement for enforcing the bank guarantee have not been fulfilled.
- ***Hindustan Construction Company v. State of Bihar***, (supra) wherein the Supreme Court has held that the bank guarantee is an independent and a separate contract and is absolute in nature and hence the existence of any dispute between the parties is not a ground for

issuing an order of injunction to restrain the enforcement of the Bank Guarantee.

c) Thirdly, Dr. Singhvi argued that the petitioner has failed to prove any fraud, irretrievable injustice or special equities which are pre-requisites for the grant of injunction against the invocation of the Bank Guarantees.

- Dr. Singhvi, argued that the fraud contemplated by the judgments of the courts which can vitiate the transaction in the cases involving bank guarantees enabling the court to pass interim injunction against the invocation of the guarantees, is the fraud of egregious nature. Such fraud must be pleaded and established on record. It has been argued by Dr. Singhvi, that since the unconditional bank guarantee is a contract distinct from the underlying contract, the fraud must be such which should be directed towards the Bank in fulfilment of the terms contained in the Bank Guarantee or something which the bank has knowledge at the time when the invocation of the bank guarantee is sought for. In the instant case, there exists no fraud at all much less egregious fraud as per Dr. Singhvi which could be said to be within the knowledge of the Bank vitiating the entire transaction. It has been argued by Dr. Singhvi that the petitioner is alleging the breaches in order to categorise them as fraud which is impermissible in law as the bank has no concern with such allegations and by no stretch of imagination, the said allegations of putting the responsibility

of the breaches on the respondent No.1 can enable this Court to infer any fraud out of the same which could also be within the knowledge of the bank vitiating the transaction/ contract of the bank guarantee. In the absence of the same, the contentions of the petitioner as per Dr. Singhvi are required to be rejected and the petitioner has failed to prove any circumstance of the fraud of the egregious nature as per the law.

- Likewise Dr. Singhvi argued that the irretrievable injustice in the cases involving seeking restraint on Bank Guarantees is the one which cannot be mere burdensome loss caused to the petitioner but the one wherein the aggrieved party is rendered remediless. In support of the said proposition, the judgment in the case ***U.P. State Sugar Corporation vs. Sumac International Ltd.***, AIR 1997 SC 1644 was relied upon. It has been argued that such is not the case in the present case as the arbitration proceeding are yet to commence and the petitioner if at all has any claims, the same can be made and adjudicated by the arbitral tribunal.
- Dr. Singhvi also argued that the special equities required for the Court to pass restraint order against the invocation of the bank guarantee also deserve similar threshold. It has been argued that the dispute as regards the breach of the contract or that the contractor has a serious counter- claim which are referred to arbitration cannot create any special equities. To support this proposition the judgments passed

in the case of **BSES Ltd. V. Fenner India Ltd.**, (2006) 2 SCC 728 and **Hindustan Steel Works Construction Ltd v. Tarapore and Co.** (1996) 5 SCC 34 were relied upon.

In view of the aforementioned submissions, it has been argued by Dr. Singhvi that none of the factors affecting the invocation of the bank guarantee are present in the present case and this court should not pass any interim orders against the encashment of the bank guarantee independent of the ground that the said bank guarantees are already encashed in the eyes of law.

- d) Fourthly, Dr. Singhvi argued that the clause 9.2.2 of the contract provides that the security under the contract shall be in the form of the unconditional bank guarantee. Thus, the petitioner cannot contend to the contrary that the bank guarantees are conditional. Likewise, it has been argued that the notice to cure the defects as argued by the petitioner relates clause 36.2.2 which relates to termination. The said notice has nothing to do with the invocation of the bank guarantee. In such a case, as per Dr. Singhvi, the requirement of the notice cannot be imported prior to the invocation of the bank guarantee and the contention of the petitioner in this respect is non meritorious.

19. In view of the aforementioned submissions advanced by Dr. Singhvi, it has been prayed that this Court should proceed to dismiss OMP No.557/2014 by vacating the interim order passed on 16<sup>th</sup> May, 2014.

20. I have gone through the petition filed by the petitioner, reply on behalf of the respondent and the documents filed by the respective parties. I have also given my careful consideration to the oral submissions advanced by the learned counsel for the parties at the Bar and the written submissions filed by the parties. I shall now proceed to discuss the various aspects which fall for consideration before this Court for the purpose of deciding the present petition.

21. First and foremost, it is noteworthy to mention that there are 8 bank guarantees which have been invoked by the respondent on 14<sup>th</sup> May, 2014 and the said bank guarantees contain different terms and conditions in the guarantee documents which are worded distinctly. The said aspect needs consideration in view of the well settled principle of law that the bank guarantee is a contract independent from the underlying contract and in order to test as to whether the invocation of the bank guarantee is as per the contract, the stipulations contained in the document of bank guarantee are germane as against the terms of the underlying contract/ main contract which may or may not be relevant depending upon the incorporation of the terms of the main contract in the guarantee documents. Furthermore, to find out an answer to the question, whether the nature of bank guarantees is unconditional or the terms of the bank guarantees prescribe some prerequisites in order to attract the liability, the terms and the wordings of the bank guarantee are relevant.

22. Let me therefore see the terms of the bank guarantees in order to find out the answers to the aforementioned questions.

- a. There is a performance guarantee No.0910310BG0000160 dated 12<sup>th</sup> March, 2010 for Rs.5,49,74,199-/ which has been extended upto 21<sup>st</sup> January, 2015 and the relevant terms of the bank guarantee reads as under:

**“PERFORMANCE SECURITY FORM**

Contract No.TPTL/TOWER-A-2/01.

Ex-works Supply Contract for Tower Package – A2 for 400 KV D/C (Quad) Panighata-Kishanganj Transmission Line section of Teesta-III-Kishanganj Transmission Line associated with 1200 MW Teesta III HEP at North Sikkim.

Specification No.: TPTL/TOWER-A2

We refer to the Contract (“the Contract”) signed on 22.02.2010 between you and Joint Venture of M/s Abir Infrastructure Private Limited, having its Registered Office at Ground Floor, C-Block, Plot No.14, Factory Road, Adj. to Safdarjung Hospital, Ring Road, New Delhi-110029 and M/s Deepak Cables (India) Limited having its Registered office at No.7, N.S.Iyenger Street, Sheshadripuram, Bangalore-560020 (“the Contractor”) concerning Ex-works Supply of all equipments and materials including mandatory spares for the complete execution of Tower Package – A2 for 400 KV D/C (Quad) Panighata-Kishanganj Transmission Line section of Teesta-III – Kishanganj Transmission Line associated with 1200 MW Teesta III HEP at North Sikkim.

By this letter we, the undersigned, State Bank of India, Industrial Finance Branch, Raj Bhavan Road, Somajiguda, Hyderabad – 500082, a Bank (which expression shall include its successors, administrators, executors and assigns) having its Registered/Head Office at State Bank Bhavan, Central Office, 8<sup>th</sup> Floor, Madame Cama Marg, Mumbai-400021, Maharashtra, do hereby irrevocably guarantee payment to you up to Rs.5,49,74,199/- i.e., ten percent (10%) of the Contract Price until ninety (90) days beyond the Defect Liability Period i.e., upto and inclusive of 22.01.2013.

We undertake to make payment under this Letter of Guarantee upon receipt by us of your first written demand signed by your duly authorized officer declaring the Contractor to be in default under the Contract and without cavil or argument any sum or sums within the above named limits, without your need to prove or show grounds or reasons for your demand and without the right of the Contractor to dispute or question such demand.

Our liability under this Letter of Guarantee shall be to pay to you whichever is the lesser of the sum so requested or the amount then guaranteed hereunder in respect of any demand duly made hereunder prior to expiry of the Letter of Guarantee, without being entitled to inquire whether or not this payment is lawfully demanded.

This Letter of Guarantee shall remain in full force and shall be valid from the date of issue until ninety (90) days beyond the Defect Liability Period of the Facilities i.e. upto and inclusive of 22.01.2013 and shall be extended from time to time for such period (not exceeding one year), as may be desired by the Contractor on whose behalf this Letter of Guarantee has been given. Except for the documents herein

specified, no other documents or other action shall be required, notwithstanding any applicable law or regulation.

Our liability under this Letter of Guarantee shall become null and void immediately upon its expiry, whether it is returned or not, and no claim may be made hereunder after such expiry or after the aggregate of the sums paid by us to you shall equal the sums guaranteed hereunder, whichever is the earlier.

All notices to be given under shall be given by registered posts to the addressee at the address herein set out.

