

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

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Date of decision: 24th December, 2014.

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O.M.P. 1641/2014 & I.A. No.26253/2014 (u/O 6 R-17 CPC)

**OMAXE INFRASTRUCTURE AND
CONSTRUCTION LTD**

..... Petitioner

Through: Mr. Kapil Sibal, Sr. Adv. with Mr.
Sandeep Sharma, Mr. Vikas Sharma,
Mr. Amit Chaudhary & Ms. Risha
Mittal, Advs.

Versus

DIRECTOR CONTRACT (UNION OF INDIA) Respondent

Through: Mr. Jaswinder Singh & Mr. Saqib,
Advs.

AND

+

O.M.P. 1642/2014 & I.A. No.26254/2014 (u/O 6 R-17 CPC)

**M/S OMAXE INFRASTRUCTURE AND
CONSTRUCTION PVT. LTD.**

..... Petitioner

Through: Mr. Kapil Sibal, Sr. Adv. with Mr.
Sandeep Sharma, Mr. Vikas Sharma,
Mr. Amit Chaudhary & Ms. Risha
Mittal, Advs.

Versus

**UNION OF INDIA, DIRECTOR GENERAL, MARRIED
ACCOMMODATION PROJECT PHASE-II, ... Respondent**

Through: Mr. Jaswinder Singh & Mr. Saqib,
Advs.

AND

+ **O.M.P. 1643/2014 & I.A. No.26255/2014 (u/O 6 R-17 CPC)**

**M/S OMAXE INFRASTRUCTURE AND
CONSTRUCTION LTD.**

..... Petitioner

Through: Mr. Kapil Sibal, Sr. Adv. with Mr.
Sandeep Sharma, Mr. Vikas Sharma,
Mr. Amit Chaudhary & Ms. Risha
Mittal, Advs.

Versus

**DIRECTOR GENERAL, MARRIED ACCOMMODATION
PROJECT (PHASE -II)**

..... Respondent

Through: Mr. Jaswinder Singh & Mr. Saqib,
Advs.

CORAM:-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. Each of these petitions, under Section 9 of the Arbitration and Conciliation Act, 1996, seeks the interim measure of restraining the sole respondent in each of the petitions namely Director General, Married Accommodation Project, E-in-C's Branch, Integrated HQ of MoD (Army), Kashmir House, Rajaji Marg, New Delhi from invoking and encashing the bank guarantees furnished at the instance of the petitioner in favour of the respondent.

2. O.M.P. No.1641/2014 is filed with respect to bank guarantee Nos. 172113ILPER0014, 172113ILFIN1619, 172113ILFIN1620, 172113ILFIN1621, 172113ILFIN1622, 172113ILFIN1623, 172113ILFIN1624, 172113ILFIN1625 and 172113ILFIN1626 valid upto 10th February, 2015, 10th March, 2015, 10th March, 2015, 10th March, 2015, 10th March, 2015, 10th March, 2015, 10th March, 2015, 10th March, 2015 and 10th March, 2015 respectively for an amount totaling Rs.9,89,28,900/- furnished by the United Bank of India (UBI), Nehru Place, New Delhi at the instance of the petitioner in favour of the respondent.

3. O.M.P. No.1642/2014 is filed with respect to the bank guarantee Nos.172113ILPER0015, 172113ILFIN1634, 172113ILFIN1635, 172113ILFIN1636 and 172113ILFIN1637 valid upto 10th February, 2015, 10th March, 2015, 10th March, 2015, 10th March, 2015 and 10th March, 2015 respectively for an amount totaling Rs.8,89,63,310/- furnished by the United Bank of India, Nehru Place, New Delhi at the instance of the petitioner in favour of the respondent.

4. O.M.P. No.1643/2014 is filed with respect to the bank guarantees No.172113ILPER0018, 172113ILFIN1629, 172113ILFIN1630, 172113ILFIN1631, 172113ILFIN1632 and 0170813IPG000307 valid upto

10th February, 2015, 10th March, 2015, 10th March, 2015, 10th March, 2015, 10th March, 2015 and 12th May, 2015 respectively for an amount totaling Rs.14,68,61,000/- furnished by the United Bank of India, Kolkata / Nehru Place, New Delhi and Allahabad Bank, Kolkata / Okhla Branch, New Delhi at the instance of the petitioner in favour of the respondent.

