

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

% *Judgment Reserved on : September 11, 2014*

Judgment Pronounced on : September 15, 2014

+ **FAO(OS) 397/2014**

CONSORTIUM OF DEEPAK CABLE INDIA
LIMITED & ABIR INFRASTRUCTURE PRIVATE
LIMITED (DCIL-AIPL) THR ABIR

..... Appellant

Represented by: Mr.Rajiv Nayyar and Mr.Chetan
Sharma, Sr.Advocates instructed by
Mr.Kartik Nayar, Mr.Shaan Mohan
and Mr.Himanshu Gupta, Advocates

versus

TEESTAVALLEY POWER TRANSMISSION
LIMITED

..... Respondent

Represented by: Dr.Abhishek Manu Singhavi,
Mr.Amarjeet Singh Chandhiok and
Mr.Sandeep Sethi, Sr.Advocates
instructed by Ms.Haripriya
Padmanabhan, Mr.Aman Garg,
Mr.Vaibhav Jain, Mr.Abhimanyu
Garg and Mr.Ritesh Kumar,
Advocates

FAO(OS) 398/2014

ABIR INFRASTRUCUTURE PRIVATE LIMITED..... Appellant

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Sharma, Sr.Advocate instructed by
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CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J.

1. Since factual backdrop is common to the two captioned appeals they are being decided by a common order. Challenge in FAO(OS) No.397/2014 is to the order dated September 03, 2014 passed by the learned Single Judge dismissing application filed by the appellant under Section 9 of the Arbitration and Conciliation Act, 1996 seeking to restrain the respondent from invoking the letter dated May 30, 2014 terminating two Supply and Service Agreements : TPTL/Tower-A1/01 and TPTL/Tower-A2/01 dated February 22, 2010, modified by two Supplementary Agreement(s) dated May 10, 2010; finding a reflection by way of Amendment-1 dated July 05, 2010 to the agreement(s) dated February 22, 2010. Challenge in FAO (OS) No.398/2014 is to an order dated September 03, 2014, dismissing a petition filed by the appellant under Section 9 of the Arbitration and Conciliation Act, 1996, praying that the notice dated May 30, 2014, terminating the two contracts be stayed and the respondent be directed to maintain status quo in respect of the works pending adjudication of the dispute regarding the termination of the contract before an Arbitral Tribunal, since the contract(s) between the parties had an arbitration clause.
2. On November 18, 2009 the letter of intent was issued to the appellant resulting in a binding agreement for the Tower Packages A1 and A2, and as

per the terms of the offer, requiring the works to be completed by October 17, 2011 for the reason completion time was 23 months.

3. Undisputedly, time for completing the works was extended thrice - on November 11, 2011, November 30, 2012 and lastly on July 04, 2013. As per the last extension dated July 04, 2013, the scheduled date for completion of the works was October, 2014; and we take it to be October 31, 2014. While granting extensions no liquidated damages were levied, but the right to levy the same was reserved.

4. The works to be executed under the two agreements concerned the laying of a power supply line for transmitting electricity, to be generated from a hydro power project in the State of Sikkim on the river Teesta, to the designated end point. The work was sub-divided, keeping in view that part area where works had to be executed was hilly and part plains. The hilly section referred to as Tower Package A-1 and formed one contract had a segment from the hydro power station to Rangpoo, which was within the State of Sikkim and thereafter from Rangpoo to Panighatta in the Darjeeling District in the State of West Bengal. The plain section was from Panighatta to Kishanganj in the State of Bihar. The contract was for supply of material and erection of a Transmission Line. All necessary material to lay the foundations and erect the towers and thereafter lay the Transmission lines (called stringing) had to be supplied by the appellant and necessary works had to be executed. Since the supply line would pass through government land and private land; through forest areas and non-forest areas; necessary permissions required concerning the forest land from the competent authority and sanctions as per local laws for non-forest land had to be obtained. Consent of the owners of the land had to be obtained and

compensation paid. To access the site where the towers would be erected a Right of Way had to be obtained, and in case of private lands, as per law, which could be mutually agreed consent terms or as per the statutory provisions of the Indian Telegraph Act, 1885.

5. The parties were conscious that the execution of the works would require extensive preparatory work in the form of documentation for filing applications before various authorities to seek permissions and consent, and if a work had to be executed on private land, and if consent was not given for the compensation offered to the land owners, to initiate proceedings under the Indian Telegraph Act, 1885. This is apparent from the fact that before the contracts were entered into, but after notice inviting proposals/offer was issued by the respondent, on December 04, 2009, the appellant made an offer to the respondent in which it, inter alia, it wrote :

“As discussed during the meeting held with your good self, we would like to confirm and assure that APIL is fully competent to undertake the above works and have all expertise for preparing the Forest & Civil Aviation Proposals and obtaining the necessary clearances from respective State and Central Government authorities. We have in-house teams of surveyors, experience transmission line engineers along with back-end teams of technical experts and our Liaison Professionals.

We are prepared to offer our most competitive consultancy charges for providing above services as under:-

(The rates are thereafter given in a schedule, which we are not noting being not relevant. The quoted rate is ₹19,74,67,799/- (Rupees Nineteen Crores Seventy Four Lacs Sixty Seven Thousand Seven Hundred Ninety Nine only).

6. As per Annexure-I to the proposal dated December 04, 2009, the

scope of work concerning the proposals was detailed, and suffice it to state that the scope of work included preparing the necessary documents and liaising with the forest officers and officers of the revenue department in the State of Sikkim, West Bengal and Bihar; including documentation for submission to the District Magistrates.

7. The original agreements dated February 22, 2010 excluded from the scope of work, obtaining the necessary permissions and sanctions as also consents.

8. The scope of work was expanded under the Supplementary Agreement(s) dated May 10, 2010.

9. Relevant for the purposes of the present decision would be that the scope of works increased as per the Supplementary Agreement(s) dated May 10, 2010 were listed in Clause I, which reads :-

“Following additional services are agreed to be added under the Scope of Facilities:

- (i) Survey (Fresh Detailed Survey) and Contouring.*
- (ii) Preparation of proposals for obtaining clearances from Civil Aviation and Owners/administrative offices of EHV Power lines, Railways, Roads, Rivers & Highways, Communication lines.*
- (iii) Preparation of proposals for and arranging way leave clearances from owners of land coming under towers/compensation of damage to crops etc as well as cutting of trees in consultation with and consent of the Revenue and Forest authorities of respective district/states.”*

10. In Clause II the rates were quoted and relevant would it be to note that

while quoting the rates it was indicated that the same includes '*preparation of proposals and arranging way leave clearances from owners of land coming under towers/compensation of damages to crops etc. as well as cutting of trees in consultation with/consent of the revenue and forest authorities of respective district/States.*' A note was appended under clause II as under:-

"Note.

- (i) The rate/amount for the items mentioned at Sl.No.1.0 is inclusive of Service Tax.*
- (ii) The rates/amounts for the items mentioned at Sl.No.2.0 & 3.0 are exclusive of Service Tax, which shall be paid by M/s TPTL, as applicable.*
- (iii) The above amounts do not include the following which will be paid by TPTL directly to the lawful owners and appropriate Central/State Agencies:*
 - Compensation for (i) Diversion land required for Towers (ii) Crop (iii) Tree (iv) buildings (v) afforestation cost etc., as assessed by Forest/Revenue department or any other agency,*
 - Central or State Judicial or Non Judicial Stamp duties, legal fees or cases related to TPTL.*

11. Pertaining to the terms of payment, under clause III, it was clearly indicated vide sub-clause (B)(d) '*balance 35% of the respective lump sum amount, on receipt of approvals.*'

12. Clause IV in the Supplementary Agreement(s), pertaining to time schedule, was drawn up as under:-

“Time Schedule (Appendix-4-Contract Agreement)

The Contractor shall complete the services including the additional items of works/services within the Time for Completion given under the Contract unless an extension of time is authorized by the Employer keeping in view the additional scope of services, if any.

The Contractor shall be responsible for getting the statutory clearances including Right of Way (ROW) and way leave clearances required for completion of the Facilities within stipulated Time of Completion.”

13. Before continuing with the factual narration, it would be appropriate if we note the relevant legal provisions which necessitated the issue of clearances and permissions for execution of the works to be kept in mind by the parties and commercial terms thereof finding a reflection in the agreement(s) dated may 10, 2010, between the parties.

14. The Indian Telegraph Act, 1885, as amended by Act No.8 of 2004, with effect from April 01, 2002, vide Section 3(1AA) defines ‘*Telegraph*’ to mean ‘*any appliances, instrument, material or apparatus used or capable of use for transmission or reception of signs, signals, writing, images, and sounds or intelligence of any nature by wire, visual or other electro-magnetic emission Radio waves or Hertzian waves, galvanic, electric or magnetic means.*’ Sub-Section(4) of Section 3 defines a ‘*Telegraph line*’ to mean ‘*a wire or wires used for the purpose of a telegraph, with any casing, coating, tube or pipe enclosing the same, and any appliances and apparatus connected therewith for the purpose of fixing or insulating the same*’. Under Section 4 of the Act, within India, the Central Government has the exclusive privilege of establishing, maintaining and working telegraphs. But

as per the proviso thereof, is empowered to grant a license on such conditions, as it thinks fit, to any person to maintain or work a telegraph within any part of India. Since laying of telegraph lines would require erection of poles and towers and laying of lines, it is apparent that a power had to be vested in the Central Government to acquire any right over, along, across, in or upon land. Thus, Section 10 of the Indian Telegraph Act, 1885 was enacted to confer said power in the Central Government. If the land belonged to a local authority, permission as per Section 12 had to be obtained from the local authority, with the obligation of the local authority to grant the necessary permission on payment of such expenses as the local authority desired. For private land, the power was, as per Section 10(d), for the Central Government to acquire the right by paying compensation to the person interested. The statute envisaged a situation where the owner of a private land refused to give consent or refused to agree on the compensation to be received and thus Section 16 was enacted, as per which the Central Government was empowered to make a reference to the District Magistrate to permit the Central Government to exercise its rights under Section 10 and require a dispute pertaining to compensation to be referred to the District Judge, whose determination was final.

15. Rather than to enact similar provisions pertaining to laying of electricity transmission lines, while enacting ‘The Electricity Act, 2003’, a provision was made for the applicability of the provisions of the Indian Telegraph Act, 1885 to The Electricity Act, 2003, and thus we find Section 164 in The Electricity Act, 2003, which reads as under:-

“Exercise of powers of Telegraph Authority in certain cases.-

The Appropriate Government may, by order in writing, for the placing of electric lines or electrical plant for the transmission of electricity or for the purpose of telephonic or telegraphic communications necessary for the proper co-ordination of works, confer upon any public officer, licensee or any other person engaged in the business of supplying electricity under this Act, subject to such conditions and restrictions, if any, as the Appropriate Government may think fit to impose and to the provisions of the Indian Telegraph Act, 1885, any of the powers which the telegraph authority possess under that Act with respect to the placing of telegraph lines and posts for the purposes of a telegraphs established or maintained, by the government or to be so established for maintained.”

16. Since the respondent – ‘Teesta Valley Power Transmission Limited’ had obtained a license from the appropriate authority under Section 14 of The Electricity Act, 2003, it was authorized to transmit electricity as a transmission licensee. To enable it to exercise the powers under the Indian Telegraph Act, 1885, as per the requirement of Section 164 of The Electricity Act, 2003, the appropriate government : being the Central Government, issued the necessary order in writing on April 29, 2010, notified on May 11, 2010, (a day after the Supplementary Agreement(s) dated May 10, 2010 were executed) conferring the power which a telegraph authority possesses under the Indian Telegraph Act, 1885. The order dated April 29, 2010 succinctly notes the route of the transmission line to be led and list the district in the State of Sikkim, West Bengal and Bihar through which the transmission lines had to pass.

