

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.04.2015

CORAM

THE HON'BLE MR.JUSTICE S.MANIKUMAR

C.M.A.No.3872 of 2011

M.P.No.1 of 2011 and 1 of 2012

M/s.Ircon International Ltd.,
rep., by its Additional General Manager,
Cuddalore District.

... Appellant/Respondent

vs.

M/s.Alankar Constructions,
rep., by its Proprietor,
Chennai.

... Respondents/Petitioner

Appeal filed under Section 37(1)(a) of the Arbitration and Conciliation Act, 1996, against the judgment and decree dated 28.10.2011, made in Arb.O.P.No.128/2011, on the file of the Principal District Judge, Cuddalore.

For appellant : Mr.V.Niranjan

For Respondent : Mr.N.Ramakrishnan

JUDGMENT

This Civil Miscellaneous Appeal is filed, challenging the order, made in Arb.O.P.No.128/2011, dated 28.10.2011, on the file of the Principal District Judge, Cuddalore, by which, the appellant has been restrained from invoking unconditional bank guarantees given by the respondent.

2. Short facts leading to the appeal are as follows:

The appellant is a Government of India undertaking, that executes infrastructure projects, all over India. It has invited tender bids for executing some portions of a project, it had undertaken. On 18.08.2009, the respondent made an offer and subsequently, its negotiated offer letter No.ALANKAR/IRCON/3ROBs, dated 25.08.2009, was accepted by the appellant on 02.09.2009, vide letter of Acceptance/Work Order IRCON/4016/TNRSP-01/ROBs/Sub & Super Structure/PKG-5B. The

"Scope of Work", allotted to the respondent, vide the Work Order, was the "Construction of Sub & Super Structure works for 3 ROBs at Sirkazhi BR 312, Ariyalur BR 380 & Vriddhaachalam BR 322 above Pile Cap" and the following conditions were clearly stipulated in the work order,

"(a) That the work to be executed under the Work Order was to be carried out inter alia in accordance with the General Conditions of Contract and Special Conditions of Contract. (clause 1(a)(i))

(b) That the entire work was to be completed within six months from the date of issue of the Work Order (ie 02.09.2009. (clause 3),

(c) That in the event of delay the Respondent would be liable to pay by way of liquidated damages a sum equivalent to 0.05 % of the contract value, per day, subject to a maximum of 10 % of the Contract Value. (Clause 10.1)

3. It is the further case of the appellant that the Contract Value under the Work Order was Rs.3,44,30,707 (Rupees Three Crores Forty Four Lakh Thirty Thousand Seven Hundred and Seven Only) and a Mobilisation Advance of 10% of this amount (approximately Rs.34 lakh) was paid to the respondent by the appellant in order to facilitate the speedy execution of the Work Order. The respondent furnished unconditional Bank Guarantees 15055, 15056, 15057, 15059 and 15060, dated 03.09.09 for Rs.5,00,000/- each in favour of the appellant, as security for the Mobilisation Advance, which was to be adjusted in the bills submitted by the respondent. If there is any delay in the Work Order, the following clauses would come into operation, to ensure that the appellant can have the project completed through third parties risk,

(a) Clause 20.2 of the Special Conditions of Contract provided that the Appellant could induct resources from the market at the risk and cost of if the Respondent if the Respondent is unable to adhere to the applicable deadlines;

(b) Clause 20.3 of the Special Conditions of Contract provided that the appellant could have the remainder of any Project that the Respondent fails to execute on time executed through third parties at the risk and cost of the respondent.

4. The appellant has further submitted that on 10.10.2009, the respondent submitted a schedule of work, which indicates that the respondent has failed to discharge its obligations, under the Contract. Therefore, the Appellant convened a meeting on 20.10.2009, wherein the respondent agreed to atleast complete the sub-structure works of Vriddhachalam ROB and Ariyalur ROB by 29.11.2009 and 30.11.2009 respectively, and submit the methodology for construction of PSC Girders at Sirkazhi ROB in the last week of November' 2009. The respondent failed to meet any of these commitments, despite several reminders, dated 27.11.2009, 07.12.2009 and 18.12.2009. Thereafter, on 07.01.2010, the appellant emphasised the importance of the project, since they are the responsible Government Undertaking, executing projects, to benefit the general public, using public money. Despite the same, the respondent has failed to make any progress with the Project, notwithstanding further reminders sent on 11.01.2010, 23.01.2020 and 08.02.2010.