5. All the three petitions were listed on urgent mentioning in the post-lunch session on 19th December, 2014, when the counsels for the respondent appeared on advance notice. It was however represented by the petitioner on that date that owing to the urgency of the relief claimed and the paucity of time, all the requisite papers could not be filed and perused and, while seeking ad-interim injunction, time therefor was sought. The counsel for the respondent had however opposed the adjournment and contended that the petitioner is guilty of concealment of material documents and facts. It was stated that M/s Reacon Engineers (India) Pvt. Ltd. claimed to have purchased the petitioner company and had in a letter written to the respondent admitted the failure of the petitioner to perform its part of the contractual obligations viz.-a-viz. the respondent, owing to its internal problems. It was also informed that the respondent had vide letters dated

17th December, 2014, besides invoking the bank guarantees cancelled the contracts with the petitioner.

6. On enquiry, it was informed on 19th December, 2014 that the respondent though had invoked the bank guarantees subject matter of all the three petitions, but the guaranteeing bank(s) had till then not remitted the monies to the account of the respondent, though the same was stated to be in process. In the circumstances, while adjourning the matters to 23rd December, 2014, it was ordered that if the monies till then had not been transferred by the bank(s) who had issued the bank guarantees, to the account of the respondent, the same be not transferred till 23rd December, 2014.

7. The petitioner has filed I.A. No.26253/2014 in O.M.P. No.1641/2014 for amendment of the petition, to incorporate the plea that M/s Omaxe Limited has transferred all its shareholding in the petitioner company to M/s. Reacon Engineers (India) Pvt. Ltd. and now the petitioner is wholly and fully owned by the said M/s. Reacon Engineers (India) Pvt. Ltd. and that though originally the bank guarantees were submitted from Delhi but after the transfer of ownership of the company, the bank guarantees were issued

from the Banks in Kolkata. The petitioner has also filed proposed amended petition as well as additional documents.

8. The senior counsel for the petitioner and the counsels for the respondent were heard on 23rd December, 2014 and matter posted for today for pronouncing orders.

9. I may at the outset state that the senior counsel for the petitioner has argued all the three petitions as one only and with reference to the documents filed in O.M.P. No.1641/2014. Axiomatically, the counsels for the respondent have also argued, as if the arguments made apply to the facts of each of the three cases.

10. The senior counsel for the petitioner has contended that the bank guarantees subject matter of these petitions are of three kinds i.e. (I) performance bank guarantee; (II) bank guarantee in lieu of retention money against material; and, (III) bank guarantee in lieu of retention money against work done.

11. Attention has been invited to the performance bank guarantee and the relevant part whereof is as under:

“Bank Guarantee for Performance Security.

1. In consideration of the President of India (hereinafter called “the Government”) having agreed to exempt M/s Omaxe Infrastructure & Construction Limited (Hereinafter called “the said Contractor(s)”) from the demand, under the terms and conditions of an Agreement dated 23rd Feb. 2011 “**CA No.DG MAP/PHASE II / PKG-24/21 OF 2010-11**” construction of Dwelling Units at Deolali (Army) & Nasik (AF) (hereinafter called “the said agreement”) of performance security deposit for the due fulfillment by the said Contractor(s) of the term and condition contained in the Said Agreement on production of a Bank Guarantee terms for, Rs.6,79,28,900/- (Rupees Six Crores Seventy Nine Lacs Twenty Eight Thousand and Nine Hundred Only). We United Bank of India, Corporate Finance Branch, 11, Hemanta Basu Sarani, Kolkata-700 001 do hereby undertake to pay to the Government an amount not exceeding Rs.6,79,28,900/- (Rupees Six Crores Seventy Nine Lacs Twenty Eight Thousand Nine Hundred Only) against any loss or damage cause to or suffered or would be caused to or suffered by the government by reason of any breach by the said Contractor(s) of any of the terms or conditions contained in the said Agreement.