17. Under the contracts the appellant had furnished six bank guarantees, two to secure the mobilization advanced which appellant received from the respondent and four towards performance guarantee. Under the contract a percentage of the sum payable was to be retained by the respondent, payable

after successful completion and testing of the works. But apparently to enable the appellant to overcome a financial crisis the respondent released the withheld amounts but under two bank guarantees. Thus, in this manner, eight bank guarantees came to be furnished by the State Bank of India at the instance of the appellant, with the respondent being the beneficiary. Put in a tabular form (with one more additional column setting out the amount invoked under the bank guarantees), the details of the guarantees would be as under:-

S. No.	Number of Bank Guarantee	Type of Bank Guarantee	Value of BG	Amount Encashed
1.	0910310BG0000163 SBI	BG Form for advance payment	26,17,42,403/-	8,83,85,339/-
2.	0910310BG0000165 SBI	BG for advance payment	11,22,79,862/-	76,78,053/-
3.	0910310BG0000160 SBI	Performance Security Form	5,49,74,199/-	5,49,74,199/-
4.	0910310BG0000161 SBI	Performance Security Form	11,74,10,649/-	11,74,10,649/-
5.	0910310BG0000162 SBI	Performance Security Form	10,83,99,960/-	10,83,99,960/-
6.	0910310BG0000164 SBI	Performance Security Form	3,67,24,953/-	3,67,24,953/-
7.	0910311BG0001115 SBI	BG for release of Balance payment	3,65,00,000/-	3,65,00,000/-
8.	0910311BG0000841 SBI	BG for release of Balance payment	2,90,00,000/-	2,90,00,000/-
		TOTAL	₹62,75,85,144	₹47,90,73,153/-

18. On May 14, 2014, the respondent invoked the four performance guarantees and the two bank guarantees issued at the instance of the appellant, when withheld payments were released in full to it, and the two

bank guarantees for advance payment. The latter two, not in full value of the guarantees, but as per serial No.1 and 2 of the tabular statement hereinabove.

19. Appellant immediately rushed to this Court and filed OMP No.557/2014 under Section 9 of the Arbitration and Conciliation Act, 1996 praying that the State Bank of India be restrained from making any payment to the respondent under the bank guarantees. A reference was made in the pleadings to a bank guarantee No.2102413BG0001287 in sum of ₹5.8 crores issued by the State Bank of Hyderabad, but for what purpose has not been brought out. The reply filed by the respondent is centered around the eight bank guarantees issued by the State Bank of India. The impugned decision dated September 03, 2014 has discussed the issue concerning the eight bank guarantees issued by State Bank of India. No arguments were advanced even before us concerning the bank guarantee issued by the State Bank of Hyderabad. What happened to the guarantee, whether or not it was invoked and payment was received? The reason being that the appellant had never furnished said guarantee to the respondent. It appears that the appellant had got a bank guarantee in sum of ₹5.8 crores signed by the manager of a branch of the State Bank of Hyderabad, but was never submitted to the respondent. In the hurry to draft the petition, because the respondent had invoked the eight bank guarantees issued by the State Bank of India and time was running out, a reference got made to a non-existent bank guarantee. It was pleaded in the petition that the appellant was not in breach of its contractual obligations. It was further pleaded that apart from the amount due under the contract for work done, the appellants had a claim of ₹41.23 crores for price variation and recompense for idle machinery. It was pleaded that the respondent had not complied with its obligations under the two

contracts to ensure that the appellant had a Right of Way (ROW) to access the sites, nor had it obtained the necessary consent from the owners of lands who would be affected during the execution of the work. It was pleaded that time had been extended, without imposing liquidated damages, to complete the work by October, 2014. It was pleaded that on May 09, 2014 the respondent had issued a cure notice as per Article 36.2.2 of the General Conditions of the Contract as per which 14 days mandatory time was given to the appellant to take remedial action. It was thus pleaded that the invocation of the guarantees on March 14, 2014 was ex-facie fraudulent and mala-fide. It was also pleaded that invocation of the guarantees would cause irreparable injury to the appellant. It was pleaded that it was a case of special equities in favour of the appellants which was not in breach of any obligation under the contract and the execution of the works was delayed to reasons solely attributable to the respondent.

20. To put it pithily, the special equity and fraud pleaded was on two premises : (i) that the appellant was not in breach of its obligations under the contract; and (ii) that having extended the time for completion of the works by October, 2014 and having given a cured notice on May 09, 2014, the duration of the cure period within which appellant could take remedial action, invocation of the bank guarantees on May 14, 2014 was mala-fide and hence fraudulent or alternatively said facts creating a special equity in favour of the appellant.

21. The respondent opposed the petition pleading that the eight guarantees were unconditional and it was within its right to invoke the same. It was pleaded that it had received the amount under the eight bank guarantees and had presented the banker's cheque for encashment to its banker : Bank of

Baroda. It was denied that the respondent was in breach of any obligation.

22. On May 16, 2014 the learned Single Judge stayed encashment under the guarantees noting that a cure notice was issued in terms of clause 36.2.2 of the general conditions of the contract on May 09, 2014 and the guarantees were invoked on May 14, 2014. The learned Single Judge also noted that time for completion of the contract had been extended till October, 2014. The learned Single Judge noted that a caveat had been lodged by the respondent by one Mr.Aman Garg, Advocate. The learned Single Judge noted that he had taken up the matter for hearing at 10:00 AM on a mention being made and the Court Master had telephonically informed Mr.Aman Garg that the matter would be taken up immediately. The learned Single Judge had noted that Mr.Aman Garg did not appear till 10:25 AM.

23. The respondent filed FAO (OS) No.250/2014 attacking the order dated May 16, 2014, pleading that in spite of a caveat lodged, the learned Single Judge had passed the order in spite of being aware that a caveat had been lodged. It was pleaded that Court timing in the Delhi High Court commences at 10:30 AM and telephonic information by the Court Master to Sh.Aman Garg, Advocate was no substitute for the counsel being served with a copy of the OMP.

24. The Division Bench disposed of the appeal directing that ₹47.90 crores received under eight bank drafts by the respondent shall be remitted to this Court and kept in a fixed deposit till the OMP was decided by the learned Single Judge. The Division Bench noted that appellants learnt of the bank guarantees being invoked on May 15, 2014 and thus had hardly any time to respond to the caveat filed by the respondent.

25. This appears to be the reason that at the stage of final hearing before

the learned Single Judge the issue was discussed only with respect to the bank guarantees issued by the State Bank of India.

26. Concerning the bank guarantees, the arguments advanced before the learned Single Judge were : (i) that the guarantees were conditional; (ii) the respondents were in breach by not ensuring a Right of Way (ROW) and unencumbered land being made available for construction of towers; (iii) that the contract period was extended till October, 2014 and before said date respondent could not allege any breach, the notice to cure under clause 36.2.2 of the General Conditions of the Contract given on May 09, 2014 disentitled respondents to invoke the bank guarantees five days thereafter. The respondent was in touch with TATA Project Ltd. to which it had awarded the work unfinished, evincing complete mala-fide; and (iii) there were thus special equities in favour of the appellant.

27. The learned Single Judge has found two out of the eight bank guarantees as conditional. Six have been found to be unconditional. ₹9,60,63,392/- concerning bank guarantees No.0910310BG0000163 and 0910310BG0000165 has been directed to be returned to the State Bank of India with interest accrued on the deposit of ₹47,90,73,153/- received in this Court pursuant to the orders passed by the Division Bench in FAO (OS) No.250/2014. The remaining amount has been directed to be paid along with accrued interest to the respondent.

28. Needless to state the learned Single Judge has held that there were no special equities. The learned Single Judge has, in paragraphs 28 to 30, very briefly discussed whether prima-facie the respondent was in breach. The learned Single Judge has held that these issues had to be decided by the Arbitral Tribunal. The learned Single Judge has noted a few decisions

holding that pending adjudication of disputes before an Arbitrator it is permissible for a beneficiary to encash the bank guarantees. The learned Single Judge has noted the well-recognized legal position that the bank guarantees issued by bank are an independent contract between the bank and the beneficiary and issues concerning invocation of bank guarantee have to be determined on the language of the bank guarantees.

29. On May 30, 2014, the respondent proceeded to terminate the agreements with the appellant. This resulted in the appellant filing OMP No.651/2014, a petition invoking Section 9 of the Arbitration and Conciliation Act, 1996, praying that pending resolution of the disputes before the Arbitral Tribunal (yet to be constituted), the notice of termination dated May 30, 2014 be stayed and status quo be maintained.

30. In the said petition it was pleaded that time was extended thrice and lastly up to October, 2014 to complete the works and thus on said reason alone it was contended that the respondent could not terminate the contract. It was highlighted in the pleadings that the foremost obligation to be complied with before any works could be executed was to obtain the Right of Way, which was the obligation of the respondent. It was pleaded that necessary forest clearances had to be obtained by the respondent. It was highlighted that only on April 11, 2012, the respondent informed about Right of Way issues in the State of Sikkim. It was pleaded that at a meeting held on June 15, 2013, the respondent deputed a team of its officers to settle issues concerning Right of Way and compensation. Reference was made to various letters written by the appellant concerning Right of Way and sanction to utilize forest land for the project. Reference was made to the notice to cure dated May 09, 2014. It was highlighted that as per contract

the appellant would have fourteen days to take remedial action pursuant to the notice to cure. It was pleaded that the respondent is a joint venture of Power Grid Corporation of India and Teesta Urja Ltd. the major shareholding whereof is held by the State of Sikkim. It was thus pleaded that the respondent could not act unreasonably and in an arbitrary manner.

31. At the outset we may note that the pleadings in the OMPs are sketchy while make a reference to correspondence between the parties, in that, do not bring out the intention of the appellant to plead a reference to the conduct of the parties during execution of the works concerning how they understood the contractual terms. We simply highlight that it is settled law that if a term of a contract is found to be ambiguous, it is open to either party to plead, with reference to the contemporaneous acts of the parties during the executor period of the contract, to show how the parties understood the same. We are so highlighting that extensive arguments were advanced in appeal before us making a reference to the conduct of the parties gleaned through the correspondence exchanged between the parties. We may additionally note that in the pleadings there is no reference to any facts nor have any pleas being urged concerning award of some works concerning the project to TATA Projects Ltd. To put it pithily, OMP No.651/2014 was premised on : (i) reasonableness in action expected from an instrumentality of the State; (ii) time for completion of the works being extended without levy of liquidated damages thrice, and time for completion of the works being extended to October 31, 2014; (iii) cure notice being given on May 09, 2014 requiring fourteen days' time to the appellant to remedy the breaches if any and proximity of the time when contract was terminated with the expiry of the said fourteen days period i.e. May 23, 2014 and May 30, 2014, being

indicative of malice and gross unreasonableness in the action : the argument being that if by May 23, 2014 the appellant, in compliance with the cure notice, would take remedial action, it was impossible that by May 30, 2014 it would be able to complete the works; and (iv) delay was occasioned principally due to non-availability of ROW and permissions under the Forests Act concerning forest land and consent from owners of private land as also from the local authorities, all of which were the obligations of the respondent. (The underlying emphasis in the pleadings would be that it was a water tight strong prima facie case in favour of the appellant). It was pleaded that there was a mechanism under the contract to resolve the issues and thus the respondent could not without exhausting the resolution mechanism straightway proceed to terminate the contract.

32. We may note that in the pleadings there is a scattered reference to a few letters exchanged, but during arguments in appeal learned counsel had referred to various letters exchanged, to which reference has not been made in the pleadings, but were otherwise filed along with the OMP or at stages thereafter.

33. We would like to speak a word on this.

34. Rule 9 of Order 6 of the Code of Civil Procedure guides that wherever the contents of a document are material, it shall be sufficient in any pleadings to state the effect thereof as briefly as possible, without setting out the whole or any part thereof. Rule 2 of Order 6 guides us that pleadings must contain in a concise form on material facts on which a party pleading relies for its claim or defence as the case may be. Thus, if it is the case of a party that it would be relying upon the conduct of the parties during the contract period, pleadings of fact have to be made of said conduct, and if the

conduct is sought to be inferred from correspondence exchanged, a brief reference to the correspondence must be made in the pleadings to bring out as to how the party was bringing out a fact asserted from the correspondence. This would enable a Court to focus on the issues of fact on which parties are at variance with each other.

35. This helps the Court in focusing its attention when arguments are advanced and notes are taken by the presiding judge.