5. However, on 27.02.2010, the respondent requested the appellant to grant extension of nine months, without furnishing any document. Thereafter, a progress review meeting was conducted on 25.06.2010, wherein, it was found that the respondent had completed only 11.64% of the Contract. Even though the respondent had failed to substantiate its claims, the appellant granted an extension of time and directed to complete the project by 15.09.2010 for Vriddhachalam and Ariyalur ROB and by 31.07.2010 for Sirkazhi ROB.

6. Thereafter, the appellant invoked Clause 20.3 of the Special Conditions of the Contract, withdrew the Sirkazhi Project from the respondent, by letter, dated 02.08.2010. Similarly, in respect of Vriddhachalam and Ariyalur Projects, the appellant invoked Clause 20.2, inducted resources from the market for the completion of these projects, at the respondent's risk and cost. As a result of having to obtain material and services from other contractors, the appellant has incurred expenses, which are considerably higher than the original contract value of about Rs.3.44 Crores. In view of the abovesaid clause, the respondent is liable to pay these amounts and the same would be the subject matter of mutual settlement and conciliation and if the same fail, arbitration clause has to be invoked between the parties.

7. On 23.05.2011, the appellant wrote a letter to the Federal Bank, to invoke the unconditional bank guarantees. On 25.05.2011, the respondent admitted that it is liable to pay the excess amount incurred by the appellant, on account of invoking Clause 20.2 and promised to pay "whatever amount" is found to be due. In the mean time, the respondent filed Arbitration O.P.No.128 of 2011 and obtained an interim injunction on 28.10.2011, restraining the appellant from encashing the bank

guarantees, till 31.12.2011. Against which, the present appeal has been filed.

8. Placing reliance on a decision of the Apex Court in *S.T.C. v. Jainsons Clothing Corporation* reported in 1994 (6) SCC 597, it is the contention of the appellant that no injunction can be granted in respect of an unconditional bank guarantee, unless the applicant clearly establishes a case of fraud or irretrievable hardship of a wholly exceptional nature. It therefore submitted that since the pleadings before the Principal District Judge, Cuddalore, contained no averment of fraud or sufficient particulars of irretrievable hardship, it is not open to the Principal District Judge, Cuddalore, to grant an order of injunction.

9. The appellant has further contended that the Principal District Judge, Cuddalore lacks jurisdiction to entertain an application under section 9 of the Arbitration and Conciliation Act, 1996, because such applications are maintainable only in the court, that exercises territorial jurisdiction, in accordance with section 2(1)(e), which defines, "court" as the principal civil court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil Court of a grade inferior to such principal civil Court, or any Court of Small Causes.

10. It is the further contention of the appellant that this Court would without doubt have had jurisdiction to decide the subject-matter of the arbitration, if it had been the subject-matter of a suit, under clause 12 of the Letters Patent, because a part of the cause of action arose within the territorial jurisdiction of this Court and therefore, any application under section 9 of the 1996 Act lies to this Court, and not to the Principal District Judge, Cuddalore, particularly when section 2 (1)(e) explicitly provides that "court" does not include "any civil court of a grade inferior to such principal civil court". Reference was made to a Hon'ble Full Bench decision of Bombay High Court in *Fountain Head Developers v Maria Arcangela Sequiera* reported in (2008)1 CTC 7, wherein, it has been held that any order passed by a court not satisfying the definition in section 2(1)(e) is a nullity.