2. We United Bank of India, Corporate Finance Branch, 11, Hemanta Basu Sarani, Kolkata-700 001 do hereby undertake to pay the amounts due and payable under this guarantee without any demur, merely on a demand from the Government stating that the amount claimed is due by way of loss or damage caused to or would be caused to or suffered by the Government by reason of any breach by the said Contractor(s) of any of the terms or conditions contained in the said Agreement or by reason of the Contractor’s failure to perform the said Agreement. Any such demand made on the Bank shall be conclusive as regards the amount due and payable by the Bank under this guarantee. However, our liability under this guarantee shall be restricted to an amount not exceeding

Rs.6,79,28,900/- (Rupees Six Crores Seventy Nine Lacs Twenty Eight Thousand Nine Hundred Only)."

12. It is contended that the bank guarantee, though unconditional and though as is now well settled, an independent contract, in Clause (1) supra has incorporated the "underlying contract between the petitioner and the respondent" in it.

13. Attention is next invited to the following part of Clause 48 of the General Conditions of the "underlying contract between the petitioner and the respondent" and which is as under:

"48. Cancellation of Contract in part or in full for contractor's Default.

If the Contractor:-

- (a) Makes default in commencing the Works within a reasonable time from the date of the handing over the site, and continues in that state after a reasonable notice from P.M.; or*
- (b) In the opinion of the P.M. at any time, whether before or after the date or extended date for completion, makes default in proceeding with the Works, with due diligence and continues in that state after a reasonable notice from P.M.; or*
- (c) Fails to comply with any of the terms and conditions of the Contract or after reasonable notice in writing with orders properly issued thereunder; or*
- (d) Fails to complete the Works, Work order and items of Works, with individual dates for completion and clear the Site on or before the date of completion."*

14. It was argued that as per the “underlying contract between the petitioner and the respondent” aforesaid, the respondent could have terminated the contract only on either of the aforesaid four events happening / occurring.

15. Attention was next invited to the letter dated 17th December, 2014 of the respondent to the guaranteeing bank(s), invoking the bank guarantee and the relevant part whereof is as under:

“2. And whereas it is expressly provided in the aforesaid Bank Guarantee Bonds that you undertake to pay the amount due and payable under the guarantees without any demur, merely on a demand from the Government stating that the amounts claimed is due by way of loss or damage caused to or suffered or would be caused to or suffered by the Government by reasons of any breach by the contractor of any of the terms and conditions contained in the said Contract Agreement or by the reason of contractor’s failure to perform the said agreement.

3. And whereas there has been a breach by the contractor of the terms and conditions of the Agreement and by virtue of such breach there would be loss / damage caused to the Government by reason of such breach by the contractor which in the estimate of the DGMAP, will exceed the value of said Bank Guarantee Bond.”

16. Attention was next invited to the letter dated 17th December, 2014 of the respondent to the petitioner, of termination of the “underlying contract” and the relevant part whereof is as under:

“2. In spite of notices issued to you vide referred letters in connection with the work to be executed under the above mentioned contract, you have failed to proceed with the work with due diligence. The work is at standstill at all the site for a considerable period of time. Sufficient opportunities have already been given to your firm to accelerate the progress at site but no response has been received from your side. You have also failed to reply to the final notice issued by me vide letter No.81982/MAP/PH-II/PKG-24/743/E8 dated 20 Nov 2014.

3. Therefore, I, Accepting Officer of the contract on behalf of the Government acting under the power vested in me in terms of condition 48 of the General Conditions on SI page No.126-127 of contract and without prejudice to any other right or remedy which shall have accrued or shall accrue hereafter to the Government in terms of the above said contract, hereby cancel your contract on account of your default with effect from 18 Dec 2014.

4. Please note that the work as defined in the contract condition 1(c) of the General Conditions of contracts will now be got completed by me through other agency at your risk and cost.