36. As we would unfold the narrative of the factual controversies with reference to the correspondence exchanged by the parties, it would be apparent that had parties been focused in their pleadings, judicial time would not have been wasted. We note that at the opening of the arguments in the two appeals, learned senior counsel for the appellant had contended that under the contract the obligation to obtain the Right of Way and various permissions, sanctions and consents from land owners, be it private land owners, government owning the land or local authorities owning the land, was that of the respondent; but had to argue completely differently in rejoinder submissions. The fulcrum of the opening arguments on issues concerning the Right of Way and clearances commenced from a letter dated June 20, 2012, written by the respondent with reference to a committee constituted to resolve the issues concerning settlement of compensation to land owners, gram panchayats and the Right of Way. The arguments commenced, and naturally they were attractive to the Court, that the Supplementary Agreement had put in, as noted hereinabove in paragraph 11 above, in Clause IV pertaining to Time Schedule, the words '*the contractor shall be responsible for getting the statutory clearances including Right of Way (ROW) and way leave clearances required for completion of the*

Facilities within stipulated Time of Completion'. The letter dated June 20, 2012, written by the respondent to the appellant refers to Section 164 of the Electricity Act, 2003 and brings out that all powers for Right of Way for the transmission line has been vested in it. The letter thereafter refers to pending issues of compensation to be paid to land owners for tower location in the State of Sikkim, West Bengal and Bihar. It then refers to a meeting held on June 07, 2012 wherein it was decided that a committee comprising members of both contracting parties shall be constituted to facilitate settlement of ROW issues. It then refers to constitution of a three member committee comprising A.K.Tyagi General Manager and Mr.D.Ravi Prashad Senior Manager of the respondent and Mr.Gautam Sen, General Manager of the appellant or alternatively Mr.T.Subramanyam, Sr.DGM of the appellant. The letter terminates by listing the mandate of the committee to be to assess compensation to land owners and gram panchayats where towers had to be erected as also Right of Way to reach those sites as also for stringing. At first blush, the letter would be indicative of the fact that as of said date the respondent had admitted its liability to obtain the clearances, consents and permissions and the role of the appellant as per the Supplementary Agreement(s) dated May 10, 2010 being limited to helping the respondent with the documentation etc. Our entire focus during hearing of arguments by the appellants was to take copious notes with reference to documents referred to by the learned senior counsel for the appellants concerning said aspect. For indeed, the correspondence between the parties evinces delay largely attributable to Right of Way issues and issues concerning compensation to land owners and permissions under the Indian Forest Act. But as we heard the respondent, a completely new dimension emerged. We

shall be bringing out this aspect while noting the contemporaneous exchange of correspondence, but would terminate our discussion (on the subject of pleadings) with a lament on the pleadings of the appellant and bring on record our anguish that valuable judicial time was wasted because we had to hear arguments in the two appeals spread over four days commencing from Monday the 8th day of September, 2014 till Thursday, the 11th day of September, 2014. On each day we had to devote nearly three hours out of the five hours sitting time.

37. The respondent opposed the relief prayed in OMP No.651/2014, pleading that as per the Supplementary Agreement(s) executed on May 10, 2010, the obligation to obtain clearances from the Forest Authorities and authorizations to enter upon private land and resolved issues of compensation to land owners as also to obtain permissions and sanctions from the local authorities, was that of the appellant. The respondent denied its character of that being an instrumentality of the State. Concededly the respondent is a company. 26% shares being held by Power Grid Corporation of India Ltd., a wholly owned company by the Central Government. The remaining 74% share are held by Teesta Urja Ltd. 26% shares of which company i.e. Teesta Urja Ltd. are held by the Government of Sikkim and the remainder by private individuals. Thus, it was pleaded that the respondent would not qualify to be an instrumentality of the State. Even taking into account that 26% share holding in Teesta Urja Ltd., which in turn held 74% shares of the respondent, was held by the Government of Sikkim and 26% shares of the respondent were held by a Government owned company, it would not qualify as an instrumentality of the State because the majority controlling shares of the respondent were still in private hands.

Thus, its actions could not be tested on principles of reasonableness and fairness – a requirement of public law, concerning actions by a State and its instrumentalities. The respondent pleaded breach of obligations by the appellant. The respondent pleaded that under Section 9 of the Arbitration and Conciliation Act 1996 the Court would not stay a letter of termination of a supply and works contract because claim for damages would be adequate remedy. It was pleaded that the appellant itself had evinced a desire to off-load the unexecuted part of the contract on April 03, 2014 and this would be an expression of the appellant not being ready and willing to comply with its obligations under the agreement. It was pleaded that a stay of the letter of termination would amount to a specific performance of the supply and works contract. It was pleaded that the contract was terminable.

38. Vide impugned order dated September 03, 2014, the learned Single Judge has dismissed the application filed by the appellant and has vacated the ad-interim order dated June 06, 2014 requiring parties to maintain status quo.

39. In dismissing the petition, the learned Single Judge has held after noting the facts and the contentions advanced, with the discussion commencing from paragraph 48 onwards of the decision : on the subject as to who had to obtain the necessary permissions and approvals as also consent from land owners, that issue was vexed and each side was blaming the other. In paragraph 51 the learned Judge has opined that it was for the Arbitral Tribunal to take a call and that it would not be proper for the learned Single Judge to decide on the merits of said controversy.

40. Noting various judgments cited on the subject of terminable contracts and whether for a supply and works contract an injunction requiring status

quo to be maintained in the context of damages being an alternative remedy and specific performance of such contracts not being directed, all four being rolled into one set of discussion, the learned Single Judge has opined that highly disputed questions of fact were arising for consideration and that claim for damages would be the appropriate remedy. The learned Single Judge has highlighted appellant's letter dated April 03, 2004 to off-load the remaining work at no risk and cost to the appellant but with recompense for loss of profit. The learned Single Judge has, while discussing said four issues of law, albeit based on facts, discussed whether there was reasonableness in the action of the respondent to terminate the contract. The decisions noted by the learned Single Judge on said issue concern the defending party being an instrumentality of the State. No opinion has been expressed by the learned Single Judge regarding respondent's character as a State or an instrumentality of the State. The learned Single Judge has, during the discussion, in paragraph 54, held that a very high degree of prima facie case is required to be shown in order to obtain relief of stay of termination of a supply-cum-works contract. In the same paragraph the learned Single Judge has held that the '*reasoning accorded by the petitioner by informing the faults of the respondents are not the ones which are ex-facie apparent on the face of it therefore, prima facie, the reasons for termination as given by the respondents cannot altogether be brushed aside by calling it frivolous in nature.*' A finding which has invited the attack by the appellant - on the one hand the learned Single Judge has opined that the vexed questions of facts at which the parties were at variance would advisedly be got settled before the Arbitral Tribunal and thus the learned Single Judge was not delving into the same, but on the other hand a finding

has been returned against the appellant that prima facie it had not made good its submissions that the reasons for termination given by the respondent were not justified.

41. Having already noted in paragraph 2 above that the letter of intent for the two tenders were issued on November 18, 2009 and having noted in paragraph 1 above that on February 22, 2010, two contracts were executed containing the terms, commercial as well as technical, we have already noted that on May 10, 2010, two Supplementary Agreement(s) were executed reflecting further obligations of the appellant and the respondent.

42. Under the original contract, vide Clause 6, the respondent was obliged to acquire and provide legal and physical possession of the site and access thereto. The respondent was also obliged to acquire all permits, approvals and licenses from all local, State or National Government authorities required for the performance of the contract.

43. Thus, as per the original contract dated February 22, 2010, it was the responsibility of the respondent to pay compensation to the owners of private land, whether to be utilized for erection of the towers or by way of Right of Way. The respondent had to obtain the necessary permissions in respect of the land if it belonged to a gram sabha or a local authority. In respect of forest land, the necessary permissions had to be obtained by the respondent.

44. But, the Supplementary Agreement(s) dated May 10, 2010 altered said responsibility evidenced by Clause 1 of the Supplementary Agreement(s) dated May 10, 2010, which we have reproduced in paragraph 9 above. Vide sub-clause (iii) the appellant took upon itself the task of 'Preparation of proposals for and arranging way leave clearances from owners of land

coming under towers/compensation of damage to crops etc. as well as cutting of trees in consultation with and consent of the Revenue and Forest Authorities of respective district/States’. Further, as per Clause II, where rates were quoted, as noted in paragraph 10 above, a distinct rate was quoted for ‘*preparation of proposals and arranging way leave clearance from owners of land coming under towers/compensation of damage to crops etc. as well as cutting of trees in consultation with and consent of the Revenue and Forest Authorities of respective district/States’*’.

45. The note under Clause II clarified that compensations had to be paid by the respondent. Under Clause IV, while listing the time schedule within which the necessary approvals had to be obtained, a note was recorded that the appellant shall be responsible for obtaining the statutory clearances including Right of Way and way leave clearances.

46. Thus, appellant’s argument that ‘*the insidiously added paragraph beneath the time schedule clause*’ could not shift the liability on the appellant to obtain the necessary clearances, approvals and sanctions holds no water.

47. As noted in paragraph 5 above, after the letter of intent was issued, but before the contract was signed on February 22, 2010, the appellant had vide its letter dated December 04, 2009, relevant part whereof has been noted in paragraph 5 above, expressed its desire to not only prepare necessary documents but even obtained necessary clearances from the State and Central Government Authorities. It is apparent that in harmony with the tender documents, the contract bonds were signed on February 22, 2010, but side by side the parties were discussing shifting of the obligation of the respondent under Clause 6 of the contract to the appellant, and upon further

negotiations, it being agreed that the appellant would take over said responsibility, the Supplementary Agreement(s) dated May 10, 2010 were executed, followed by formally amending the original contract by Amendment-1 on July 05, 2010. Of course the money had to be paid by the respondent.

48. In this regards it assumes importance to note that the requirement of Section 164 of The Electricity Act, 2003 had required a written order to be issued by the appropriate government authorizing the respondent to lay down electric lines for transmission of electricity. As noted in paragraph 16 above, on April 29, 2010 the Central Government had issued the necessary order which was notified on May 11, 2010, a day after the Supplementary Agreement(s) dated May 10, 2010 were executed. It is clear that the parties were aware on March 29, 2010 that the respondent had the necessary authorization required by Section 164 of The Electricity Act, 2003. The ensuing notification on May 11, 2010 was thus a mere ministerial act.

49. There is thus no merit in the contention advanced before us that when the Supplementary Agreement(s) were executed on May 10, 2010, since the respondent did not have the necessary authorization in its favour under Section 164 of The Electricity Act, 2003, the agreement in question was void.

50. We need to deal with another legal submission at this stage. It was urged by learned senior counsels for the appellant that the obligation of the respondent in terms of Section 164 of The Electricity Act being a statutory obligation, it could not be delegated, and hence the Supplementary Agreement(s) were void.

51. The argument overlooks the fact that an order contemplated by

Section 164 of The Electricity Act empowers the licensee to exercise the powers under the Indian Telegraph Act, 1885, while laying down transmission lines. The powers under the Indian Telegraph Act, 1885 which the licensee exercises are as per Section 10. The right to acquire land by paying compensation as per Section 10(d) is a power available sans a statute because in an open market a willing seller can be contacted to sell the land to a willing buyer. The statutory power is actually to be found in Section 16, which is to make a reference to the District Magistrate to permit entry upon a land pending adjudication of dispute qua compensation to be referred to the District Judge. The word power would be misnomer, and the correct word should be '*right*'. A right is conferred upon the Central Government (a person to whom a license has been issued also having same right) to make a request to the District Magistrate to pass an order permitting it to take possession of land or have a Right of Way through land, requiring issue of compensation to be paid to be decided by the District Judge. To put it differently, ministerial acts required to be performed by firstly entering into negotiations with the owners of lands and upon failure to settle a rate, require a reference to be made to the District Judge can be performed by any person authorized by the licensee; of course, the person concerned acts for and on behalf of the licensee.

52. As we shall note the correspondence between the parties, it would become clear that the appellant rightly understood the legal position to be as aforesaid, evidenced by the fact that the appellant was, with the consent of the respondent, negotiating with owners of private land to discuss the compensation payable for Right of Way and/or site where towers had to be erected. The appellant was preparing the necessary documents required to

be submitted to the various authorities and after obtaining signatures of the authorized officer of the respondent, was submitting the same and was taking follow up action. The money was paid by the respondent. As per the Supplementary Agreement(s) dated May 10, 2010, the appellant was raising bills and receiving payments.

53. It is trite that while exercising power to pass interim orders, a Court should avoid discussing the merits of the factual controversies and return determinative findings, lest parties are prejudiced at the trial before the Court or the Arbitral Tribunal, and a reference to the facts in an order which is by way of an interim nature has to be the bare minimum to capture the backdrop facts; and only prima facie findings should be returned, we shall hereinafter be capturing the backdrop facts in which the dispute has surfaced and thereafter determine whether the appellant made out prima facie case in its favour for restraining the respondent from invoking the bank guarantees and terminating the contract.

54. But we note that the injunction order passed by the learned Single Judge concerning two bank guarantees which were found to be conditional bank guarantees has not been challenged by the respondent, and thus regarding the bank guarantees, we shall be noting the facts relevant to the six guarantees for which the finding returned is in favour of the respondent. The guarantees have been opined to be unconditional, a finding which was not challenged during arguments when the two appeals were heard.