We hereby agree that any part of the contract may be amended, renewed, extended, modified, compromised, released or discharged by mutual agreement between you and the Contractor, and this security may be exchanged or surrendered without in any way impairing or affecting our liabilities hereunder without notices to us and without the necessity for any additional endorsement, consent or guarantee by us, provided, however, that the sum guaranteed shall not be increased.

No action, event or condition which by any applicable law should operate to discharge us from liability hereunder shall have any effect and we hereby waive any right we may have to apply such law so that in all respects our liability hereunder shall be irrevocable and, except as stated herein, unconditional in all respects.

Notwithstanding anything contained herein :

- i) Our liability under this Guarantee shall not exceed Rs.5,49,74,199 (Rupees Five Crore Forty Nine Lac

Seventy Four Thousand One Hundred Ninety Nine Only).

- ii) This Bank Guarantee shall be valid upto 22.01.2013.
  - iii) We are liable to pay the guaranteed amount or any part thereof under this Bank Guarantee only and only if Employer serve upon Bank a written claim or demand on or before 22.01.2013.”
- b. There is another bank guarantee bearing no. 0910310BG0000161 dated 12<sup>th</sup> March, 2010 for sum of Rs.11,74,10,849/- which has also been extended upto 21<sup>st</sup> January, 2015. The clauses of the guarantee document read on similar lines as contained in bank guarantee No.0910310BG0000160. The clauses read as under:

**“PERFORMANCE SECURITY FORM**

Contract No.TPTL/TOWER-A-1/02.

Service contract for Tower Package – A1 for 400 KV D/C (Quad) Teesta III HEP – Panighata section of Teesta – III - Kishanganj Transmission Line associated with 1200 MW Teesta III HEP at North Sikkim.

Specification No.: TPTL/TOWER-A1

We refer to the Contract (“the Contract”) signed on 22.02.2010 between you and Joint Venture of M/s Abir Infrastructure Private Limited, having its Registered Office at Ground Floor, C-Block, Plot No.14, Factory Road, Adj. to Safdarjung Hospital, Ring Road, New Delhi-110029 and M/s Deepak Cables (India) Limited having its Registered office at No.7, N.S.Iyenger Street, Sheshadripuram, Bangalore-560020 (“the Contractor”) concerning Ex-works Supply of all equipments and

materials including mandatory spares for the complete execution of Tower Package – A1 for 400 KV D/C (Quad) Teesta-III HEP – Panighata section of Teesta III – Kishanganj Transmission Line associated with 1200 MW Teesta III HEP at North Sikkim.

By this letter we, the undersigned, State Bank of India, Industrial Finance Branch, Raj Bhavan Road, Somajiguda, Hyderabad – 500082, a Bank (which expression shall include its successors, administrators, executors and assigns) having its Registered/Head Office at State Bank Bhavan, Central Office, 8<sup>th</sup> Floor, Madame Cama Marg, Mumbai-400021, Maharashtra, do hereby irrevocably guarantee payment to you up to Rs.5,49,74,199/- i.e., ten percent (10%) of the Contract Price until ninety (90) days beyond the Defect Liability Period i.e., upto and inclusive of 22.01.2013.

We undertake to make payment under this Letter of Guarantee upon receipt by us of your first written demand signed by your duly authorized officer declaring the Contractor to be in default under the Contract and without cavil or argument any sum or sums within the above named limits, without your need to prove or show grounds or reasons for your demand and without the right of the Contractor to dispute or question such demand.

Our liability under this Letter of Guarantee shall be to pay to you whichever is the lesser of the sum so requested or the amount then guaranteed hereunder in respect of any demand duly made hereunder prior to expiry of the Letter of Guarantee, without being entitled to inquire whether or not this payment is lawfully demanded.

This Letter of Guarantee shall remain in full force and shall be valid from the date of issue until ninety (90)

days beyond the Defect Liability Period of the Facilities i.e. upto and inclusive of 22.01.2013 and shall be extended from time to time for such period (not exceeding one year), as may be desired by the Contractor on whose behalf this Letter of Guarantee has been given.

Except for the documents herein specified, no other documents or other action shall be required, notwithstanding any applicable law or regulation.

Our liability under this Letter of Guarantee shall become null and void immediately upon its expiry, whether it is returned or not, and no claim may be made hereunder after such expiry or after the aggregate of the sums paid by us to you shall equal the sums guaranteed hereunder, whichever is the earlier.

All notices to be given under shall be given by registered posts to the addressee at the address herein set out.

We hereby agree that any part of the contract may be amended, renewed, extended, modified, compromised, released or discharged by mutual agreement between you and the Contractor, and this security may be exchanged or surrendered without in any way impairing or affecting our liabilities hereunder without notices to us and without the necessity for any additional endorsement, consent or guarantee by us, provided, however, that the sum guaranteed shall not be increased.

No action, event or condition which by any applicable law should operate to discharge us from liability hereunder shall have any effect and we hereby waive any right we may have to apply such law so that in all

respects our liability hereunder shall be irrevocable and, except as stated herein, unconditional in all respects.

Notwithstanding anything contained herein :

- i) Our liability under this Guarantee shall not exceed Rs.5,49,74,199 (Rupees Five Crore Forty Nine Lac Seventy Four Thousand One Hundred Ninety Nine Only).
  - ii) This Bank Guarantee shall be valid upto 22.01.2013.
  - iii) We are liable to pay the guaranteed amount or any part thereof under this Bank Guarantee only and only if Employer serve upon Bank a written claim or demand on or before 22.01.2013.”
- c. The third bank guarantee is bearing No.0910310BG0000162 dated 12<sup>th</sup> March, 2010 for sum of Rs.10,83,99,960/- which has been extended 21<sup>st</sup> January, 2015. The clauses contained in the bank guarantee are also worded on the same lines as contained in the bank guarantee Nos.0910310BG0000160 and 0910310BG0000161. The said clauses being identical in nature are not reproduced again.
- d. The fourth bank guarantee is bearing No.0910310BG0000164 dated 12<sup>th</sup> March, 2010 for the sum of Rs.3,67,24,953 which is also renewed upto 21<sup>st</sup> January, 2015. The clauses contained in the document of the bank guarantee are also on the same lines which are mentioned in bank guarantees Nos.0910310BG0000160, 0910310BG0000161 and 0910310BG0000162 and therefore not reproduced again.

Upon reading of the afore noted clauses contained in the documents of 4 bank guarantees along with the respective amounts, it can be said that the wordings of the clause clearly provide that the bank has undertaken to make the payment upon receipt of the first written demand by the beneficiary/respondent No.1 herein declaring the contractor to be in default under the contract. The said payment is required to be made without any cavil or argument and without further proof of grounds or reasons for the demand and without any right of the contractor to question such demand. As such, the clauses of the 4 bank guarantees noted at (1), (2) and (3) do not provide for any condition attached to the payment of the sum except that the payment shall be made upon receipt of the written demand. The respondent No.1 has written the letter dated 14<sup>th</sup> May, 2014 to the Bank of Hyderabad stating that the petitioner is at the default of the contract. The contents of one of the sample letters dated 14<sup>th</sup> May, 2014 out of four letters issued to Bank of Hyderabad on similar lines are reproduced hereinbelow:

“To : May 14, 2014  
State Bank of India,  
Industrial Finance Branch,  
6-3-1109/1 Raj Bhawan Road,  
Somajiguda,  
Hyderabad-500082

Sub : Guarantee No.0910311BG0000841 issued on  
behalf of applicant Abir Infrastructure Private  
Limited

Dear Sir,

We refer to the guarantee No.0910311BG0000841 dated August 20, 2011 as amended through a 1<sup>st</sup> Amendment dated August 18, 2012 and further amended through a 2<sup>nd</sup> amendment dated August 19, 2013 and 3<sup>rd</sup> amendment dated February 13, 2014 as issued by the State Bank of India, Industrial Finance Branch, Raj Bhawan Road, Somajiguda, Hyderabad 500082 valid upto February 19, 2015.