5. You are accordingly requested to report to the Project Manger (Phase-II), Md Accn Project, C/o Station HQ Devlali-422401 at his office in person or through an accredited representative at 1000 hours on 29 Dec 2014 or on date to be fixed by the Presiding Officer of the BOO to be convened by concerned stn HQ when an inventory of complete / incomplete

items of work and materials, if any, left by you at site will be made and recovered jointly. In the event of your failure to keep the appointment, inventory will nevertheless be prepared notwithstanding your absence and the same shall be fully binding on you and any representation in the matter at later date will not be entertained due to your default.”

17. It is argued, i) that the invocation by the respondent of the bank guarantees is not in terms of the bank guarantees and is not an invocation entitling the respondent to encash the bank guarantees; and ii) that the respondent could invoke performance bank guarantee only by specifying as to in breach of which of the said Clauses (a), (b), (c) and (d) of Clause 48 supra, according to the respondent, the petitioner was and mere parrot like repetition of the language of the bank guarantee cannot be deemed to be proper invocation, entitling encashment of the performance bank guarantee.

18. With respect to the other two kinds of bank guarantees, it is contended that 100% monies were released by the respondent to the petitioner with respect to the part of the works completed by the petitioner, only after being satisfied of the successful completion of that part of the work and of the value of the material brought by the petitioner to the construction site of the respondent and even though the respondent had made the petitioner furnish bank guarantees in lieu of retention money but the said part of the work

being complete, and the material brought by the petitioner having been used / being still in the custody of respondent, the respondent is not entitled to the money thereunder.

19. It is also argued that this is a fit case where the encashment of the bank guarantee should be stayed by an ad-interim order and the respondent be made to file a reply and the petition be disposed of only thereafter, since the bank guarantees are alive till March, 2015.

20. Attention is also invited to the communications addressed by the petitioner to the respondent and listed in the petitions, complaining of the hindrances being faced by the petitioner in completing the contracted works. It is stated that the respondent, at the contemporaneous time, maintained a stoic silence and has now all of sudden terminated the contract and invoked the bank guarantee. It is also informed that of all the 39 works contracts issued by the respondent, as many as 29 have been cancelled and bank guarantees furnished thereunder invoked. It is conveyed that the respondent is following the practice of repeatedly issuing contracts and terminating the same and with the result that all its projects are held up.

21. Per contra, Mr. Jaswinder Singh, counsel for the respondent in O.M.P. Nos.1641/2014 & 1643/2014 has contended that there is no need for filing any reply to these petitions and the same be heard as the matter is squarely covered by the judgment dated 21st November, 2013 of the Division Bench of this Court in FAO(OS) No.529/2013 titled ***Indu Projects Limited Vs. Union of India*** and other connected appeals. He has further contended that the application aforesaid for amendment has been filed, after the respondent during the hearing on 19th December, 2014 took the said objection; thus the petitioner is guilty of suppression of material facts and is not entitled to any interim relief on this ground alone.

22. He has further contended that the petitioner is not entitled to any interim relief, having admittedly sublet and assigned the contract. It is contended that the petitioner was found eligible to be awarded the contracts for the reason of being part of Omaxe Ltd. and M/s. Reacon Engineers (India) Pvt. Ltd. and / or the petitioner on its own, was / is otherwise not even eligible for the subject contracts.

23. It is controverted that the performance bank guarantees have ceased to be independent from the underlying contract between the petitioner and the respondent, for the reason of the said contract between the petitioner and the

respondent having been incorporated in the bank guarantees as has been contended by the senior counsel for the petitioner. It is contended that the underlying contracts between the parties in pursuance to which the bank guarantees were furnished, have to be necessarily mentioned / referred to in the bank guarantee and merely therefrom the same cannot be said to have got incorporated in the bank guarantee or to have become a part of the bank guarantee.