55. On September 07, 2011 the Government of India issued the necessary clearance under the Indian Forest Act, 1927 for execution of the works in the State of Sikkim. Pertaining to the forest land in the State of West Bengal the necessary permissions were granted by the Central Government under the

Indian Forest Act, 1927 on May 28, 2013. The two notifications would show that 48.4485 hectares land in the State of Sikkim and 47.4932 hectares land in West Bengal was affected.

56. Neither party has brought out as to how many towers were to be erected in these forest lands. But one thing is clear, the first segment of the transmission line, from the hydro power stations on Teesta River up to Rangpoo had the necessary clearance under the Indian Forest Act, 1927 by September 07, 2011. Thus, the appellant was in a position to commence erection of towers in forest land in the State of Sikkim by September 07, 2011 and prior thereto, in the State of Sikkim was in a position to erect towers on non-forest land, but subject to the consent of the land owners, which obviously subsume an agreement to pay the necessary compensation and in failure of such an agreement after obtaining necessary permissions from the District Magistrates. The adjudication of compensation payable by the District Judge would not have impeded the execution of the works. Likewise, in the State of West Bengal, the works could have been executed on non forest land. Post May 28, 2013 this hindrance qua forest land ceased to exist. There appears to be no forest land adversely affected by the power supply line in the State of Bihar.

57. Undisputedly the transmission line had a length of 36 km between the hydro power plant on Teesta river in the State of Sikkim till Rangpoo, 70 km between Rangpoo and Panighatta and 104 km between Panighatta and Kishanganj. Further, it is undisputed position that the number of towers to be erected in the Sikkim segment was 278 and in the West Bengal and Bihar segment 291. The stringing was 106 km in the State of Sikkim and West Bengal and 104 km in the remainder. The further undisputed position is that

when the contracts were terminated on May 30, 2014 only 86 towers were erected out of 278 in the first segment and tower foundation was complete only in 107. In other words $278 - 86 = 192$ towers had yet to be erected and $278 - 107 = 171$ foundations had yet to be laid. As against 106 km stringing only 11 km stringing had been done. In the second segment 262 towers were erected leaving a short fall of 29 towers. 265 foundations had been laid leaving a short fall of 26. Of the 104 km length, stringing had been completed only in 59 km.

58. Since most of the correspondence filed by the parties pertains to the year 2011 onwards, it is apparent that the period June, 2010 till December, 2010 was consumed in preparatory works. We presume that owners of private land were contacted to negotiate the compensation to be paid if private lands were to be utilized for Right of Way or where the towers had to be erected. Revenue records were looked into. Gram panchayats were contacted. If the lands belonged to statutory or local authorities, they were contacted. Necessary permissions if all required under local laws were applied for. But things were moving slowly.

59. May 02, 2011 appears to be the date when the parties decided to tighten their belts and proceed ahead from the seat of their pants, for the reason a little over one year had gone by. The stipulated date for contract to be completed was October 17, 2011. Hardly any progress had been made. On May 02, 2011 a high level progress review committee meeting was held in which 12 officers of the respondent and 4 of the appellant were present. A lengthy minutes spanning 7 pages were drawn up highlighting the progress achieved in the form of the District Magistrates being contacted and instructions issued by them in North Sikkim, South Sikkim and Darjeeling

portions of the work in the State of West Bengal. The minutes record progress made with the various gram panchayats. The minutes note that in the West Bengal portion urgent steps would be taken, treating the portion to be priority, to obtain necessary orders for 24 locations concerning forest. Field work status in North, East and South Sikkim was noted. Meetings were thereafter held at regular intervals on June 29, 2011, which were minuted, July 30, 2011, August 30, 2011, November 02, 2011, December 02, 2011 and December 27, 2011.

60. The minutes of the meetings would evidence that the respondent kept on expressing its concern at the slow pace of work, and we need to simply highlight that by December 27, 2011, evidenced by a letter written by the respondent to the appellant, of the 278 towers to be erected in Segment A1 only 9 were erected and as regards tower foundation the same was complete only in 55.

61. The minutes of the meetings would show that the representatives of the appellant were agreeing that the Right of Way clearances and consents to be obtained from owners of private land and in the alternative to apply to the District Magistrates was their obligation.

62. Thus, prima facie, conduct of the appellant from the inception of the contract evinces its understanding its obligations under the Supplementary Agreement(s), contrary to what the appellant now contends before us.

63. It was only on April 03, 2012 that the appellant appears to have, for the first time, tried to half heartedly take the stand that its obligations under the Supplementary Agreement(s) dated May 10, 2010 was limited to preparing cases under the Forest Act, obtaining ROW and proposals for obtaining mandatory clearances. The appellant unilaterally sought to

terminate the Supplementary Agreement(s). The respondent immediately responded on April 16, 2012 refuting the contents of the appellant's letter dated April 03, 2012 informing that the appellant could not unilaterally terminate the contract or suspend performance thereof in view of the general conditions of the contract No.35 and 36. The appellant was informed of its obligations under the Supplementary Agreement(s). It is at this stage that the respondent decided to form a committee to facilitate settlement of compensation issues and wrote a letter to the appellant which reads as under:-

“Sub: Formation of Committee to facilitate settlement of compensation issues for construction of 400 KV Teesta III HEP-Kishanganj (Karandighi) transmission line.

Teestavalley Power Transmission Ltd.(TPTL) have been conferred, under Section 164 of the Electricity Act, 2003 all powers of Right of Way for establishment and maintenance of 400 KV Teesta III HEP-Kishanganj (Karandighi) transmission line falling in the States of Sikkim, West Bengal and Bihar. Accordingly construction works i.e. foundation and tower erection are being carried out for the said line after release of payment against crop compensation to the land owners.

In the State of Sikkim, compensation amount to the land owners for tower locations is being assessed by the concerned District Collectors and payment is being released to the concerned District Collectors for onward distribution to the land owners. The amount of compensation in the State of Sikkim is in the range of ₹1.00 to 2.00 lacs per tower location. However, compensation amount for damage of crops for transportation of tower materials, hardware, insulators, T&P etc. for approach to the tower locations is not being assessed by the District Collectors.

In the State Bihar and Naxalbari area of West Bengal Plain,

compensation amount to the land owners for tower locations as well as approach to the locations is being assessed by the concerned Gram Panchayat. It may be mentioned that amount of compensation these locations is in the range of ₹8000 – ₹10000 per tower location. However, in few locations of these area compensation amount is in the range of ₹10000 – ₹40000.

In the Tea Estates of West Bengal Plain, there are 17 tower locations where ROW issues are to be settled with the owners of the Tea Estates which is pending for last two years. Similarly, ROW issues for 94 tower locations In non-forest area of West Bengal Hills (Darjeeling District) are also for last two years. The issues was deliberated in the meeting taken by Director (Projects), POWERGRID on 7.6.2012 wherein it has been decided that a committee comprising of members from TPTL and DCIL-AIPL JV shall be constituted to facilitate settlement of ROW issues.

In view of above, it is proposed to constitute a committee comprising of the following three members from TPTL and DCIL-AIPL JV to facilitate settlement of ROW issues:

- (i) Mr.A.K.Tyagi, General Manager, TPTL*
- (ii) Mr.Goutam Sen, General Manager, DCIL-AIPL JV alternative Mr.T.Subramanyam, Sr.DGM, DCIL-AIPL JV.*
- (iii) Mr.D.Ravi Prasad, Sr.Manager, TPTL/Mr.Prashant Singh Manager, TPTL.*

The committee shall carry out site visits and perform the following activities:

- (i) Locations in Sikkim : To assess compensation amount for damage of crops for transportation of tower materials, hardware, insulators, T&P etc. for approach to the tower locations in foundation & erection as well as line corridor for stringing, not assessed by the District Collectors and vetting of the same by the Gram Panchayats.*

- (ii) *Locations in Bihar and Naxalbari area of West Bengal Plain : To assess compensation amount of more than ₹10000/- for damage of crops in tower locations/line corridor for foundation, erection & stringing and vetting of the same by the Gram Panchayats.*
- (iii) *Locations in Tea Estate of West Bengal Plain : To assess compensation amount for damage of tea plants in tower locations/ line corridor for foundation, erection and stringing in association with Tea Estates Officials and vetting of the same by the District Revenue officials.*
- (iv) *Locations in West Bengal Hills (Darjeeling District) : To assess compensation amount for damage of crops in tower locations/line corridor for foundation, erection & stringing and vetting of the same by the Dist.Revenue Officials.*

The Committee shall submit its report for the assessed locations along with the compensation amount to the Sr.Vice President for approval. However, present methodology of compensation payment for locations in Sikkim assessed by the District Collectors and for locations in Bihar & West Bengal assessed by the Gram Panchayats upto ₹10000/- shall be continue.

The proposal may kind be approved.”

64. Much was sought to be made out by learned Senior counsel for the appellant on the language of the letter and in particular the constitution of the committee to facilitate settlement of ROW issues. With reference to the opening paragraph of the letter wherein it has been recorded that power has been conferred under Section 164 of the Electricity Act, 2003 for Right of Way establishment and maintenance of transmission lines, it was urged during opening of the arguments in the appeal that by writing said paragraph

the respondent has admitted its obligations to obtain the Right of Way after making payment to the affected land owners. With reference to next two paragraphs wherein it is written that compensation issues are being assessed by the District Collectors it was sought to be urged as if the respondent was informing the appellant that it was actively pursuing issues of compensation. With respect to the constitution of the committee it was sought to be projected as if the respondent was constituting a committee so that the appellant, having a member on the committee, would be kept aware of the status of the Right of Way. But, in view of the documents read by the respondent, during arguments in rejoinder the learned senior counsel for the respondent laid great emphasis on a letter dated May 21, 2012 written by the appellant to the respondent in which it wrote as under:-

“Dear Sir,

Kindly refer to our above cited letters/referred mails inviting your attention to the grim situation, we are being made to face due to non-payment of compensation payments by TPTI. While the erection gangs lost working time, we continue to incur idle charges of erection gangs and Watch & ward expenses at several other locations where tower material is shifted in advance as per program.

As may be seen from the enclosed details, there are 218 cases of compensation payments pending with TPTI for locations in Bihar (A2 package).

- *61 cases submitted on 2nd April,*
- *97 cases submitted on 24th April,*
- *43 cases submitted on 2nd May,*
- *16 cases submitted on 9th May, 12.*

This delay in payment of compensation is holding up tower erection work at 12 locations (278/1, 278A/8, 281, 282/1, 285,

294B, 294D/2, 294D/4, 294F, 294E/2 and 295B). We will be submitting our claim for the idle labour as well as Watch & Ward of tower material wherever it is shifted but erection has been stopped by landowners on account of non-payment of compensation.

Similarly in Bengal (A2 package) there are 60 cases of compensation payments pending with TPTI.

- 28 cases submitted on 24th March 12.*
- 32 cases submitted on 2nd May, 12.*

(Detail of Owners, location Nos & compensation amount are enclosed)

We are in the process of identifying & cleaning corridor for stringing work, in Bengal A2 section, however non-payment of previous compensation is a large issue for the affected landowners which needs to be addressed immediately.”

To urge that the letter in question evidenced that by May 21, 2012 that it had processed 218 cases of compensation and that delay in payment of compensation was holding up tower erection at 12 locations. The argument was that the letter in question was proof that in spite of the appellant processing the claims concerning payment of compensation and issues of compensation being resolved, the non-payment of the compensation by the respondent was delaying the execution of the works. It is apparent that in rejoinder a totally new case concerning the obligation of the parties pertaining to whose obligation it was to obtain the Right of Way and settle compensation claims.

65. The learned Senior counsel for the appellants had referred to their letter dated June 10, 2013 wherein it had written to the respondent on the subject of non-availability of forest clearance and urged that assuming it

being appellant's responsibility to process the applications and take up follow up actions thereafter for clearances under The Indian Forest Act, the appellant could not take the matter any further because clearances under the Forest Act were conditional.

66. We fail to understand the logic of the argument for the reason the two permissions concerning forest land in the State of Sikkim and the State of West Bengal granted by the Central Government, the first on September 07, 2011 and the second on January 07, 2013, grant the necessary sanctions. There are no conditions attached to the sanction(s). The condition antecedent are being treated by the appellant as a condition precedent.

67. The condition antecedents regarding felling/pollarding/pruning of trees requiring permission of the State Forest Department, compensatory forestization etc. are relatable to the Forest Conservation Act, 1980, and do not in any manner hinder the clearances under the Indian Forest Act.

68. Another twist was given to the argument by referring to a Government of India order dated March 21, 2011 as per which the Government of India had instructed that unless approvals under the Indian Forest Act are obtained no work should commence even in non-forest land because if ultimately approval under the Indian Forest Act is not granted, the entire money spent on a project would be wasted.