We hereby intimate you that the Contractor named in the said guarantee has breached and failed to fulfil its obligations under the Contract (as named in the said guarantee) and that such breaches by the Contractor may result in losses, damages, costs, charges or expenses being caused to or suffered by us, Teestavalley Power Transmission Limited. Accordingly, we hereby make a claim for an amount of INR 2,90,00,00.00 (Rupees Two Crores Ninety Lakhs) only pursuant to the said guarantee No. 0910311BG0000841 as the value of the losses, damages, costs, charges and expenses caused to or suffered by us on account of the breach by the contractor of its obligations under the contract and call upon you State Bank of India, Industrial Finance Branch, Raj Bhawan Road, Somajiguda, Hyderabad 500082 to forthwith pay the claimed amount to us, Teestavalley Power Transmission Limited, New Delhi by way of demand draft immediately. Alternatively, remit through RTGS immediately to the following account.

|                  |   |                |
|------------------|---|----------------|
| Bank Account No. | : | 2158020000073  |
| IFSC Code        | : | BARB9INDELX    |
| Bank Name        | : | Bank of Baroda |
| Branch Address   | : | CFS New Delhi  |

The copies of the said bank guarantee along with extension letters is enclosed and upon receipt of the claimed amount the original bank guarantee shall be duly returned to the Bank.

For Teestavalley Power Transmission Limited

(T.K. Wali) (V. Vasu)

Authorized Signatories

- Encl :
1. Copy of BG alongwith extension letters.
  2. Letter from Bank of Baroda, New Delhi for Attesting signature of the Authorized Signatories.
  3. State of outstanding Advance.”

Upon reading of the contents of the letter dated 14<sup>th</sup> May, 2014 issued to bank - respondent No.2 along side the wordings of the guarantee, it cannot be said that the respondent No.1 has wrongfully mentioned anything in the said letter or misrepresented the bank or withheld anything of any sort to which the bank has any knowledge in relation to the invocation of these three bank guarantees. The letters issued by the respondent No.1 are in accordance with the wordings of the guarantee and the petitioner has not raised the dispute to the wordings of the letters of invocation in order to allege any fraud on the part of the respondent No.1. Petitioner however, has contended that there existed fraud on the ground that on merits of the case, the respondent No.1 has extended the term of the contract upto October, 2014 earlier and later on without notice to the petitioner invoked the bank guarantee. *Prima facie*, I find that

the respondent No.2 bank has nothing to do with the dispute which the petitioner is raising at this stage on merits in as much as the bank is to simply honour the bank guarantee by looking into the contents of the letter unconditionally without any demur or to cross question the respondent which is plain from the wordings of the guarantee. If such is the case, then the grounds of fraud which in the instant case links the disputes of the petitioner with the merits of the case concerning with main contract as against the contract of the guarantees which are independent and separate contracts may be good ground towards raising an arbitrable claim which if found tenable may result in some success but the same may not hold good for seeking prevention of the invocation of bank guarantee in view of the unconditional nature of the bank guarantee and especially when the law is well settled on the subject that the bank is not concerned with the disputes between the parties in cases of the unconditional bank guarantees and is bound to honour the bank guarantees irrespective of such dispute. I shall deal with the other grounds raised by the petitioner separately after discussing the clauses of other bank guarantees and the contents of invocation letters.

- e. There is a bank guarantee bearing No.0910311BG0001115 dated 25<sup>th</sup> November, 2011 and valid upto 31<sup>st</sup> December, 2014. The relevant terms of the said bank guarantee reads as under :

“To  
M/s. Teestavalley Power Transmission Ltd.  
(A JV Company of Teesta Urja Ltd. & Powergrid)  
143-144, Udyog Vihar, Phase IV,  
Guragaon – 122015 (Haryana).

**Bank Guarantee for release of Balance Payment**

|                    |   |                  |
|--------------------|---|------------------|
| Bank Guarantee No. | : | 0910311090001115 |
| Amount             | : | Rs.3,65,00,000   |
| Date of Issue      | : | 25.11.2011       |
| Valid upto         | : | 24.11.2012       |
| Claim period       | : | 24.11.2012       |

In consideration of the M/s. Teestavalley Power Transmission Ltd. having its registered office at NBCC Towers, 1<sup>st</sup> Floor 15 Bhikaji Cama Place, New Delhi 1100 66, (hereinafter called “the Beneficiary”, which expression shall unless repugnant to the context or meaning thereof, include its administrators, successors, executors and assigns) having awarded to M/s. Abir Infrastructure Private Limited (in Joint Venture with M/s. Deepak Cables (India) Limited having its Registered Office at No.7, N.S. Iyenger Street, Sheshadripuram, Bangalore-560020) having its Registered Office at SF-2, Bhikaji Cama Bhawan, Bhikaji Cama Place, New Delhi-110066 (hereinafter called the “the Contractor”) which expression shall unless repugnant to the context or meaning thereof, include its administrators, successors, executors and assigns) Contracts bearing Nos.(1) TPTL/Tower-A1/01 dated 22.02.2010 (2) TPTL/Tower-A2/01 dated 22.02.2010 for the work of Supply for execution of Tower Packages for Teesta-III HEP – Panighata section of Teesta III – Kishangunj Transmission Line associated with 1200 MW Teesta III

HEP, North Sikkim (hereinafter referred as “Contract”) the Beneficiary has, in terms of said contracts, agreed to release the balance payment on submission of Bank Guarantee and therefore, the Contractor has agreed to provide a Bank Guarantee for Rs.3,65,00,000/- (Rupees Three Crores Sixty Five Lac only) for performance of the Contracts.

We the State Bank of India (hereinafter referred as “the said Bank”) and having our registered office at the State Bank Bhavan, Central Office, 8<sup>th</sup> Floor, Madame Cama Marg, Mumbai, Maharashtra 400021 and among other places at Industrial Finance Branch, Raj Bhavan Road, Hyderabad-500082 do hereby undertake and agreed to indemnify and keep indemnified the Beneficiary from time to time, to the extent of Rs.3,65,00,000/- (Rupees Three Crores Sixty Five Lac only) against any loss or damage costs, charges and expenses caused to or suffered by or that may be caused to or suffered by the Beneficiary by reason of any breach or breaches by the Contractor of any the terms and conditions contained in the said contracts to unconditionally pay the amount claimed by the Beneficiary on demand and without demur to the extent aforesaid.

We the State Bank of India, further agree that the Beneficiary shall be the sole judge of and as to whether the said contractor has committed any breach of any of the terms and conditions of the said contracts and the extent of loss, damage, costs, charges and expenses caused to or suffered by or that may be caused to or suffered by the Beneficiary on account thereof and the decision of the Beneficiary that the said contractor has committed such breach or breaches and as to the

amount or amounts of loss, damage, costs charges and expenses caused to or suffered by or that may be caused to or suffered by the Beneficiary from time to time shall be final and binding on us.

We, the said Bank, further agree that the Guarantee herein contained shall remain in full force and effect during the period that would be taken for the performance of the said contracts and till all the dues of the Beneficiary under the said contracts or by virtue of any of the terms and conditions governing the said contracts have been fully paid and its claims satisfied or discharged and till the Beneficiary certifies that the terms and conditions of the said contracts have been fully and properly carried out by the said contractor and accordingly discharges this Guarantee subject, however, that the Beneficiary shall have no claim under the Guarantee after expiry date i.e. 24.11.2012 or from the date of cancellation of the said contracts, as the case may be, unless a notice of the claim under this Guarantee has been served on the Bank before the expiry of the said period.

The Beneficiary shall have the fullest liberty without affecting in any way the liability of the Bank under this Guarantee or indemnity, from time to time to vary any of the terms and conditions of the said Contracts or to extend time of performance by the said contractor or to postpone for any time and from time to time any of the powers exercisable by it against the said contractor and either to enforce or forbear from enforcing any of the terms and conditions governing the said contracts or securities available to Beneficiary and the said bank shall not be released from its liability under these presents by

any exercise by the Beneficiary of the liberty with reference to the matters aforesaid or by reason of time being given to the said contractor or any other forbearance, act or omission on the part of the Beneficiary or any indulgence by the Beneficiary to the said contractor or any other matter or thing whatsoever which under the law relating to sureties would but for this provision have effect of so releasing the Bank its such liability.

It shall not be necessary for the Beneficiary to proceed against the contractor before proceeding against the bank and the guarantee herein contained shall be enforceable against the bank, notwithstanding any security which the Beneficiary may have obtained or obtain from the contractor shall at the time when proceedings are taken against the bank hereunder be outstanding or unrealized.

We, the said Bank, lastly undertake not to revoke this Guarantee during its currency except with the previous consent of the Beneficiary in writing and agree that any change in the Constitution of the said Contractor or the said Bank shall not discharge our liability hereunder. If any further extension of this Guarantee is required the same shall be extended to such required periods on receiving instructions from Contractor on whose behalf this Guarantee is issued.