24. I may record that the counsel for the respondent wanted to argue that the invocation and encashment of the bank guarantee can be stayed by the Courts only on the ground of established fraud and in this regard wanted to cite *Svenska Handelsbanken Vs. Indian Charge Chrome Ltd.* (1994) 1 SCC 502, particularly para 60 thereof but the senior counsel for the petitioner interjected that the petitioner is not seeking any relief on the plea of fraud (fraud of an egregious nature) and is seeking the stay of invocation / encashment of bank guarantee only on the ground of invocation of the bank guarantee being not in terms of the bank guarantee and thus the counsel for the respondent was not allowed to pursue the said line further.

25. The counsel for the respondent argued that the language of the bank guarantees subject matter of *Indu Projects Limited* supra was identical to the

bank guarantees subject matter of these petitions and the same was interpreted by the Division Bench to be an “unconditional bank guarantee” and it was held that the invocation thereof, claiming that there had been a breach by the contractor of the terms and conditions of the agreement and by virtue of such breach there would be loss / damage caused to the Government which in the estimate of HQ DG MAP would exceed the value of the bank guarantee, was proper invocation in terms of the bank guarantee and it was not at all necessary to quantify the amount of loss and damage.

26. Mr. Saqib, Counsel for the respondent in O.M.P. No.1642/2014 invited attention to Clause 13A of the General Conditions of the contract to show that time was of the essence of the contract. He has further invited attention to Clause 19.4 of the contract under the caption “performance security” to show that the performance bank guarantee is in lieu of the said performance security in terms of the contract. Attention was next invited to Clause 48 supra to contend that upon cancellation of the contract on any of the grounds a,b,c,d supra, the respondent is entitled to complete the work by any means at the contractor’s risk and cost. With respect to the retention money bank guarantees, attention was invited to Clause 54 of the contract to contend that though in terms thereof the petitioner as contractor was entitled

to 95% only of the value of the work executed on the site and the balance 5% was to be retained by the respondent and payable only on satisfactory completion of entire contractual work. It is argued that the petitioner obtained 100% of the value of the work and gave a bank guarantee for the balance 5% and since the petitioner has not completed the works, it has not become entitled to the balance 5% and the respondent is entitled to invoke the bank guarantee in lieu thereof.

27. Attention was invited to paras 4 & 6 of OMP No.1642/2014 to contend that the petitioner has erroneously pleaded that the bank guarantee in lieu of retention money against material is for 70% of the value of the material (the senior counsel for the petitioner at this stage admitted that it is a typographical error as the bank guarantee is for 30% only). It is also argued that the petitioner in para 6 of the OMP has portrayed as if the respondent had unilaterally changed the terms of the contract, when the same was consensual and under signatures of both parties (the senior counsel for the petitioner again interjected that he has not even argued on the said aspect).

28. Attention is also invited to Clause 2 of the Special Conditions of the Contract providing for the contractor to, by visiting the site, satisfy himself and it is contended that the pleas raised by the petitioner, of admitted delay, being attributable to the respondent owing to the site being unavailable, is contrary to the contract. However the senior counsel for the petitioner again interjected to contend that the respondent in reply is referring to pleas, facts and documents which have not even been urged on behalf of the petitioner.

29. The counsel for the respondent in OMP No.1642/2014 further referred to the terms aforesaid of the performance guarantee to contend that the purpose thereof was to secure the respondent against the likely loss assessed by the respondent. It is contended that as many as five extensions of 750 days were given to the petitioner but the progress in the contract subject matter of OMP No.1642/2014 was only 27%.

30. The counsel for the respondent in OMP Nos.1641/2014 and 1643/2014 stated that the date of completion of the work subject matter of OMP No.1643/2014 was 24th October, 2012; was extended till 28th March, 2014, but the progress was only of 37.43%.

31. However before such particulars with respect to OMP No.1641/2014 could be given, the senior counsel for the petitioner again contended that the arguments of fact cannot be urged by the respondent without filing a reply. He further contended in rejoinder that the judgment of the Division Bench in *Indu Projects Ltd.* is only on the aspect of whether the loss suffered / likely to be suffered was required to be quantified while invoking the bank guarantee. He reiterated that it was essential for the respondent to invoke the bank guarantee by specifying as to in breach of which clause of the contract the petitioner was and without the respondent so specifying, there is no proper of invocation of the bank guarantee and hence the encashment thereof ought to be stayed during the pendency of arbitration of disputes between the parties.