69. The argument overlooks that on January 07, 2013, the Government of India had modified its aforesaid recommendatory directive for linear projects involving use of forest land. Linear projects would be such as roads, canals, pipelines and electricity transmission lines. The relaxation was that work could commence in non-forest land if it was technically feasible to execute the project along and alternate alignment if approval under The Indian Forest

Act was not granted. It was not the case of the appellant that it was not possible to complete the supply line along and alternate alignment if approval under The Indian Forest Act was refused. The position would therefore be that at least for the stretch in the State of Sikkim there being a forest clearance as early as September 07, 2011, there could be no excuse for the work not to proceed at full pace along said stretch.

70. As noted in paragraph 3 above time was extended thrice for completion of the works. Firstly on November 11, 2011, thereafter on November 30, 2012 and lastly on July 04, 2013. At each stage, while extending time for completion of the works, schedules were fixed, but were not adhered to by the appellant.

71. Learned counsel for the parties had made a reference to correspondence exchanged after July 04, 2013 in some detail because the reason was that notwithstanding time being extended to complete the works by October 31, 2014 as per the last extension granted on July 04, 2013, the respondent had terminated the contract on May 30, 2014, and the argument of the appellant was that the respondent could not terminate the contract mid between the extended period.

72. Since we have to look at the case at the stage from the point of view of what prima facie stands out, and we have to eschew any determinative findings, we would only note that on April 03, 2014 the appellant wrote a letter expressing a desire to be relieved from the contract obligations at no risk and cost to it and all it being recompensed the loss of profit for the unfinished work. The letter reads as under:-

“Sub: Construction of 400 KV D/C Teesta III-Panighata section Package A1 & Panighata- Kishanganj section Package

A2 of Teesta III-Kishanganj Transmission Line associated with 1200 MW Teesta III HEP at North Sikkim under Contract No. TPTL/TOWER-A1/01 & 02 and A2/01 & 02 dated 22nd February 2010.

Ref: 1) Supplementary Agreements to Service Contract nos.TPTL/TOWER-A1/02 & A2/02; dated 10th May 2010.

2) Your letter No.TPTL/HQ/Tower Package/298 dated 26th Feb 2014.

3) Our letter no.TR/01/TPTL/480 dated 10th March 2014

4) Minutes of Meeting held on 27th March 2014.

Dear Sir,

With reference to the above referred correspondences and discussion held on the subject, we note your concern that the project needs to be completed by January 2015 inorder to wheel the power of Teesta-III HEP but we are extremely sorry to inform you that you are not able to appreciate the serious concern raised by us on account of ROW issues, Forest clearances, compensation payment and pending payment issues leading to delay in completion of work These issues have been brought to your notice from time to time and also reiterated during recent discussions but you have failed to understand the gravity of the situations. It is evident that reasons of delay is beyond our control and not attributable to us hence offloading of portion of work is unwarranted and not acceptable to us. Therefore we would prefer and request you to take over the complete work on á s is where is basis' at no risk and cost to us. However, in view of your continuous insistence for offloading of services work of Darjeeling and part of South Sikkim from our scope and completion of balance portion of

work by us, we would request you for acceptance of the following conditions to enable us to continue with the work:

- *Offloading of part work as proposed by you shall be done at no risk and cost to us*
- *All works related to statutory clearances such as Right of Way, Forest clearances and way leave clearance etc including preparation of proposals for the same for entire line (both the packages) under supplementary agreement shall be excluded from our scope.*
- *Rates for the items of the balance work in our scope shall be revised in line with the rates which shall be finalized by you for service contract of the offloaded Darjeeling and part of South Sikkim portion.*
- *Revised time extension shall be granted with Price Variation and without imposition of Liquidated Damages.*
- *Proportionate performance bank guarantee shall be returned for the portion of work to be withdrawn.*
- *All the pending bills, price variation bills and claims etc for the executed work of offloaded portion shall be released*
- *Mobilization and demobilization charges including expense incurred for stores and other infrastructural facilities shall be reimbursed.*
- *Loss of profit due to offloading of work shall be released*
- *Loss incurred due to offloading of work to BCEPL in the offloaded portion shall be released.*

We are awaiting your response by return on the aforesaid issued.”

73. Now, in the letter the appellant has unequivocally evinced its intention to off-load the complete work on as is there is basis. The learned Single Judge has thus correctly opined that in view of said letter the appellant would not be entitled to adopt a dog in a manger approach by not being in a position and having no intention to complete the work in not allowing

anybody else to do so.

74. In this reference, as is brought by the letter dated April 03, 2014, we simply note that correspondence between the parties between the months of January, 2014 till March 2014 would show the anxiety of the respondent to ensure that somehow or the other the works in Sikkim and Darjeeling district in West Bengal be completed and the appellant expressing its inability to do so. This is the reason why in the letter in question the appellant has consented that as an alternative measure service works of Darjeeling and part of South Sikkim be off-loaded. The correspondence would show that as a matter of fact the appellant had expressed its inability to complete the work in South Sikkim and Darjeeling and this is the reason why the respondent had invited limited offers from experience parties in February, 2014 for unfinished works in the Darjeeling and South Sikkim segment, which works alone have been awarded to TATA Projects Limited on May 30, 2014.

75. In this connection we would terminate our discussion by noting that the contract, vide clause 36 empowered the respondent to withdraw certain works as per the contract without any financial liability and even terminate the contract.

76. We have already noted in paragraph 57 above that a major portion of the work remained unexecuted by May 30, 2014.

77. The argument that having extended the time till October 31, 2014, the respondent could not have terminated the contract on May 30, 2014, appears to be attractive at first blush, but as the flushing is over, one realizes that the argument is no more than a puffing. The correspondence between the parties would evince that the envisaged progress when extension was granted on July 04, 2013 for the works to be completed by October 31, 2014

was not achieved even up to 40% of the stage by which the works were to be completed. The appellant was lagging far behind evidenced by the fact that as per the extension, by January 2014, in Tower Package A1 as against 67 more foundations to be laid only 13 were laid and as against 79 more towers to be erected only 46 were erected. Similarly, for Tower Package A2 as against 32 foundations more to be laid till January 04, 2014 only 2 were laid and as against 29 more towers to be erected during this period, none were erected. On the laying of cables (stringing), as against 23 kilometers to be laid only 4 kilometers were laid in Tower Package A1 and for Tower Package A2 as against 46 kilometers only 12 kilometers were laid. If a contractor lags behind by more than 60% of the envisaged works between a period, rendering it impossible for the works to be completed in the remainder, it would not be expected that the owner should wait for the d-day and meet his water loop.

78. The respondent had served upon the appellant a notice to cure, being the requirement of Clause 30.22 of the General Conditions of the contract on May 09, 2014. The relevant part of the clause reads : *'then the employer may then without prejudice to any other rights it may possess under the contract give a notice to the contractor stating the nature of the default and requiring the contractor to remedy the same. If the contractor fails to remedy or take to steps to remedy the same without 14 days of its receipt of such notice, then the employer may terminate the contract forthwith by giving a notice of termination to the contractor.'*

79. The appellant has not shown any document to us that within 14 days it responded to the cure notice by remedying the defects pointed out. The correspondence post May 09, 2014 would show that the appellant insisted on

its stand that its inability to continue with the work was the defaults by the respondent.

80. Seeing not even an iota of forward movement post May 09, 2014, the respondent would be prima facie justified in terminating the contract.

81. The argument that the letter dated May 30, 2014 terminating the contract makes the termination effective after seven days is a mis-reading of the letter of termination. It was preceded by the appellant's letter dated May 23, 2014 reiterating its offer to hive off a portion of the work in Darjeeling and South Sikkim and the same being given to some other contractor which was followed the respondent's letter on May 24, 2014. The appellant responded on May 28, 2014. The letter of termination has referred to the termination being forthwith and we only highlight that clause 36.2.1 empowers the respondent to terminate the contract forthwith. The seven days time referred to in the letter of termination is the requirement of clause 36.2.3 of the contract which requires the contractor to hand over the site with all documents to the respondent by a notified date. The respondent was thus complying with the requirement of clause 36.2.3 when it gave seven days time to the appellant to vacate the unfinished sites.

82. It is trite that determinable/terminable contracts would not be interdicted by interim orders especially when the same relate to supply and execution of works because damages for breach would be an adequate remedy. On the facts of the instant case, the offers made by the appellant to off-load the remaining works in full and alternatively the unfinished works in South Sikkim and Darjeeling district would further justify no interim relief being granted with respect to the termination of the contracts.

83. Thus, on facts the conclusion arrived at by the learned Single Judge in

declining to confirm the ex-parte ad-interim order of status quo and dismiss the petition filed by the appellant under Section 9 of the Arbitration and Conciliation Act, 1996 concerning the letter dated May 30, 2014 cannot be faulted with.

84. As we have prima facie found that the respondent is not an instrumentality of the State, there would be no question of the respondent being subjected to the rigorous of Article 14 of the Constitution of India. The respondent would be as free as any other individual and would have the same freedom as anyone else would have in matters of contract. But for the reason we find a few decisions by learned Single Judges of this Court, five of which were cited by learned counsel for the appellant in support of the plea that even in matters which are post contractual in nature the State and its instrumentalities would have to justify the action taken under the contract on principles of reasonableness and fairness, we would think it appropriate, as a Division Bench should do, to iron out the creases and throw light in the penumbral region. The five decisions cited were 2006 (126) DLT 504 Atlas Interactive India Pvt. Ltd. Vs. BSNL & Anr., 2003 (103) DLT 44 Pioneer Publicity Corporation Vs. DTC, an unreported decision dated August 14, 2012 in OMP No.581/2010 KSL & Industries Ltd. Vs. National Textile Corporation Ltd., 2002 (Supp.) Arb.LR. 632 Softline Media Ltd. & Shalimar Advertisers Vs. DTC and an unreported decision dated February 28, 2014 in OMP No.260/2014 Mayar Health Resorts Ltd. Vs. Indian Tourism Development Corporation.

85. Article 14 of the Constitution of India protects individuals against arbitrary State action. It mandates that the State shall not deny to any person the equality before the law or the equal protection of law. The article

establishes equality of legal status for all and insulates an individual from discrimination. Any administrative and executive action of the State which is arbitrary, unguided, actuated by malice or based on irrelevant criteria has been treated as subjecting individual to a discriminatory treatment and thus violative of Article 14. Over the years, most of the principles of judicial review as expanded by the Courts in England and America have, with suitable modifications, been brought within the extending horizon of judicial review over State action in this country. A corresponding horizon as to which authorities would constitute a State has taken place. The distinction between judicial, quasi-judicial, administrative or executive State action has been obliterated.

86. In the field of contract as well, there has been an extension of law on this subject. Since a State enters into a contract in exercise of its executive power, it has been held that State action in matters pertaining to contract cannot be taken out from the purview of judicial review.

87. However, this evolution of law has to be understood and applied with a rule of caution.

88. Business requires total freedom to decide and take action in the best interest of business. Profit, is the aim of every business and, therefore, when a State conducts business it must have all the freedom to do so. If shackled by the strict principles of judicial control over administrative action, it may become impossible for a State to conduct business, as business needs to be conducted.

89. We may ignore the judgments dealing with the limitations on the power of the State at the time of entering into contract, for they would constitute a different category of cases.

90. Disputes involving breach of alleged obligations by the State or its agent can be classified into three groups:-

(i) *Where grievance relates to alleged breach of promise on part of the State where claimant has acted to his prejudice on basis of assurance or promise on the part of the State, but the agreement is short of a contract within the meaning of Article 299 of the Constitution;*

(ii) *Where the State after entering into a contract, acts in exercise of statutory power and the claimant alleges a breach on the part of the State; and*

(iii) *Where the rights are purely contractual and claimant alleges breach by the State of a term of the contract.*

91. The present case before us has to be placed in the third category. Questions of pure alleged breaches of contract are raised.

92. Undoubtedly, a body which is an instrumentality of the State, while exercising its powers or discretion is subject to the Constitutional limitations. The rule inhibiting arbitrary action will apply to such body in their dealing with the public. This rule flows directly from the doctrine of equality embodied in Article 14. As noted in the decision reported as AIR (1979) SC 1628 Ramana Dayaram Sethi Vs. IAAI the principles of reasonableness and rationality and non-arbitrariness as projected under Article 14 of the Constitution of India characterise every State action whether it be under authority of law or in exercise of execution power without making of law.

93. Has this principle been extended to State action under a contract pure and simple after a contract was executed between the parties and the

instrumentality of the State claimed acting in exercise of a right (not a power) under the contract?