Notwithstanding anything contained herein above in the Bank Guarantee :

- 1) Our liability under this guarantee shall not exceed Rs.3,65,00,000/- (Rupees Three Crores Sixty Five Lac only).

- 2) This Guarantee shall be valid upto 24.11.2012.
- 3) We shall be liable to pay any amount under this Bank Guarantee or part thereof only if we receive (if you serve upon us) a written claim or demand under this Guarantee on or before 24.11.2012 at State Bank of India, Industrial Finance Branch, Raj Bhavan Road, Hyderabad – 500082.

In presence of

Witness : For and on behalf of \_\_\_\_ (the bank)

1. Signature :
2. Name & Designation  
Authorization No.:  
Date & Place :  
Seal of Bank : ”

- f. Likewise, the bank guarantee containing similar terms in the guarantee document is bearing No.0910311BG0000841 dated 20<sup>th</sup> August, 2011 for the sum of Rs.2,90,00,000-/. The clauses of the guarantee are the same as contained in bank guarantee No.0910311BG0001115 as stated above and thus are not reproduced again.

The respondent No.1 while invoking the said bank guarantees issued the letter dated 14<sup>th</sup> May, 2014 the contents of one of which reads as under:

“To :

May 14, 2014

State Bank of India,  
Industrial Finance Branch,  
6-3-1109/1 Raj Bhawan Road,  
Somajiguda  
Hyderabad-500082

Sub : Guarantee No.0910311BG0000841 issued on  
behalf of applicant Abir Infrastructure Private  
Limited

Dear Sir,

We refer to the guarantee No. 0910311BG0000841 dated August 20, 2011 as amended through a 1<sup>st</sup> Amendment dated August 18, 2012 and further amended through a 2<sup>nd</sup> amendment dated August 19, 2013 and 3<sup>rd</sup> amendment dated February 13, 2014 as issued by the State Bank of India, Industrial Finance Branch, Raj Bhawan Road, Somajiguda, Hyderabad 500082 valid upto February 19, 2015.

We hereby intimate you that the Contractor named in the said guarantee has breached and failed to fulfil its obligations under the Contract (as named in the said guarantee) and that such breaches by the Contractor may result in losses, damages, costs, charges or expenses being caused to or suffered by us, Teestavalley Power Transmission Limited. Accordingly, we hereby make a claim for an amount of INR 2,90,00,00.00 (Rupees Two Crores Ninety Lakhs) only pursuant to the said guarantee No. 0910311BG0000841 as the value of the losses, damages, costs, charges and expenses caused to or suffered by us on account of the breach by the contractor of its obligations under the contract and call upon you State Bank of India, Industrial Finance Branch, Raj Bhawan Road, Somajiguda, Hyderabad 500082 to forthwith pay the claimed amount to us, Teestavalley Power Transmission Limited, New

Delhi by way of demand draft immediately. Alternatively, remit through RTGS immediately to the following account.

Bank Account No. : 2158020000073  
IFSC Code : BARB9INDELX  
Bank Name : Bank of Baroda  
Branch Address : CFS New Delhi

The copies of the said bank guarantee along with extension letters is enclosed and upon receipt of the claimed amount the original bank guarantee shall be duly returned to the Bank.

For Teestavalley Power Transmission Limited

(T.K. Wali) (V. Vasu)  
Authorized Signatories

Encl : 1. Copy of BG alongwith extension letters.  
2. Letter from Bank of Baroda, New Delhi for Attesting signature of the Authorized Signatories.”

The careful reading of the clauses of bank guarantee Nos.0910311BG0001115 and 0910311BG000841 make it clearly evident that the wordings of the said clauses clearly allow the bank to honour the sum under the bank guarantee upon being notified that the petitioner is in breach of the obligations under the contract. The respondent No.1 being the beneficiary under the contract of the guarantee is the sole judge to ascertain the breaches and there is no obligation upon the beneficiary/respondent herein to proceed against the petitioner prior to seeking the invocation of the two bank guarantees which are discussed under this head. The liability of the

bank is again without cavil or dispute or any authority to question the respondent No.1. Under these circumstances, the two bank guarantees are clearly unconditional in terms. The letter dated 14<sup>th</sup> May, 2014 issued by the respondent No.1 clearly state that the petitioner is in breach of the obligations under the contract and the invocation is sought on account of the damages, costs, charges and expenses arising out the said breach. The petitioner has not disputed again the contents of the said letters by stating that the said letters are contrary to the terms of the bank guarantees. The petitioner also has not stated that the respondent No.1 while issuing these letters has withheld any fact or misrepresented bank. The petitioner has sought to allege the fraud on the ground that the respondent No.1 has showed volte face to the petitioner by not allowing the petitioner to continue with the contract despite allowing the extension of time and that too with no fault of the petitioner. Prima facie, I have already arrived at the finding that these grounds of fraud are on merits and can have some bearing upon the petitioner's claim before the Arbitral Tribunal but the same cannot come to the aid of the petitioner to alleged that there is fraud of egregious nature emanating from the respondent No.1 while invoking the bank guarantee which is directed towards the bank and the bank has some information about the same. Such not being the case, the petitioner's allegation that there is fraud by merely raising a dispute when the bank guarantees are plainly unconditional in nature and there is no infirmity at the time of invocation of bank guarantees, the said ground has no relevance with the contract of the bank guarantee which is an independent contract

between the bank and the beneficiary and is governed by the terms contained in guarantee document and the bank is to honour the guarantee irrespective of the dispute between the parties unless the terms of the main contract are incorporated in the terms of the guarantee. In the instant case, the respondent No.1 is the sole judge to ascertain the breach and inform the bank and the decision of the respondent No.1 is binding. Thus, the disputed question cannot be raised before the bank and this Court cannot substitute its own reasoning or dispute with the reasoning of the bank when the contract itself does not permit raising of any dispute by the bank. The wordings of the two bank guarantees are closer to the ones involved in the judgments passed by the Apex Court in ***Mahatma Gandhi Sakkare Karkhane*** (supra) ***U.P. State Sugar Corporation*** (supra) and wherein again the wordings of the clauses relating to beneficiary being the sole judge were the same and the same were also unconditional bank guarantees. The Supreme Court in such circumstances observed the bank is to honour the bank guarantees irrespective of the dispute between the parties and the bank is not concerned with the disputed questions in unconditional bank guarantees. Thus, the plea of the fraud raised by the petitioner is not meritorious and liable to be rejected. I shall examine the plea of special equities separately in the latter part of this judgment.

It is settled law that Bank Guarantee is an independent and a separate contract which is absolute in nature, and hence the existence of any dispute between the parties to the contract is not a

ground for issuing an order of injunction to restrain enforcement of bank guarantees. [**Hindustan Construction Company v. State of Bihar**, (1999) 8 SCC 436].

As per settled law for the last many decades only 3 exceptions have been carved out to the general rule that the invocation of unconditional bank guarantees should not be interfered with. The exception of fraud to invocation as alleged by the petitioner is also not applicable in the present case owing to the following reasons:

- It is well settled that the fraud perpetrated must be of egregious nature which shakes the conscience of the Court. This Court has held that the fraud must be an established fraud and not mere allegations. [**Bhandari Builders and Engineer Pvt. Ltd. v. Vijaya Bank**, (2010) 168 DLT 47]. The fraud pleaded must be of an egregious nature so as to vitiate the entire underlying transaction of the Bank Guarantee. [**U.P. State Sugar Corporation v. Sumac International Ltd.** (supra)].
- There is no established fraud in the present case let alone any fraud of an egregious nature. The Petitioner has failed to establish that there existed any fraud in the invocation of the Bank Guarantees that affects the very Guarantees itself or that vitiates the Contract.
- Order VI Rule 4 of CPC requires that in case a party relies on any fraud, the material particulars shall be required to be stated in the pleadings. In the instant case, the petitioner has

merely mentioned the work 'fraud' in the petition [**para 27, 29, 30 of the Petition**] without providing any specific pleading, material particular or establishing the same.

- g. There is a bank guarantee No.0910310BG0000163 for the sum of Rs.26,17,42,403 which is renewed upto 31<sup>st</sup> December, 2014. The terms and conditions of the said bank guarantee reads as under:

**“BANK GUARANTEE FORM FOR ADVANCE PAYMENT**

Contract No.TPTL/TOWER-A-1/01 & TPTL/TOWER-A-1/02

Specification No.TPTL/Tower-A1

Ex-works supply contract for Tower Package – A1 for 400 KV D/C (Quad) Teesta III HEP – Panighata section of Teesta – III – Kishanganj Transmission Line associated with 1200 MW Teesta III HEP at North Sikkim.

and

Service contract for Tower Package – A1 for 400 KV D/C (Quad) Teesta III HEP – Panighata section of Teesta – III – Kishanganj Transmission Line associated with 1200 MW Teesta III HEP at North Sikkim.