32. I have considered the rival contentions.

33. As would be obvious from the aforesaid, the petitioner in its arguments has not even drawn attention to the bank guarantees in lieu of retention money and to be fair to the senior counsel for the petitioner, rightly so. The said bank guarantees are unequivocal and unconditional and the guaranteeing bank thereunder has agreed to pay to the respondent the

amount thereof to the respondent “against any loss or damage caused to or suffered or would be caused to or suffered” by the respondent “by reason of any breach” by the petitioner “of any of the terms and conditions contained in the agreement” of the petitioner with the respondent and “without any demur, merely on a demand” from the respondent “stating that the amount claimed is due by way of loss or damage caused to or suffered or would be caused to or suffered” by the respondent “by reason of any breach” by the petitioner “of any of the terms or conditions contained in the said agreement or by reason of” the petitioner’s “failure to perform the said agreement”. The guaranteeing bank further agreed that “any such demand made on the bank shall be conclusive as regards the amount due and payable by and the liability of the bank” under the guarantee and the bank would pay the amount demanded “notwithstanding any dispute or disputes raised” by the petitioner “on any ground whatsoever and notwithstanding any proceeding pending in any Court or Tribunal relating to the said agreement” between the petitioner and the respondent or the subject bank guarantee and “the liability of the bank under this guarantee being absolute and unconditional”.

34. The argument of the senior counsel for the petitioner, that the respondent is not entitled to invoke the bank guarantees in lieu of retention

money, is without regard to the petitioner in the contract having agreed to retention by the respondent of a percentage of the payment due, towards completed parts of the work or for the material brought to the construction site by the petitioner and the reason therefor. If merely for the reason of having brought the material to the construction site and / or for having completed a part of the work, the petitioner was to be entitled to the entire payment therefor, the occasion for furnishing the bank guarantees in lieu of retention money would not have arisen. At least at this interim stage, no interim measure contrary to the contract between the parties can be ordered. The same would amount to, at the interim stage only, ordering the respondent to pay to the petitioner the monies which the respondent, as per the contract, is entitled to retain and which the petitioner can only recover from the respondent only upon being ultimately found entitled thereto. It cannot be forgotten that the said bank guarantees are ‘in lieu of’ the monies which the respondent was not immediately liable to pay to the petitioner and which were released to the petitioner ‘in lieu of’ the petitioner furnishing bank guarantee. I therefore find that the petitioner has not even made out any case for restraining encashment of the bank guarantees in lieu of retention money.

35. As far as the case made out by the petitioner for injunction encashment of performance bank guarantees is concerned, the short point for adjudication is whether the invocation thereof is not in terms of bank guarantee, i.e. not as required to invoke the bank guarantee.

36. I tend to agree with the counsel for the respondent that mere mention of / reference to the underlying contract in the bank guarantee does not amount to incorporation thereof in the bank guarantee and that mention / reference thereof in the bank guarantee is essential to show the consideration for which the bank guarantee has been furnished.

37. The performance bank guarantee was issued to secure the respondent against any loss or damage caused to or suffered or would be caused to or suffered by the respondent by reason of any breach by the petitioner of any of the terms or conditions of the contract entered into between them. Without mentioning the said contract, the bank guarantee could not also have conveyed as to for securing losses or damages against what, it was being furnished.

38. Moreover, a bank guarantee being but a contract, has to be interpreted like a contract i.e. no single part or clause of the contract can be picked and

read/interpreted in isolation and the contract between the parties and their intention, is to be gauged from a complete reading thereof. If it were to be held, that before the bank guarantee could be encashed the respondent was required to satisfy the bank that the petitioner had breached the contract and that it had indeed suffered loss or damage or was likely to suffer loss or damage therefrom, then, the clauses of the said bank guarantee whereunder the bank had agreed to pay the amount thereunder, without any demur, merely on demand from the respondent stating that the amount claimed was due by way of loss or damage caused or would be caused to or suffered by the respondent by reason of any breach by the petitioner of any of the terms and conditions contained in the agreement or by reason of the petitioner's failure to perform the said agreement and of such demand made by the respondent on the bank being conclusive as regards the amount due and payable by the petitioner under the guarantee, would become otiose/meaningless.