94. The decision of the Supreme Court reported as AIR 1989 SC 1642 Dwarka Das Marfatia & Sons Vs. Board of Trustees of the Port of Bombay needs to be noted. Action of the Board of Trustees Bombay Port pertaining to eviction of a tenant from its property came up for consideration. The argument of the appellant was that the action of the respondent in terminating its tenancy had a public law character attached to it and was, therefore, subject to judicial review. It was asserted that every action of the respondent which was a State within Article 12 of the Constitution, whether it be in the field of contract, or any other field was subject to Article 14 of the Constitution (refer para 10). It was noted (refer para 11) that the eviction of the appellant was only in pursuance of a policy of the Port Trust. Relying upon the judgment in International Airport Authority's case (supra) it was held that '*Government policy would be invalid as lacking in public interest, unreasonable or contrary to the protest standards*', if it violates the mandate of Article 14 pertaining to arbitrariness and unreasonableness and any action taken pursuant thereto would be invalid.

95. Thus, it is to be noted that what was considered was a policy decision, which was applied thereafter to a contract and not a decision arising out of the contract.

96. Judgment of the Supreme Court reported as AIR 1990 SC 1031 Mahavir Auto Vs. Indian Oil Corporation & Ors. also needs a clarification because it is often cited by counsel for the parties as if at a post agreement stage, a dispute pertaining to a contract and especially when the same is determined is actionable under a public law remedy. Issue related to a post

contract dispute (as was the situation in Dwarka Dass Marfatia's case). The following observations of the Supreme Court are relevant:-

"16) Mr. Salve submitted that in private law field there was no scope for applying the doctrine of arbitrariness or mala fides. The validity of the action of the parties have to be tested, it was urged on behalf of the respondent on the basis of "right" and not "power". A plea of arbitrariness/mala fides as being so gross cannot shift a matter falling in private law field to public law field. According to Mr. Salve to permit the same would result in anomalous situation that whenever State is involved it would always be public law field, this would mean all redress against the State would fall in the Writ Jurisdiction and not in suits before Civil Courts.

"17) We are of the opinion that in all such cases whether public law or private law rights are involved, depends upon the facts and circumstances of the case. The dichotomy between rights and remedies cannot be obliterated by any straight jacket formula. It has to be examined in each particular case. Mr. Salve sought to urge that there are certain cases under Article 14 of the arbitrary exercise of a "right" arising either under a contract or under a Statute. We are of the opinion that that should depend upon the factual matrix.

"18) Having considered the facts and circumstances of the case and the nature of the contentions and the dealings between the parties and in view of the present state of law, we are of the opinion that decision of the State/public authority under Article 298 of the Constitution, is an administrative decision and can be impeached on the ground that the decision is arbitrary or vocative of Article 14 of the Constitution of India on any of the grounds available in public law field."

97. On facts, it was noted that the Ministry of Energy, Department of Petroleum had issued certain guidelines/directions, based on which Indian Oil Corporation had taken an administrative decision to discontinue

business, inter alia, with the appellant before the Supreme Court. Since, action was based pursuant to an administrative decision, it was held that principles of judicial review were attracted. We may note the observations of the Supreme Court in para 20 of the judgment as under:-

"20) Having regard to the nature of the transaction, we are of the opinion that it would be appropriate to state that in cases where the instrumentality of the state enters the contractual field, it should be governed by the incidence of the contract."

98. Certain observations of the Supreme Court in the decision reported as AIR 1991 SC 537 Srilekha Vidyarthi Vs. State of UP, in our opinion are relevant and need to be noted. Case related to the termination of the appointment of District Government Advocates, which was in the nature of a contractual appointment terminable at will on either side; not being appointment to a post under the Government. Pursuant to a policy decision taken by the State of Uttar Pradesh, circular was issued, pursuant thereto the services of the existing Government Counsel were dispensed with. Direct writ petition under Article 32 of the Constitution of India was filed as also the appeals arising out of judgment of the Allahabad High court dismissing the writ petition were heard together and decided. What is relevant to be noted is the question framed by the Supreme Court for being answered. In para 4 the questions was posed as under :-

"Broadly, two questions arise for decision by us in this bunch of matters. These are: Is the impugned circular amenable to judicial review?; and if so, is it liable to be quashed as violative of Article 14 of the Constitution of India, being arbitrary?"

99. Answering the question it was observed :-

" It can no longer be doubted at this point of time that Article 14 of the Constitution of India applies also to matters of governmental policy and if the policy or any action of the Government, even in contractual matters, fails to satisfy the test of reasonableness, it would be unconstitutional.(See Ramana Dayaram Shetty vs . The International Airport Authority of India (1979) 3 SCR 1014 and Kasturi Lal Lakshmi Reddy Vs . State of Jammu and Kashmir [1980] 3 SCR 1338 . In Col. A.S. Sangwan Vs . Union of India, AIR 1981 SC 1545 , while the discretion to change the policy in exercise of the executive power, when not trammelled by the statute or rule, was held to be wide, it was emphasised as imperative and implicit in Article 14 of the Constitution that a change in policy must be made fairly and should not give the impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touch-stone, irrespective of the field of activity of the State, has long been settled. Later decisions of this Court have reinforced the foundation of this tenet and it would be sufficient to refer only to two recent decisions of this Court for this purpose."

100. As in the earlier judgments, it was the policy decision which was found to be violative of Article 14 of the Constitution of India and the striking down of the action purportedly taken under the contract were thus struck down.

101. In the decision reported as 1989 (2) SCC 116 Bareilly Development Authority Vs Ajay Pal Singh it was held that after entering into the field of contracts, the '*relations are no longer governed by the constitutional provisions but by the legally valid contract which determines the rights and obligations of the parties inter se. In this sphere, they can only claim rights conferred upon them by contract.*'

102. In the decision reported as AIR 2001 SC 3609 Verigamto Naveen Vs. Government of A.P. & Ors, after a brief resume of its earlier judgments

given on the issue where disputes arose purely in the contractual field, the Supreme Court referred to its decision in Mahabir Auto Store, Srilekha Vidyarthi and Dwarka Dass Marfatia (referred above) and a few other decisions. It was held :-

" Where the breach of contract involves breach of statutory obligation when the order complained of was made in exercise of statutory power by a statutory authority, though cause of action arises out of or pertains to contract, brings within the sphere of public law because the power exercised is apart from contract. The freedom of the Government to enter into business with anybody it likes is subject to the condition of reasonableness and fair play as well as public interest. After entering into a contract, in cancelling the contract which is subject to terms of the statutory provisions, as in the present case, it cannot be said that the matters falls purely in a contractual field."

103. The aforesaid decisions of the Supreme Court when analysed, clearly bring out the distinction that where action is taken pure and simple under a contract, the principles of justness, fairness, arbitrariness, reasonableness etc. flowing out of Article 14 of the Constitution of India cannot be attracted. Where, however, the foundation of the action lies in an administrative or an executive policy decision taken and then applied to the contract, the merits of the administrative or executive decision taken are subject to judicial review. In each of the cases, aforesaid, before the Supreme Court it was noted that either the police decision taken suffers from the vice of arbitrariness or the administrative decision taken was found to be so suffering. In each and every decision the Supreme Court was at pains to clarify that their observations would not apply purely to a field of contract pure and simple.

104. The decision of the Supreme Court reported as 1994 (4) SCC 104 Assistant Excise Commissioner Vs. Issac Peter & Ors is another decision to which we may refer to. All the aspects of arbitrariness, reasonableness, promissory estoppel, estoppel by conduct and legitimate expectation in the field of contract, where Government was a party were considered. Earlier decisions referred by us above (except the decision in Verigamto's case) were considered. We may extract the relevant observations:-

"24) Learned counsel for the respondents sought to invoke the rule of promissory estoppel and estoppel by conduct. The attempt is a weak one for the said rules cannot be invoked to alter or amend specific terms of contract nor can they avail against statutory provisions. Here, all the terms and conditions of contract, being contained in the statutory rules, prevail.

25) Learned counsel for the respondents also sought to rely upon the rule of legitimate expectation which the licensees entertained in view of the practice during previous years. Firstly, the rule cannot be invoked to modify or vary the express terms of contract, more so when they are statutory in nature. No decision has been brought to our notice supporting the said proposition.

26) Learned counsel for respondents then submitted that doctrine of fairness and reasonableness must be read into contracts to which State is a party. It is submitted that the State cannot act unreasonably or unfairly even while acting under a contract involving State power. Now, let us see, what is the purpose for which this argument is addressed and what is the implication?..... Doctrine of fairness or they duty to act fairly and reasonably is a doctrine developed in the administrative law field to ensure the rule of law and to prevent failure of justice where the action is administrative in nature. Just as principles of natural justice ensure fair decision where the function is quasi-judicial, the doctrine of fairness is evolved to ensure fair action where the function is administrative. But it can certainly not be

invoked to amend, alter or vary the express terms of the contract between the parties.....We are, Therefore, of the opinion that in case of contracts freely entered into with the State, like the present ones, there is no room for invoking the doctrine of fairness and reasonableness against one party to the contract (State), for the purpose of altering or adding to the terms and conditions of the contract, merely because it happens to be the State. In such cases, the mutual rights and liabilities of the parties are governed by the terms of the contract (which may be statutory in some cases) and the laws relating to contracts. It must be remembered that these contracts are entered into pursuant to public auction, floating of tenders or by negotiation. There is no compulsion on anyone to enter into these contracts. It is voluntary on both sides. There can be no question of the State power being involved in such contracts. It bears repetition to say that the State does not guarantee profit to the licenses in such contract. There is no warranty against incurring losses. It is a business for the licensees. Whether they make profit or incur loss is no concern of the State. In law, it is entitled to its money under the contract. It is not as if the licensees are going to pay more to the State in case they make substantial profits. We reiterate that what we have said hereinabove is in the context of contracts entered into between the State and its citizens pursuant to public auction, floating of tenders or by negotiation. It is not necessary to say more than this for the purpose of these cases."

105. Even the decision reported as (2004) 3 SCC 553 ABL International Ltd. & Anr. Vs. Export Credit Guarantee Corporation of India Ltd. & Ors. granted public law remedy relief to a claim under a contract because of the obligation under the statute cast upon the respondent to perform public functions because of a direction issued by the Reserve Bank of India to cover the risk arising out of the export of tea by AVL International as per an assigned contract requiring ECGC India Ltd. to ensure the risk. There was thus a statutory flavour to the contract of insurance.

106. There may be, after all a said and written in law, regarding public law and private law remedies, a miniscule category of cases which irrespective of public law or private law remedies may invite the application of law laid down by Maugham, J. in the decision reported as (1929) – 1 Ch. 602 Maclean Vs. Workers' Union which was cited with approval by the Supreme Court in the decision reported as AIR 1963 SC 1144 T.P.Davar Vs. Lodge Victoria No.363 SC Belgaum & Ors. Maugham, J. observed that in private actions, and the case before him related to an allegation of being expelled from the membership of a private association, in an unfair and unjust manner. It was observed that an action even of a private person would be treated as unfair and unjust if it violates the principles of 'fair play so deeply rooted in the minds of modern English men'. In such cases, it would be irrelevant whether the defendant/respondent is a private individual or an instrumentality of the State.

107. Thus, there may be an extreme case where malice is writ large and the corresponding injury to the other party is manifest. Hardly a fact is in dispute. From the given facts no conclusion other than the one projected by the agreed party is possible. The view taken by the offender is demonstrably unreasonable, and unreasonableness being of the *Wednesbury's* kind, in such cases, irrespective of the character of the respondent and irrespective of whether the dispute arises out of a contract, it may be possible to grant by way of an interim measure the stay of the determination/termination of a contract. But the genre of such cases would be rare.

108. The forensic battle fought at the bar on the subject of the encashment of the bank guarantees centered on: what is the sweep of the expression

special equity the span whereof entitles the guarantor to avoid payment under the guarantee.

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

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

111. Though opinions on bank guarantees span half a century, we plunge mid-stream and commence our discussion with the celebrated decision of the Supreme Court reported as 1987 (2) SCALE 1149 *U.P. Coop. Federation Ltd. Vs. Singh Consultants & Engrs. (P) Ltd.* The decision has noted the prior landmark decisions on the subject and throws considerable light on what would be '*special circumstances*' or '*special equity*' justifying issuance of an injunction to restrain the bank from paying under the guarantee issued by it, which decision has been constantly followed in latter decisions of the Supreme Court.

112. Two guarantees, one a performance guarantee and the other by way of security for monies advanced were the subject matter before the Supreme Court in an action for injunction.