We refer to the Contract (“the contract”) signed on 22.2.2010 between you and Joint Venture of M/s. Abir Infrastructure Private Limited having its Registered Office at Ground Floor, C-Block, Plot No.14, Factory Road, Adj. to Safdarjung Hospital, Ring Road, New Delhi-1100 29 and M/s. Deepak Cables (India) Limited having its Registered Office at No.7, N.S.Iyenger Street, Sheshadripuram, Bangalore – 560020 (“the contract”) concerning Ex-works

Supply of all equipment and materials including mandatory spares for the complete execution of Tower Package – A1 for 400 KV D/C (Quad) Teesta III HEP – Panighata section of Teesta III – Kishanganj Transmission Line associated with 1200 MW Teesta III HEP at North Sikkim and concerning Services Contract for providing all services in respect of equipment supplied under Supply Contract for providing all services in respect of equipment supplied under Supply Contract for the complete execution of the Tower Package – A1 for 400 KV D/C (Quad) Teesta III HEP – Panighata section of Teesta III - Kishanganj Transmission Line associated with 1200 MW Teesta III HEP at North Sikkim.

Whereas, in accordance with the terms of the said Contract, the Employer has agreed to pay or cause to be paid to the Contractor an Advance Payment in the amount of Rs.26,17,42,403/- (Rupees Twenty Six Crores Seventeen Lakhs Forty Two Thousand Four Hundred and Three only).

By this letter we, the undersigned, State Bank of India, Industrial Finance Branch, Raj Bhavan Road, Somajiguda, Hyderabad – 500082, a Bank (which expression shall include its successors, administrators, executors and assigns) having its Registered/Head Office at State Bank Bhavan, Central Office, 8<sup>th</sup> Floor, Madame Cama Marg, Mumbai-400021, Maharashtra, do hereby irrevocably guarantee repayment of the said amounts upon the first demand of the Employer without cavil or argument in the event that the Contractor fails to commence or fulfil its obligations under the terms of the said Contract, and in the event of such failure, refuses to repay all or part (as the case may be) of the said advance payment to the Employer.

Provided always that the Bank's obligation shall be limited to an amount equal to the outstanding balance of the advance payment, taking into account such amounts, which have been repaid by the Contractor from time to time

in accordance with the terms of payment of the said contract as evidenced by appropriate payment certificates.

This Guarantee shall remain in full force from the date upon which the said advance payment is received by the Contractor upto ninety (90) days beyond the date on which the entire advance so advanced along with the interest if any due thereon has been fully adjusted in the terms of the contract i.e., upto of ninety (90) days beyond the date of completion of the Facilities under the contract. This Guarantee may be extended from time to time, as may be desired by the Contractor on whose behalf this Guarantee has been issued.

Any claims to be made under this Guarantee must be received by the Bank during its period of validity, i.e. upto of ninety (90) days beyond the date of Completion of the Facilities by the Employer i.e., upto and inclusive of 22.01.2012.

Notwithstanding anything contained herein :

- i) Our liability under this Guarantee shall not exceed Rs.26,17,42,403/- (Rupees Twenty Six Crore Seventeen Lac Forty Two Thousand Four Hundred Three Only).
- ii) This Bank Guarantee shall be valid upot 22.01.2012.
- iii) We are liable to pay the guaranteed amount or any part thereof under this Bank Guarantee only and only if Employer serve upon Bank a written claim or demand on or before 22.01.2012.”

The respondent No.1 has written the letter dated 14<sup>th</sup> May, 2014 to State Bank of India, Hyderabad – respondent No.2 and the contents of the same are reproduced here under:

“To :  
State Bank of India,  
Industrial Finance Branch,  
6-3-1109/1 Raj Bhawan Road,  
Somajiguda  
Hyderabad-500082

May 14, 2014

Sub : Guarantee No.0910311BG0000841 issued on  
behalf of applicant Abir Infrastructure Private  
Limited

Dear Sir,

We refer to the guarantee No. 0910311BG0000841 dated August 20, 2011 as amended through a 1<sup>st</sup> Amendment dated August 18, 2012 and further amended through a 2<sup>nd</sup> amendment dated August 19, 2013 and 3<sup>rd</sup> amendment dated February 13, 2014 as issued by the State Bank of India, Industrial Finance Branch, Raj Bhawan Road, Somajiguda, Hyderabad 500082 valid upto February 19, 2015.

We hereby intimate you that the Contractor named in the said guarantee has breached and failed to fulfil its obligations under the Contract (as named in the said guarantee) and that such breaches by the Contractor may result in losses, damages, costs, charges or expenses being caused to or suffered by us, Teestavalley Power Transmission Limited. Accordingly, we hereby make a claim for an amount of INR 2,90,00,00.00 (Rupees Two Crores Ninety Lakhs) only pursuant to the said guarantee No. 0910311BG0000841 as the value of the losses, damages, costs, charges and expenses caused to or suffered by us on account of the breach by the contractor of its obligations under the contract and call upon you State Bank of India, Industrial Finance Branch, Raj Bhawan Road, Somajiguda, Hyderabad 500082 to forthwith pay the claimed amount

to us, Teestavalley Power Transmission Limited, New Delhi by way of demand draft immediately. Alternatively, remit through RTGS immediately to the following account.

Bank Account No. : 2158020000073  
IFSC Code : BARB9INDELX  
Bank Name : Bank of Baroda  
Branch Address : CFS New Delhi

The copies of the said bank guarantee along with extension letters is enclosed and upon receipt of the claimed amount the original bank guarantee shall be duly returned to the Bank.

For Teestavalley Power Transmission Limited

(T.K. Wali) (V. Vasu)  
Authorized Signatories

Encl : 1. Copy of BG alongwith extension letters.  
2. Letter from Bank of Baroda, New Delhi for Attesting signature of the Authorized Signatories.  
3. State of outstanding Advance.”

h. On similar lines, there is bank guarantee No. 0910310BG0000165 dated 12<sup>th</sup> October, 2010 which has been renewed and valid upto 31<sup>st</sup> October, 2014 and the terms and conditions of the said bank guarantee reads on similar lines as contained in bank guarantee No.0910310BG0000163. The letter of the invocation issued by the respondent to the bank reads as under:

“To :

May 14, 2014

State Bank of India,  
Industrial Finance Branch,  
6-3-1109/1 Raj Bhawan Road,  
Somajiguda  
Hyderabad-500082

Sub : Guarantee No.0910311BG0000165 issued on  
behalf of applicant Abir Infrastructure Private  
Limited

Dear Sir,

We refer to the guarantee No. 0910311BG0000165 dated March 12, 2010 as amended through a 1<sup>st</sup> Amendment dated January 21, 2012 and further amended through a 2<sup>nd</sup> amendment dated December 29, 2012 and further amended through a 3<sup>rd</sup> amendment dated December 24, 2013 as issued by the State Bank of India, Industrial Finance Branch, Raj Bhawan Road, Somajiguda, Hyderabad 500082 valid upto December 31, 2014.

We hereby intimate you that the Contractor named in the said guarantee has breached and failed to fulfil its obligations under the Contract (as named in the said guarantee), we hereby make a claim for an amount equal to the outstanding balance of the advance payment i.e. INR 76,78,053 (Rupees Seventy Six Lakh Seventy Eight Thousand Fifty Three) only pursuant to the said Guarantee No.0910311BG0000165 and call upon you State Bank of India, Industrial Finance Branch, Raj Bhawan Road, Somajiguda, Hyderabad 500082 to forthwith pay the claimed amount to us, Teestavalley Power Transmission Limited, New Delhi by way of demand draft immediately. Alternatively, remit through RTGS immediately to the following account.

Bank Account No. : 2158020000073

IFSC Code : BARB0INDELX  
Bank Name : Bank of Baroda  
Branch Address : CFS New Delhi

The copies of the said bank guarantee along with extension letters is enclosed and upon receipt of the claimed amount the original bank guarantee shall be duly returned to the Bank.

For Teestavalley Power Transmission Limited

(T.K. Wali) (V. Vasu)  
Authorized Signatories

- Encl : 1. Copy of BG alongwith extension letters.  
2. Letter from Bank of Baroda, New Delhi for Attesting signature of the Authorized Signatories.  
3. State of outstanding Advance.”