39. No merit is also found in the contention of the senior counsel for the petitioner, of the respondent, for invoking the bank guarantees being required to specify the breach on the part of the petitioner. Clause (2) of the performance bank guarantee, as set out hereinabove, uses the expression "by

reason of any breach” and which is indicative of the respondent, while invoking the bank guarantee, being not required to specify the breach and the only requirement being for the respondent to state that the petitioner was in breach of the terms and conditions of the agreement or had failed to perform the agreement. Rather, it is felt that if such detailed reasons were to be required to be stated, the same would make the matter contentious, negating the very purpose of obtaining an unconditional unequivocal bank guarantee.

40. Having gone through the judgment of the Division Bench of the Court in *Indu Projects Limited* supra, I find that not only is the language of the bank guarantee subject matter thereof identical to the language of the performance bank guarantee with which these petitions are concerned but the letter of invocation of the bank guarantees in that case also did not specify the breach or the clause of the agreement of which the contractor therein was claimed to be in breach. Though undoubtedly the contention of the counsel for the contractor in that case before the Division Bench was that the losses or damages suffered or likely to be suffered were required to be quantified in the letter of invocation of bank guarantee and which was negated by the Division Bench but what the Division Bench has held is that

a categorical assertion on the part of the respondent that there had been a breach by the contractor of the terms and conditions of the agreement and that by virtue of such breach, there would be loss / damage which in the estimate of the respondent would exceed the value of the bank guarantee, was a proper and sufficient invocation of the bank guarantee. The Division Bench also held that since the bank had agreed that the demand made shall be conclusive as regard the amount payable thereunder, the bank had agreed to pay without demur.

41. Thus, though undoubtedly, the invocation of bank guarantee being not in terms thereof, is a ground for injuncting the invocation/encashment of bank guarantees, but in the facts of the present case I do not find the same to have been made out. The invocation by the respondent of the bank guarantees subject matter of these petitions is found to be in terms of the bank guarantees. If the intention of and the agreement of the parties was that the respondent, to be entitled to invoke the bank guarantees, must specify the breach on the part of the petitioner of the agreement and/or the clause of the agreement which the petitioner had breached, nothing prevented the parties to specify so. It is not so specified, not in the bank guarantees and even if the agreement/contract between the parties could be seen, not even therein. The

petitioner cannot be allowed to now, when the respondent has already invoked the bank guarantee, contend so and have the invocation by the respondent of the bank guarantees defeated, by springing a surprise of such a plea on the respondent. The same would amount to giving unfair advantage to the petitioner, to the prejudice of the respondent. The respondent could not be expected to conduct itself in a manner not required by the written contract. It cannot also be lost sight of that these are commercial contracts prepared by experts deft in drafting thereof, and the parties cannot as an afterthought be permitted to ascribe or impute a meaning thereto not borne out from the language thereof and which could have been, by use of different language which the parties chose not to use.

42. No other argument has been urged on behalf of the petitioner.

43. I therefore do not find the petitioner to have made out any case for grant of interim measure of injuncting the encashment of the bank guarantees.

44. I clarify that though no formal order of allowing the application for amendment has been made but the counsels have argued on the basis of the amended petition in O.M.P. No.1641/2014 and I have also in view thereof

not taken notice of the plea of the respondent of the petitioner being guilty of concealment as contended on 19th December, 2014 and as contended yesterday i.e. 23rd December, 2014 and decided the entitlement of the petitioner to the interim measure *de hors* the same.

45. I further clarify that though no reply is filed but no need is felt to keep these petitions pending, considering the nature of the interim measure sought.

46. The petitions are accordingly dismissed with costs of Rs.15,000/- in each of the petitions payable by the petitioner to the respondent within four weeks of today.

RAJIV SAHAI ENDLAW, J.

DECEMBER 24, 2014
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