113. Holding that the language of the two guarantees made it crystal clear

that the guarantees were unconditional, the Supreme Court proceeded to note prior decisions and culled out the exceptions whereunder a Court would be justified in issuing an injunction restraining invocation or payment under an unconditional guarantee.

114. The Supreme Court noted that the letter of credit has been developed over hundreds of years of international trade. It was most commonly used in conjunction with the sale of goods between geographically distant parties. That it was intended to facilitate the transfer of goods between distant and unfamiliar buyer and unknown customer. It was noted that it was difficult for a buyer to pay for goods prior to their delivery. The bank's letter of credit came into existence to bridge the gap. In such transactions, the seller (beneficiary) receives payment from issuing bank when he presents a demand as per terms of the documents. The bank must pay if the documents are in order and the terms of credit are satisfied. The bank was not allowed to determine whether the seller had actually shipped the goods or whether the goods conformed to the requirements of the contract. Any dispute between the buyer and the seller must be settled between themselves.

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

like performance bond or performance guarantee, the obligation of the guarantor (usually a bank) is the same.

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

117. The year was 1941. Injunctions against payments under letters of credit were not issued by courts. Mr.Sztejn had wanted to buy quality bristles from Indian and struck a deal for a quantity with an Indian seller. Payment was secured to the seller by means of a letter of credit which provided that upon receipt of appropriate documents the bank would pay for the shipment. Somehow Mr.Sztejn discovered that the shipment made was crates of worthless rubbish. He went to the bank with a request not to pay and received a response that being a letter of credit it was an independent undertaking of the bank and hence it must pay. Mr.Sztejn went to Court. He sought an injunction against the issuing bank to restrain it from paying under the letter of credit. He made, prima facie, good his allegations that as against the contracted goods i.e. bristles, worthless material and was shipped. Noting a fraud in the transaction the Court issued an injunction against payment.

118. The Supreme Court noted that the exception of fraud created by Shientag J. had been subsequently accepted by Courts in England in the decisions reported as (i) (1958) 2 QBD 127 Hamzen Milas & Sons. v. British Imex Industries Ltd., (ii) (1977) 2 All E. 862 R.D. Harbottle Mercantile) Ltd. & Anr. v. National West Minister Bank Ltd., (iii) (1978) 1 All E.R. 976 Edward Owen Engineering Ltd. v. Barclays Bank International Ltd.; and (iv)

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

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

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

119. We may note that the exception of fraud has been codified in Sections 5-114 of the Uniform Commercial Code.

120. With respect to the question : Can an injunction be issued upon a plea

that the beneficiary is in breach of the contract? Law on the subject was thereafter noted by the Supreme Court with reference to a decision of the Court of Appeal in England reported as (1985) 2 Q.B.D. 127 Hamzon Melas & Sons Vs. British Imex Industries Ltd., wherein it was held the principle was that commercial trading must go on the solemn guarantee either by the letter of credit or by bank guarantee or irrespective of any dispute between the contracting parties whether or not the goods were upon contract.

121. With reference to the decision of the House of Lords in UCM (Investment)'s case (supra) viz-a-viz a plea of fraud in invoking the guarantee and the opposite party being in breach of its obligations under the contract, the Supreme Court summarised the legal position as under:-

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

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

123. Being relevant for a clarification of the issue raised in the instant case, the facts and the reason for the opinion in Eliau's case needs to be noted.

124. The first defendants' Greek motor vessel 'Flora M' was chartered by Lebanese charterers for carriage of plaintiffs' cargo (consigned to Hungary) from Bairut to Rijeka. Discharge was delayed at Rijeka and Ship owners exercised lien on cargo in respect of demurrage. Third defendant bank put up guarantee in London in favour of second defendant (first defendants' London agents) to secure release of cargo. There was a claim by Yugoslavians to distrain on goods, involving ship in further delay and master of Flora M, on lifting original lien, immediately exercised another lien in respect of extra delay (which was raised when Hungarian buyers put up 2000). Two years later, shipowners claimed arbitration with charterers to assess demurrage for which first lien was exercised and claimed to enforce guarantee. Plaintiff claimed declaration that guarantee was not valid and injunction to restrain shipowners or their agents from enforcing guarantee. First and the second defendants appealed against the injunction granted by Blain, J. It was held by the Court of Appeal that it was a special case in which the Court should grant an injunction to prevent what might be irretrievable injustice. Lord Denning, M.R., observed that although the shippers were not parties to the bank guarantee, nevertheless they had a most important interest in it. If the Midland Bank Ltd., paid under this guarantee, they would claim against the Lebanese bank who in turn would claim against the shippers. The shippers would certainly be debited with the account. On being so debited, they would have to sue the shipowners for breach of their promise express or implied, to release the goods. Lord Denning, M.R., further posed the question were the shippers to be forced to take that course?

Or can they shortcircuit the dispute by suing the shipowners at once for an injunction? He further observed at page 497 of the Report that this was a special case in which injunction should be granted. Lord Denning, M.R. went on to observe that there was a prima facie ground for saying that on telex messages which passed (and indeed, on the first three lines of the guarantee) the shipowners promised that, if the bank guarantee was given, they would release the goods. He further observed that the only lien they had in mind at that time was the lien for demurrage. But would anyone suppose that the goods would be held for another lien? It can well be argued that the guarantee was given on the understanding that the lien was raised and no further lien imposed and that when the shipowners, in breach of that understanding imposed a further lien, they were disabled from acting on the guarantee.

125. The expression that it was a special case in which the Courts should grant an injunction to prevent what might be an irretrievable injustice caught the eye of the Supreme Court. In para 16 of the decision the Supreme Court noted that Lord Denning M.R. treated this as a very special case and in a later decision, being the opinion reported as 1978 (1) All. E.R. 976 Edward Owen Engineering Ltd. Vs. Barclays Bank International Ltd. Lord Denning M.R. expressed his views on the matter.

126. The facts of Edward Owen's case were that English suppliers entered into a contract with Libyan buyers to supply goods to them in Libya. The contract was subject to a condition precedent that the plaintiffs would arrange for a performance bond or guarantee to be given, for 10% of the contract price, guaranteeing performance of their obligations under the contract. Accordingly, the plaintiffs instructed the defendants, their bankers

to give on their behalf a performance guarantee for the sum of £50,203. Acting on those instructions the defendants requested a bank in Libya to issue a performance bond to the buyers for that sum, and promised the Libyan bank that they would pay the amount of the guarantee on first demand, without any conditions or proof. The Libyan bank issued a letter of guarantee for £50,203 to the buyers. The contract between the plaintiffs and the buyers provided for payment of the price of the goods supplied by a confirmed letter of credit. The letter of credit opened by the buyers was not a confirmed letter of credit and did not, therefore, comply with contract. Because of that non-compliance the plaintiffs repudiated the contract. Although it was the buyers who appeared to be in default and not the plaintiffs, the buyers nevertheless claimed on the guarantee given by the Libyan bank who in turn claimed against the defendants on the guarantee they had given. The plaintiffs issued a writ against the defendants claiming an injunction to restrain them from paying any sum under the performance guarantee. A judge granted the plaintiffs an interim injunction in the terms of the injunction claimed by the writ but subsequently another judge discharged the injunction. The plaintiff appealed to the court of appeal. Lord Denning M.R. held that the justice was right in discharging the injunction and reiterated that the bank must honour its commitment.

127. Therefore, in para 24 of its decision the Supreme Court clarified that it appears that special equities (circumstances) mentioned therein i.e. in Elia's case (supra) may be a situation where the injunction was sought for to prevent injustice which was irretrievable in the words of Lord Denning M.R. In para 28 of the decision it was categorically opined :

“It is not the decision that there should be a prima facie case. In

order to restrain the operation either of irrevocable letter of credit or of confirmed letter of credit or of bank guarantee, there should be serious dispute and there should be good prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Otherwise the very purpose of bank guarantees would be negated and the fabric of trading operation will get jeopardised.”

128. The ratio of law in U.P. Cooperative Federation Ltd.'s case (supra), would thus be that the bank must pay under an unconditional guarantee; with the exception, if prima facie case is made out that element of fraud exists on the part of the beneficiary or if there exists a special equity in the form of preventing irretrievable injustice then alone an injunction may be issued. Further, fraud has to be of an egregious nature and not a dispute that goods supplied are not as per contract.

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

130. In the decision reported as 1994 (6) SCC 597 STC Vs. Jainsons Clothing Corporation & Anr. the Supreme Court noted that the bank guarantee was unconditional and its enforcement was not hedged with or conditional upon the performance of the principal contract and that there was no fraud in the execution of the contract between Jainson and STC, the Supreme Court held that the exception carved out in the decision in U.P.Coop. Federation Ltd.'s case (supra) i.e. fraud of an egregious nature and irretrievable injustice were the only two recognized exceptions and thus

on the occurrence of the events mentioned in the bank guarantee it becomes enforceable and that disputes in the performance of the contract does not give rise to a cause to seek an injunction from enforcing the guarantee.

131. In the decision reported as 1995 (4) SCC 515 N.T.P.C. Vs. Flowmore Pvt. Ltd. & Anr. the Supreme Court revisited the law on the subject. Two performance guarantees and three guarantees to secure the mobilization advance, all five being unconditional and payable on demand, were the centre of the dispute. The main contract having an arbitration clause, the dispute was pending adjudication before an Arbitral Tribunal. S.T.C. invoked the bank guarantees pending arbitration. Flowmore sought injunction urging two pleas. That main dispute was pending adjudication before the Arbitral Tribunal and hence status quo should be maintained. Secondly, invocation was fraudulent. Repelling both contentions it was held that pendency of arbitration proceedings was an irrelevant factor and that fraud had to be of an egregious nature so as to vitiate the entire underlying transaction while irretrievable injustice had to be of a kind arising in a situation found in 566 Fed Supp 1210 Itek Corpn Vs. First National Bank of Boston. Finding none, the injunction granted by the High Court was vacated.

132. We thus need to note the decision in Itek Corporation's case (supra). The facts were that in April of 1977, Itek entered into a contract with the Imperial Government of Iran to manufacture certain high-technology optical equipment. The contract price was \$22,500,000. By the terms of this contract, the Imperial Government was required to make an advance payment to Itek of \$4,500,000. Itek, in turn, was obliged to provide security for this advance in the form of four bank guarantees, each in the amount of

\$1,125,000, issued by Bank Melli and naming the Imperial Ministry of War as beneficiary. Itek was further required to furnish a bank guarantee in the amount of \$2,250,000, issued by Bank Melli in favour of the Imperial Ministry of War as security for the good performance of its contractual obligations. As a condition to issuing the guarantees, Bank Melli required Itek to supply standby letters of credit in its favour, issued by an American bank, with amounts and terms paralleling those of its own guarantees. Itek complied with this condition by providing five letters of credit issued by FNBB and naming Bank Melli as beneficiary. Each of these standby letters of credit stated that payment would be conditioned on receipt of an authenticated cable stating that Bank Melli had been required to make payment under its corresponding guarantee to the Imperial Ministry of War and that it was airmailing to FNBB a signed statement to that effect. Of the five original letters of credit issued by FNBB, three remained outstanding as of January 1980, when the suit was brought. These were S-14555, issued and outstanding in the amount of \$2,250,000; S-14588, issued in the amount of \$1,125,000 and outstanding in the amount of \$70,753; and S-14559, issued and outstanding in the amount of \$1,125,000. The contract between Itek and the Imperial Government of Iran provided that in the event of *force majeure*, including the cancellation of Itek's export license covering the equipment, either party would be entitled to inform the other of the event constituting *force majeure* and, after three months, to cancel the contract by written notice. Upon cancellation, the parties would clear their account and release all guarantees and letters of credit. From April of 1977 through the end of 1978, work on the contract apparently proceeded without incident. An independent American company monitored the progress of the work

performed by Itek and gave Itek consistently high praise for its efforts. By February 10, 1979, the value of Itek's performance amounted to \$20,300,000; and payments to Itek totalled \$11,100,000. In early 1979, Iran underwent a revolution. Ultimately, the head of the Imperial Government, Shah Riza Pahlevi, was driven into exile, and was succeeded in power by the religious leader Ayatollah Ruhollah Khomeini. The Islamic Republic of Iran was established, and the Imperial Ministry of War was replaced by the Ministry of National Defense. On April 30, 1979, the State Department cancelled the export license for the equipment to be manufactured by Itek under the contract. Two weeks later, on May 15, 1979, Itek notified the Iranian authorities of the occurrence of *force majeure*, and requested consultations in accordance with the terms of the contract. On August 20, 1979, representatives of Itek met in Iran with officials of the Ministry of National Defense to discuss the occurrence of *force majeure* and the status of the contract obligations. At this meeting, Itek's representatives also presented the Iranian participants with copies of unpaid invoices that had accumulated since February 1979, and a summary of the account under the contract. On November 03, 1979, the United States Embassy in Teheran, Iran was forcibly taken over and 52 American citizens were taken hostage. In response to the crisis, President Carter on November 14, 1979 declared a national emergency and, by Executive Order No.12170, 'blocked' all Iranian assets subject to the jurisdiction of the United States. Shortly thereafter, the Treasury Department promulgated regulations to implement the Presidential directive that all assets be blocked. These regulations prohibited the transfer of any property subject to the jurisdiction of the United States in which Iran had any interest whatever, except as authorized by license or regulation. The