23. From the reading of the terms of the Bank guarantees Nos. 0910310BG0000163 and 0910310BG0000165, it can be seen that the bank has guaranteed to repayment to said amount to the employer without cavil in the event the contractor fails to commence or fulfil the obligations under the terms of the contract and in the event of such failure refuses to repay all or part of the said advance payment to the employer. It is thus apparent that the liability of the bank would commence when the bank is informed about the demand on the ground of the failure to commence or fulfilment of the obligations under the terms of the contract and the refusal to pay the said sum or part of the advanced sum. The liability of the bank as per the terms of the guarantee is also limited to the amount equal to the

outstanding balance of the advance payment and taking into account such amount which has been repaid by the contractor from time to time. Thus, the repayment of the advance sum and/ or adjustment by way of the repayment and/or information as to refusal to repay by the contractor the said advance sum or part thereof are crucial facts which affect the liability of the bank as per the terms of the bank guarantee Nos.0910310BG0000163 and 0910310BG0000165. Accordingly, the said facts of the refusal to repay by the contractor or repayment of the advanced sum either in part or in full and adjustment of the advanced sum by way of the payment are pre-requisite conditions on the basis of which, the bank can honour the guaranteed sum after getting itself satisfied in terms of the bank guarantee.

24. The objection of the petitioner is that so far as the letters of invocation of bank guarantees Nos.0910310BG0000163 and 0910310BG0000165 are concerned, the said letters dated 14<sup>th</sup> May, 2014 though claims the alleged outstanding balance of the advance payments Rs.15,85,05,417/- and Rs.2,80,69,966/- respectively, but the respondent No.1 nowhere informed the respondent No.2 as to when did the respondent No.1 refused to repay the said sum and when did actually the respondent No.1 called upon the petitioner to repay the advanced sum. In the absence of the same, as per the petitioner, the letter of invocation is contrary to the conditions contained in the bank guarantee and the bank could not have encashed the two bank guarantees Nos.0910310BG0000163 and

0910310BG0000165. On the other hand, the response of the respondent No.1 to this objection is that the terms of the contract has to be read alongside the terms of the bank guarantee and clause 9.2.2 of the contract clearly makes the bank guarantees unconditional in nature. Furthermore, the respondent No.1 has contended that the wordings “fails to fulfil its obligation under the terms of the said contract” has to be understood in the context and the said failure has to be the understanding or belief of the respondent No.1, to which no question can be raised by the bank. Thus, the terms of the bank guarantees cannot be said to be conditional in nature.

25. I have considered the submissions advanced by the learned counsel for the parties on the terms of the bank guarantees Nos. 0910310BG0000163 and 0910310BG0000165 being conditional or unconditional in nature and I would say the terms of the two bank guarantees are distinctly worded and the plain reading of the same do not indicate at least on prima facie basis that the said two bank guarantees are unconditional in nature, though in the contract, they are mentioned as unconditional and similar was the position when the exparte order was passed on 16<sup>th</sup> May, 2014. The reasons for my prima facie view on the two bank guarantee Nos. 0910310BG0000163 and 0910310BG0000165 are as under:

- a) It is well settled principle of law that only the terms of the bank guarantee are required to be read in order to discern whether the bank guarantees are conditional or unconditional in nature. In ***Mahatma Gandhi Sakkare Karkhane***

***v. National Heavy Engineering Coop Ltd.*** (supra) the Supreme Court has laid down this proposition in para 28 by approving the earlier judgment of ***Hindustan Construction Co. Ltd. v. State of Bihar*** (supra) and observed that the terms of the bank guarantee are extremely material in order to understand the nature of the bank guarantee. Upon applying the said principle of law to the case in hand, it can be seen that the clauses in the said bank guarantee though provide that the bank is irrevocably guaranteeing to repay the amount without of any cavil or argument but the said guarantee of the bank is further conditioned by the eventuality of the failure of the contractor to fulfil its obligation and in the event of such failure, his refusal to pay all or part of the advance payment. Under these circumstances, the guarantee of the bank to pay by way of plain reading is not completely unconditional in nature which may enable the bank to repay the sum on mere demand but the demand has to be made to the bank and should contain the necessary ingredients including the petitioners failure to fulfil the obligations contained in the contract and its refusal to repay. The said position is possible once the petitioner is alarmed about the repayment of the advanced sum or the part thereof and has been given chance to repay the same and the guarantee of the bank shall commence once the petitioner/contractor refuses to repay. The invocation letters dated 14<sup>th</sup> May, 2014 do not contain the said ingredients nor the respondent's counsel in their arguments oral as well in the

writing suggest the said position. On the contrary, the respondent continued to argue that the said bank guarantees are unconditional in nature and the wordings are to be understood in context. The said submissions are rejected as meritless in view of my reasons stated in the present paragraph

- b) The clauses of these two bank guarantees Nos. 0910310BG0000163 and 0910310BG0000165 are distinctly worded from the other ones in as much as in the cases of unconditional bank guarantees where the bank has no role to play in the transactions, the stipulations like “beneficiary is the sole judge to determine the breach” or “bank has no role to further enquire about the payment to be made” or “without going into the enquiry” or related terms are normally mentioned in the guarantee documents. In the two bank guarantees, such stipulations like that the beneficiary is the sole judge or “without going into further enquiry as to payment or correctness of the payment” or related one are clearly not present. Thus, the judgments rendered in the cases of ***UP Coop Federation Limited v. Singh Consultants and Engineers (P) Ltd.*** (supra) and ***Mahatma Gandhi*** (supra) and ***Himadri Chemicals Ltd v. Coal Tar Refining Company*** (supra) and line of the authorities passed on the basis that in unconditional guarantee documents where beneficiary is the sole judge and the party cannot raise the dispute are not applicable to the factual position in hand in view of the differences in the wordings of the Bank guarantees. Therefore, the submission of

the Dr. Singhvi, learned Senior counsel for the respondent that it is understanding and belief of the respondent which is to be taken in to consideration while seeking the repayment of the advanced sum from the bank at the time of encashing the bank guarantee is required to be rejected. This is due to the reason that the wordings of the guarantee documents do not permit the beneficiary to be the sole judge of the recovery of the advanced sum. On the otherhand, the wordings of the clauses of the guarantee documents provide the objective criteria for enabling the bank to honour the guarantee and repay the advance which is that by first looking into the contractors failure to perform the obligation and refusal to repay the advanced sum and thereafter further taking into consideration the payments already made by the contractor by looking into the payment certificates. In such circumstances, it cannot be readily inferred that the two bank guarantees are totally unconditional in nature which can be honoured on mere demand which does not fulfil the criteria for invocation as per the terms of the bank guarantee.

- c) The submission of Dr. Singhvi, learned Senior counsel that the clause 9.2.2 of the contract has to be read along with the bank guarantees while examining the petitioner's plea that the bank guarantees are conditional or unconditional as the said clause 9.2.2 mandates that the petitioner shall furnish the unconditional bank guarantees towards the advanced sum. I have examined the said submission of Dr. Singhvi and would say that the same runs contrary to the submission of learned counsel for the

respondent that the bank guarantee is a contract independent to that of the underlying contract. If the terms of the bank guarantees plainly condition the liability of the bank by fulfilment of certain pre-requisites like the failure of the petitioner to perform the obligation and in that event his refusal to repay. The said mechanism is required to be followed by the respondent at the time of the invocation and non following of the same cannot be justified by substituting the terms of underlying agreement in the guarantee document. If the submission of the respondent is that the petitioner was mandated to furnish an unconditional bank guarantee and now is arguing that the bank guarantee is conditional, that by itself does not absolve the Court from examining the terms of the bank guarantees in order see through the true import of the terms of the bank guarantees. Therefore, whatever is the effect of the clause 9.2.2, if the terms of the bank guarantee are clear and plain, the court cannot go contrary to the terms of the bank guarantee document to hold otherwise. The aspect of the breach of the said terms if any has to be looked into at the time of preferring claim or cross claim in the arbitral proceedings. Therefore, this court is unable to accede to the submission advanced by Dr. Singhvi, learned Senior counsel for the respondent.

- d) The submission of Dr. Singhvi, learned Senior counsel for the respondent that the order dated 16<sup>th</sup> May, 2014 records that the bank guarantees are unconditional in nature and thus this court should be persuaded to take the said position is also not correct

in as much as the said view was taken by the court at *ex-parte* ad interim stage. The Court after hearing the parties and examining the documents filed by them and the import of them can also form an opinion different from the one taken at *ex-parte* ad interim stage. Therefore, the said submission of the respondent counsel is also rejected.

In view of my aforementioned reasons, prima facie, I find that the bank guarantees Nos.0910310BG0000163 and 0910310BG0000165 are conditional in nature and the invocation of the said bank guarantees by way of the letter dated 14<sup>th</sup> May, 2014 without fulfilment the mechanism provided in the guarantee documents by informing the petitioner about the repayment of the advanced sum and seeking the refusal or acceptance to repay is clearly contrary to the express terms of the guarantee documents. The said invocation is therefore prima facie contrary to the terms of the bank guarantee Nos.0910310BG0000163 and 0910310BG0000165 and as such liable to be interfered with by this Court.

**26. Special Equities**

I shall now proceed to discuss the ground of the special equities as urged by the petitioner which is independent to the plea of the fraud. The petitioner has sought to establish special equities by contending that even assuming that bank guarantees to be not conditional and also that the invocation of the bank guarantees is not fraudulent, still the special equities are in favour of the petitioner

which is compelling reason for this court to prevent the invocation of the bank guarantees by way interim orders from this Court.

Learned Senior counsel for the petitioner that it is respondent who had given the extension of times under the contract without imposition of the liquidated damages and the total time period for extensions was almost of 3 years and as such the said period was 1.5 times the original period of the contract. It is argued that there are several emails and correspondences furnished by the petitioner which go on to demonstrate that the failures were on the part of the respondent to fulfil its obligations under the contract. It is the admitted position between the parties that the forest clearance has not been obtained for the whole project till date. Thus, the reasons for the delay in the progress of the work were not attributable to the petitioner but to the respondent. The respondent in such a case cannot be allowed to encash the bank guarantees which will be allowing the respondent to take advantage of its own wrongs. As such, the special equities are in favour of the petitioners. Learned senior counsel have also narrated certain following facts which as per the learned Senior counsel are special equities in favour of petitioner.

- The respondent is only entitled to the liquidated damages under the contract and the bank guarantees can only be invoked in terms of clause 36.2.6 of the GCC and even the said amount would come under Rs.10 crores while the bank guarantees sought to be invoked were to tune of Rs.47.90 crores which will be unjustly enriching the respondent.

- There is a dispute resolution mechanism by way of mutual consultation by referring the matter to the project manager which has been prescribed under clause 38 of GCC which has not been exercised prior to the invocation of the bank guarantees and as such the respondent is also in breach of the terms of the contract and cannot allowed to take benefit out of the said breach.
- No liquidated damages were ever deducted by the respondent against the extension of time granted earlier which clearly shows that the respondent was acknowledging the defaults and the respondent without examining the tenability of its claim as to the liquidated damages cannot be allowed to benefit out of the wrongs by way invocation of the bank guarantees
- The petitioner will suffer irretrievable injury because of the purported invocation, since the financial health of the company will be severely affected and there is a possibility that the company may have to be wound up.
- The respondent itself acknowledged the claims of the contractor as late as on 12<sup>th</sup> May, 2014 which was 2 days prior to invocation of the Bank Guarantees.
- The involvement of Tata Projects Limited was done without information to the petitioner and even the work was being awarded to Tata Project Limited. No notice to cure the breaches or defects was ever sent by respondent prior to 15<sup>th</sup>

May, 2014 by which time, the bids of Tata Projects Limited was opened which was done on 26<sup>th</sup> March, 2014.

- The notice to cure did not relate to termination of the entire contract and did not even mention any purported defects/breaches to cure, nevertheless the respondent sought to terminate the entire contract when earlier on 3<sup>rd</sup> April, 2014, the respondent was only keen to offload a part of the works. There were no other intervening circumstances between the said period warranting the termination of the entire contract.
- The notice to cure was not in terms of the clause 36.2.2 of the contract and the said notice was merely issued as formality though the said notice was required to make the petitioner aware of any breaches prior to the invocation of the bank guarantees but since it was issued after the encashment of the bank guarantees, the same was clearly fraudulent.

27. The respondent on the other hand has argued that the special equities are ones in the manner raised by the petitioner. It has been argued that the special equity or irretrievable injustice are to be read in the manner which leaves the petitioner as remediless or it is almost impossible for him to seek the recovery of the said sums by preferring any remedy. In such cases, the principle of the special equities or irretrievable injustice are applicable and not in the cases where there are allegations as to who is at breach or countering the breach as the bank has nothing to do with the dispute between the parties for the

breach of the contract at the time of invocation of the unconditional bank guarantees.

28. I have considered submissions advanced by the learned counsel for parties on the aspect of the special equities. The petitioner has raised the plea of special equity by urging that the delay in the execution of the works has been on account of the fault of the respondent No.1 by not providing the right of the way and other forest clearances etc, thus, the respondent cannot be allowed to take advantage of its own wrongs. In order to support the said plea, the petitioner has relied upon certain correspondences exchanged between the petitioner and respondent including letters dated 11<sup>th</sup> November, 2011, 30<sup>th</sup> November, 2012, 10<sup>th</sup> June, 2013, 4<sup>th</sup> July, 2013 wherein the respondent continued to the extend the period of the completion of the agreement upto October, 2014. It has been argued that suddenly the respondent limited the extension of time upto March, 2014. I have seen these letters and the request for extension of time and other emails relied upon by the petitioner, the entire thrust of the argument is that there are special equities in the favour of the petitioner as the respondent is under breach of obligation in providing the right of way and other forest clearances, besides the other grounds which I shall be narrated separately. I find that prima facie perusal of the letters and communications exchanged between the parties reveal that the petitioner plea it is the respondent who is completely at fault for the petitioner's delay in discharging the works under the contract by not providing the right of the way and forest clearances is also a disputed question under the agreement.

The letter dated 3<sup>rd</sup> April, 2014 issued by the respondent to the petitioner also raises a dispute the said position of the petitioner by the respondent. It has been spelt out by the respondent in the said letter to the petitioner that seeking and obtaining forest clearance and preparation and arranging the way leave or right of way for transmission line for package A1 and A2 was incorporated in the scope of the contract by way of supplementary agreement dated 10<sup>th</sup> May, 2010. I have also gone through the supplementary agreement dated 10<sup>th</sup> May, 2010 and the supplementary agreement states that the employer is desirous to include certain additional services in the scope of the works under the contract.

29. The said facilities as per clause 3 of GCC as amended by way of supplementary contract include the survey and contouring, preparation of proposals for forest clearance for entire route of the transmission line, follow up with the concerned government and other agencies culmination with accord of the forest approval by MOEF and other clearances. Thus, it becomes a disputed question as to whether it is actually the respondent to blame at this stage when there exists prima facie contra material on record. Therefore, drawing any inference in favour of the petitioner on the premise that it was the respondent who was at fault in not providing the right to way, forest clearances or other requirement would be preference of one set of facts over the other without in depth examination. Suffice it to say that the disputed question of the said kinds as narrated by the petitioner cannot act as the special equities in favour of the petitioner. The question relating to providing of the right to way or forest clearances

by the respondent is a disputed question and cannot aid the petitioner at this stage by seeking to prevent the invocation of the bank guarantees at this stage and more so when the petitioner is not remediless and can always lodge its claim in arbitral proceedings if it has any in relation to breaches as alleged by the petitioner and the tenability of the same shall be examined by the Arbitral Tribunal.

30. Likewise, the other grounds narrated by the petitioner including non following of the settlement procedure as per clause 38 of the agreement, non imposition of the liquidated damages, non issuance of the notice to cure prior to 15<sup>th</sup> May, 2014 and violation of clause 36.2.2 are all the grounds which can be urged by the petitioner at the time of the preferring claims before the arbitral tribunal as the same are in the nature of the allegation of the breaches done by the respondent. These assertions nowhere clearly point out any case of special equity which ex facie establish without going into further disputed questions that the respondent is not entitled to encash the bank guarantees which are unconditional in nature and the petitioner is remediless so far as the recovery of the sums are concerned and it is impossible for the petitioner to recover such sums in future. On the contrary, the petitioner can always prefer the claims on such assertions and seek adjustment of the said sum in the arbitral proceedings.