regulations specifically authorized payment by United States banks on letters of credit issued in favour of an Iranian entity, provided the payments were made into blocked accounts in domestic banks. At the same time, nothing in the regulations precluded any person for whose account a standby letter of credit was opened or any other person from contesting the legality of the demand from the Iranian entity or from raising any other legal defense to payment. On December 06, 1979, Itek sent to the Ministry of National Defense further written notice advising of the occurrence of *force majeure*, and again requesting consultations. No response was received to this communication. The suit was filed on January 09, 1980. Itek pleaded that prevailing circumstances in Iran created a serious risk that unwarranted and fraudulent demands would be made upon the letters of credit then outstanding with FNBB. Itek sought temporary and permanent relief in the form of an order enjoining FNBB from honoring any demand on the letters of credit, without first giving Itek five days notice. On January 09, 1980 the Court entered a temporary restraining order requiring three days notice prior to payment, and after hearing on January 18, 1980, a preliminary injunction was entered to the same effect. In February and March of 1980, Bank Melli requested extension of two of the outstanding letters of credit. In the alternative, Bank Melli requested immediate payment in full. Itek directed FNBB to refuse both the requests for extension and payment, on grounds that the contract had been cancelled and the letters of credit securing the advance payment had been cleared.

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

“In commercial litigation, the question whether the plaintiff is

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

134. Thus, the irretrievable injustice or special equity noted in *Itek's* case was the impossibility of the party at whose instance the bank guarantee was issued being in a position to retrieve the money upon obtaining a decree in its favour.

135. In an action for injunction relating to fourteen bank guarantees of four kinds; (i) to secure Mobilization Advance; (ii) to secure the Security Amount; (iii) to secure the Funds Advanced by Hindustan Steelworks Construction Ltd.; and (iv) to secure Due Performance, the High Court granted an injunction qua the guarantees except the guarantees under head No.(iii) in favour of the contractor Tarapore & Co., holding that on facts special equity or special circumstances were shown justifying grant of an injunction. Reason given by the High Court was that till the arbitrator decided the dispute the claim under the bank guarantees (qua which injunction was issued) had not yet been crystallized. Reversing the decision

of the High Court, in the decision reported as 1996 (5) SCC 34 Hindustan Steelworks Constructions Ltd. Vs. Tarapore & Co., the Supreme Court held:

“14. The High Court also committed a grave error in restraining the appellant from invoking bank guarantees on the ground that in India only a reasonable amount can be awarded by way of damages even when the parties to the contract have provided for liquidated damages and that a term in a bank guarantee making the beneficiary the sole judge on the question of breach of contract and the extent of loss or damages would be invalid and that no amount can be said to be due till an adjudication in that behalf is made either by a court or an arbitrator, as the case may be. In taking that view the High Court has overlooked the correct position that a bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction and the primary contract between the person at whose instance the bank guarantee is given and the beneficiary. What the High Court has observed would be applicable only to the parties to the underlying transaction or the primary contract but can have no relevance to the bank guarantee given by the bank, as the transaction between the bank and the beneficiary is independent and of a different nature. In case of an unconditional bank guarantee the nature of obligation of the bank is absolute and not dependent upon any dispute or proceeding between the party at whose instance the bank guarantee is given and the beneficiary. The High Court thus failed to appreciate the real object and nature of a bank guarantee. The distinction which the High Court has drawn between a guarantee for due performance of a works contract and a guarantee given towards security deposit for that contract is also unwarranted. The said distinction appears to be the result of the same fallacy committed by the High Court of not appreciating the distinction between the primary contract between the parties and a bank guarantee and also the real object of a bank guarantee and the nature of bank's obligation thereunder. Whether the bank guarantee is towards security deposit or mobilisation advance or working funds or for due performance of the contract if the same is unconditional and if there is a stipulation in the bank guarantee that the bank should

pay on demand without a demur and that the beneficiary shall be the sole judge not only on the question of breach of contract but also with respect to the amount of loss or damages, the obligation of the bank would remain the same and that obligation has to be discharged in the manner provided in the bank guarantee. In General Electric Technical Services Co. Inc. v. Punj Sons (P) Ltd. while dealing with a case of bank guarantee given for securing mobilisation advance it has been held that the right of a contractor to recover certain amounts under running bills would have not relevance to the liability of the bank under the guarantee given by it. In that case also the stipulations in the bank guarantee were that the bank had to pay on demand without a demur and that the beneficiary was to be the sole judge as regards the loss or damage caused to it. This Court held that notwithstanding the dispute between the contractor and the party giving the contract, the bank was under an obligation to discharge its liability as per the terms of the bank guarantee. Larsen and Toubro Limited v. Maharashtra State Electricity Board and Hindustan Steel Workers Construction Ltd. v. G.S. Atwal & Co. (Engineers) Pvt. Ltd. were also cases of work contracts wherein bank guarantees were given either towards advances or release of security deposits or for due performance of the contract. In both those cases this Court held that the bank guarantees being irrevocable and unconditional and as the beneficiary was made the sole judge on the question of breach of performance of the contract and the extent of loss or damages an injunction restraining the beneficiary from invoking the bank guarantees could not have been granted. The above referred three subsequent decisions of this Court also go to show that the view taken by the High Court is clearly wrong.”

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

137. We may hasten to add that the decision in Hindustan Steelworks Construction Ltd.’s case, has, vide para 18 clarified the ambit of what

constitutes a fraud justifying granting an injunction. It was clarified as under:-

“It may be pointed out that fraud which is recognised as an exception is the fraud by one of the parties to the underlying contract and which has the effect of vitiating the entire underlying transaction. A demand by the beneficiary under the bank guarantee may become fraudulent not because of any fraud committed by the beneficiary while executing the underlying contract but it may become so because of subsequent events or circumstances. We see no good reason why the courts should not restrain a person making such a fraudulent demand from enforcing a bank guarantee.”

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

139. A slightly discordant note was struck by the Supreme Court in the decision reported as 2002 (10) SCC 508 State of Haryana Vs. Continental Construction wherein the Supreme Court did not interfere with an injunction order passed by the High Court noting that the dispute was pending adjudication before the arbitrator. However in the decision reported as 2006 (2) SCC 728 BSES Ltd. Vs. Fenner India it was observed:

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

140. In the decision reported as 1997 (6) SCC 450 Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Work P. Ltd. it was held that special circumstance of irretrievable injury means a circumstance which makes it impossible for the guarantor to reimburse itself by way of restitution.

141. In the decision reported as 1997 (1) SCC 568 U.P.State Sugar Corporation Vs. Sumac International Ltd. the fact that the beneficiary was a sick company and that a scheme for its revival was pending consideration before BIFR under Sick Industrial Companies (Special Provisions) Act 1985 was held not to be a circumstance showing that money would be irretrievably lost if the claim ultimately went in favour of the contractor. Referring to the decision in Itek Corporation's case and the law pertaining to injunction claims qua bank guarantee, it was observed:

“The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned.

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

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Before us, however, in the course of argument, the learned advocate for the respondent urged for the first time in this case there would be irretrievable injustice to the respondent if the bank guarantees are allowed to be realised because the appellant is a sick industrial company in respect of which a reference is pending before the board for industrial and financial reconstruction under the Sick Industrial Companies (Special Provisions) Act, 1985. The respondent contends that even if it succeeds before the arbitrator it will not be able to realise his claim from the appellant. The mere fact that a reference under the Sick Industrial Companies (Special Provisions) Act, 1985 is pending before the Board, is, in our view, not sufficient to bring the case in the ambit of the “irretrievable injustice” exception. Under the scheme of the said Act the board is required to make such inquiry as it may deem fit for determining whether any industrial company has become a sick industrial company. Under Section 16 (4) where the board deems it fit to make an inquiry or to cause an inquiry to be made in this connection, it may appoint one or more persons to be special directors for safeguarding the financial and other interests of the company or in the public interest. Under Section 17 after making an inquiry, if the Board is satisfied that a company has become a sick industrial company, the Board may then decide, by an order in writing, whether it is practicable for company to make its net worth exceed the accumulated losses within a reasonable time. If this is practicable, then the Board shall give such company the opportunity to make its net worth exceed the accumulated losses. Under Sub-Section (3) of Section 17 if the Board decides that this is not practicable within a reasonable time, it may adopt measures specified in Section 18 and provide for a scheme for appropriate measures in relation to that company. There can, therefore, be no presumption that the company will, in no circumstance, be able to discharge its obligations.

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Under Section 22 on which the respondent relies, where in respect of an industrial company, an inquiry under Section 16 is pending, or any scheme under Section 17 is under preparation or a

sanctioned scheme is under implementation or when an appeal under Section 25 is pending, then no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or the appointment of a receiver in respect thereof can be proceeded with; and no suit for the recovery of money or for the enforcement of any security against the industrial company shall lie or be proceeded with except with the consent of the Board or, as the case may be, the Appellate Authority. The respondent contends that its right to realise its claim, of established, would be affected by reason of Section 22 of the said Act. There is no material before us to show that the appellant company cannot make its net worth positive. NO scheme has been framed under the said Act so far. Even under Section 22 there is no absolute bar against any suit for the recovery of money. The suit cannot be proceeded with except with the consent of the Board of the Appellate Authority. Therefore, in an appropriate case, the Board or the Appellate Authority is entitled to give its consent to such a claim being proceeded with. This is not a situation of the kind envisaged in the case of Itek Corpn. where there was no possibility whatsoever of recovery of any amount from the purchaser.”

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

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

144. Refusing to go for the bite, in Femur India's case, the Supreme Court held:

“We are afraid that in the face of the law succinctly laid down in U.P.Coop. Federation and reiterated in numerous judgments of this Court referred to earlier, we are unable to accept the wide proposition of law laid down in the foreign judgments cited by Mr. Sorabjee. Whatever may be the law, as to the encashment of bank guarantees in other jurisdictions, when the law in India is clear, settled and without any deviation whatsoever, there is no occasion to rely upon foreign case-law.”

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

pertaining to the prima facie nature of the respective claim of the litigating parties relatable to the main dispute. The dispute between the parties to the underlying contract has to be decided at the civil forum i.e. a civil suit if there exists no arbitration clause in the contract or before the arbitral tribunal if there exists an arbitration clause in the contract. Pendency of arbitration proceedings is no consideration while deciding on the issue of grant of an interim injunction. That certain amounts have been recovered under running bills and have to be adjusted for is of no concern in matters relating to invocation of bank guarantee. That there are serious disputes on questions as to who committed the breach of the contract are no circumstances justifying granting an injunction pertaining to a bank guarantee. Plea of lack of good faith and/or enforcing the guarantee with an oblique purpose or that the bank guarantee is being invoked as a bargaining chip, a deterrent or in an abusive manner are all irrelevant and hence have to be ignored. There are only two well recognized exceptions to the rule against permitting payment under a bank guarantee. The same are :-

- A. A fraud of egregious nature;
- B. Encashment of the bank guarantee would result in irretrievable harm or injustice of an irreversible kind to one of the parties.

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

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

putting a party in an irretrievable situation.

148. Contractual disputes cannot be projected by attempting to urge that the beneficiary under the bank guarantee is in default. Issues of fraud require pleadings to bring out a case of a fraud of an egregious nature and we do not find any brought out in the pleadings. The irretrievable injury or irretrievable injustice or special equity would mean a situation where the party at whose behest the bank guarantee is issued is rendered remediless. The pleadings do not bring out so.

149. The two appeals are accordingly dismissed with costs (one set only) assessed at ₹5,00,000/- (Rupees Five Lakhs only) against the appellant and in favour of the respondent.

150. Amount lying in this Court pursuant to the order passed by the Division Bench in FAO (OS) No.250/2014 together with interest accrued thereon shall be paid to the respondent forthwith in terms of the order passed by the learned Single Judge in OMP No.557/2014.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

SEPTEMBER 15, 2014

mamta/skb