31. The same view has been taken by the Supreme Court in the case of **BSES Ltd (Now Reliance Energy Ltd.) vs. Fenner India Ltd**, (supra) wherein the Supreme Court observed at para 28 and 29 that no such special equities existed on facts as the

petitioner in the said case can always has remedy in case it succeeds in the arbitral proceedings and no such case of special equities and irretrievable injustice is made. In the words of the Supreme Court, it was observed thus:

“28. As we have stated repeatedly, the First Respondent can succeed only if the case can be brought under the two accepted exceptions to the general rule against intervention. Evidently, there is no "egregious fraud" so as to fall within the first exception. Hence, only one more point remains: whether encashment of the guarantees will create special equities (in particular, “irretrievable injury”) in favour of the First Respondent? We are not satisfied on facts that such is the present situation.

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 he 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.”

32. Applying the said proposition of law to the facts of the present case, it can be safely said that there is no such case of the special equities which is made out by the petitioner which leaves the petitioner as remediless to recover the said sum nor the said special equities as alleged by the petitioner are such which unequivocally establish the facts the complete non entitlement of the respondent to invoke the bank guarantees by the respondent. The respondent No.1 has its own version of the nature of breaches done by the petitioner and the evaluation of the same cannot be done by this court on merits while deciding the application seeking interim measures at this stage. The said questions are disputed ones which are required to be examined and adjudicated by the arbitral tribunal to be appointed in the matter.

33. The reliance of the petitioner of the judgment passed in the case of ***Continental Construction Ltd v. Satluj Jal Vidyut Nigam Ltd.*** 2006(1) Arb LR 321 in order to support the plea of the special equities is completely misplaced. This is due to the reason that the said judgment is distinguishable on facts which can be seen as follows:

- a) In the case of ***Continental*** (supra), the respondent were intending to frustrate the internal adjudicative mechanism where the said decision was agreed to be final between the parties under the agreement. The liability under the said mechanism was already determined and the respondent was intending to frustrate the same by taking recourse to the encashment of the bank guarantee. No such final and binding

the adjudicatory mechanism exists in the facts of the present case nor the said adjudication has taken place determining the liability and further no attempts to frustrate or over reach the process has been done by the respondent No.1 in the present case. In the instant case, the clause 38 merely provides for mutual consultative process but that does not preclude the parties to raise the dispute or to arbitrate the matter. Thus, the factual position in the case of **Continental** (supra) cannot be compared to the facts of the present case.

- b) In the case of the **Continental** (supra) the claims were awarded by the internal adjudicatory mechanism in favour of the petitioner which have attained finality partially by the appellate forum and the respondent by encashing the bank guarantees were actually nullifying the impact of the said findings which was in the nature of irretrievable injustice of the nature contemplated by the law as the petitioner in the said case despite having award of claims in its favour were faced with the situation of losing out monies which was subject matter of adjudicated claims between the parties and the said case was really case of irretrievable injustice. In the present case, the liability of the respective parties are yet to be determined and the breaches on the part of the petitioner are required to be adjudicated and there is no finding in favour of the petitioner as it was existing in **Continental** (supra), therefore assumption of irreparable injustice when the petitioner and the respondent's version is yet to be

examined and determined by drawing corollary from the case where there was finding by the internal adjudicatory process in favour of the petitioner and therefore encashment was done would be improper one. The case of **Continental** (supra) is thus distinct from the present one factually.

- c) In the case of **Continental** (supra), there was a term in the contract under clause 48, the bank guarantees were required to be discharged after the maintenance period was over and the said plea was upheld by the court under the head of irretrievable injustice. No such circumstances exists which discharge the bank guarantee from the encashment. Thus, on this ground also, no special equities can assumed in favour of the petitioner in the instant case.

In view of the above, the case of the **Continental** (supra) was factually different from the instant case and the reliance of the petitioner on the said case may not aid the case of the petitioner. Thus, this court is not persuaded by any plea of special equities or irretrievable injustice in the manner raised by the petitioner.

34. With regard to the argument of the petitioner about the exception of irretrievable injustice, the argument of Dr. Singhvi is that the irretrievable injustice is not just the adverse effect due to payment of money but must be of an exceptional and irretrievable nature. The injury should override the terms of the guarantee and the adverse effect shall have an impact on the commercial dealings as a whole in the country. [**U.P. State Sugar Corporation v. Sumac International Ltd.** (supra) ].

Thus, the irretrievable injustice cannot be mere burdensome loss caused to the Petitioner. An injunction can be granted only when the injury is of the kind in ***Itek Corpn.*** Case (566 Fed. Suppl. 1210) where the aggrieved party is left remediless [***U.P. State Sugar Corporation v. Sumac International Ltd.*** (supra)].

The irretrievable injustice should be of serious nature that the party is not able to reimburse itself and is not able to reclaim its loss [***U.P. Coop. Federation Limited v. Singh Consultants and Engineers (P) Limited***, (supra); ***Dwarikesh Sugar Industries v. Prem Heavy Engineering Works (P) Ltd.***, (1997) 6 SCC 450].

35. In reply to the argument of the petitioner about special equities, it is the argument of the respondent No.1 is that the special equities claimed have to meet the similar high threshold of irretrievable injustice. The special equities need to be of a gross nature that leave the party remediless. [***U.P. State Sugar Corporation v. Sumac International Ltd.*** (supra)]. A dispute as regards the breach of the contract or that the Petitioner (Contractor) has a serious counter-claim which are referred to arbitration cannot create any special equities [***BSES Ltd. v. Fenner India Limited*** (supra); ***Hindustan Steel Works Construction Ltd. v. Tarapore & Co.*** (supra)].

36. Almost all the submissions advanced by the learned counsel for the parties have been addressed during the course of my discussion in the present judgment. The resultant effect of the discussion done under the various heads above is that so far as the bank guarantees Nos.0910310BG0000160 (Rs. 5,49,74,199), 0910310BG0000161 (Rs.11,74,10,649), 0910310BG0000162 (Rs.10,83,99,960),

0910310BG0000164 (Rs.3,67,24,953), 0910311BG0001115 (Rs.3,65,00,000) and 0910310BG0000841 (Rs.2,90,00,000) encashed and invoked by respondent No.1 from respondent No.2 are concerned, the same are unconditional in nature and there exists no exceptional case of fraud or special equities or irretrievable injustice warranting interference of this Court in the encashment of the bank guarantees of unconditional nature. The invocation of the said guarantees as per the invocation letters dated 14<sup>th</sup> May, 2014 are in consonance with the terms of the guarantee documents relating to the said bank guarantees. So far as the bank guarantee Nos.0910310BG0000163 (Rs.8,83,85,339) and 0910310BG0000165 (Rs.76,78,053) which are encashed and invoked by respondent No.1 are concerned, the same are in the nature of conditional bank guarantees in view of the prima facie finding arrived by me in the preceding paragraphs. Thus, the same are required to be kept alive and are required to be dealt with as per the mechanism provided under the guarantee documents. Accordingly, the interim order dated 16<sup>th</sup> May, 2014 is modified to the extent it restrains the encashment of Bank guarantee Nos. 0910310BG0000163 and 0910310BG0000165 only. Vide Demand Draft No.157817 dated 24<sup>th</sup> May, 2014 drawn on State Bank of India, Industrial Finance Branch (HYD), a sum of Rs.47,90,73,153/- was deposited in the Court as FDRs for one year in the name of Registrar General of this Court in compliance of order dated 21<sup>st</sup> May, 2014 passed by the Division Bench of this Court in FAO(OS) No.250/2014. The Registrar General of this Court is accordingly directed to release the sum of

Rs.38,30,09,761 in total out of the said amount towards encashment of six bank guarantees along with the interest accrued on the said amount to the respondent No.1 by encashment of FDRs as prepared in view of the order dated 21<sup>st</sup> May, 2014 passed by the Division Bench in FAO(OS) No.250/2014. So far as bank guarantees Nos.0910310BG0000163 and 0910310BG0000165 are concerned, it hereby directed that the amount equivalent to what has been stated in the invocation letters dated 14<sup>th</sup> May, 2014 pertaining to the said bank guarantees i.e. Rs.9,60,63,392 is returned to the bank i.e. respondent No.2 along with the interest accrued on the said amount and same be put in the original position. The petitioner shall keep the said bank guarantees alive by renewing them, if need arises. It is hereby clarified that the above direction does not preclude the parties to deal with the said bank guarantees as per mechanism provided in the guarantee documents.

37. The petition is accordingly disposed of. The pending application for amendment of the petition i.e. I.A. No.10888/2014 (under Order 6 Rule 17 CPC also stands disposed of.

38. Copy of judgment be given *dasti* to the parties under the signatures of Court Master.

**(MANMOHAN SINGH)**  
**JUDGE**

**SEPTEMBER 03, 2014**