11. The appellant has further contended that if the Principal District Judge, Cuddalore, is held to have jurisdiction to entertain an application under section 9, jurisdiction of this Court is usurped, in view of peremptory language in section 42 that "all subsequent applications" shall be made in "that court and in no other Court". The same would be

contrary to the explicit language of section 2(1)(e), stating that courts inferior to the principal civil court of original jurisdiction is not a "court" under the 1996 Act.

12. It is the further contention of the appellant that the Principal District Judge, Cuddalore, lacks jurisdiction, because Cuddalore is not the seat of arbitration designated by the parties in the Work Order or the contract. Although a seat of arbitration has not been expressly designated in the Work Order and the Contract, the seat of arbitration must be ascertained from "all the relevant circumstances" and Chennai may be in accordance with the principle. Reference was made to *Compagnie Maritime v Compagnie Tunisienne* [1971] AC 572 and *Egon Oldendorff v Libera Corp* [1995] 2 Lloyd's Rep 64.

13. Placing reliance on a decision of the Andhra Pradesh High Court in *Jyothi Turbopower Services Pvt Ltd v Shenzhen Shandong Nuclear Power Corporation* reported in AIR 2011 AP 111, the appellant submitted that in the above reported case, when Orissa was the seat of arbitration, an application under section 9 to restrain the respondent from invoking a bank guarantee was not maintainable in the courts in Andhra Pradesh, even though both parties were resident there. It is therefore submitted that even if the Principal District Judge had jurisdiction, it has erred in passing an order, restraining the appellant from invoking an unconditional bank guarantee and hence, the impugned order deserves to be set aside.

14. The respondent has filed a detailed counter affidavit, contending inter that pursuant to the agreement of contract, the appellant released the Mobilization Advance of Rs.34,43,070/- to the respondent, in terms of Clause 16(1)(a) of the Special Conditions of Contract, against the submission of Bank Guarantees for Rs.35.60 Lakhs. Apart from the above, the respondent has also submitted a Performance Security/Guarantee to the tune of 2% of the agreement value, amounting to Rs.6.89 Lakhs and the validity of the said guarantees were also extended periodically. The appellant was also entitled to recover 6% of the value of each R.A Bill (to achieve 5% of the contract value in the end) towards Security Deposit, which shall be released, in terms of Clause No.8.5 of the General Conditions of Contract i.e., after preparation of the Final Bill and after expiry of the defect liability period.

15. The respondent has further submitted that the original scope of work under the contract at Sirkazhi, Virudhachalam and Ariyalur, included the work of Columns, Pier Caps/Trestle Beams, Casting and Launching of PSC Girders, Casting of Slab Girders, Deck Slab/ Parapet wall, Approach Slab, Crash Barriers, etc. The contract was awarded to them, during the peak monsoon period, the location of the 3 ROBs were prone to heavy and intermittent

rains apart from being low lying areas in between high road banks. Similarly the soil in the area was highly slushy and even a single day's rain would disrupt the work site for at least two weeks, because the slushy terrain would prevent the vehicles from approaching the site. Apart from the above, there were number of other inherent problems in the sites, which have been brought to the notice of the appellant by the respondent, under their letters, dated 12.02.2010, 27.02.2010, 31.05.2010, etc.

16. The respondent has further contended that the General Manager of the appellant convened meetings on 03.07.2010 and 22.07.2010, to assess the situation and in pursuance thereof, the appellant took an unilateral decision to withdraw certain works from the scope of the contract at Sirkazhi site, vide their letter dated 02.08.2010, by invoking Clause 20.3 of the Special Conditions of Contract. In the mean while, the respondent had already completed the works on the columns and Pier Caps/Trestle Beams. However, the appellant did not call for any fresh tenders for the completion of the remaining works.

17. It is the further case of the respondent that due to the reduction in the scope of works, the appellant attempted to invoke the Bank Guarantees to the tune of Rs.15.60 Lakhs, submitted to secure the Mobilization Advance. The respondent intervened at that juncture and settled an amount of Rs.12,60,000/- (Rs.7,28,674/- was adjusted from the pending payments towards the 9 RA Bills finalized by the appellant and the balance Rs.5,31,500/- was remitted by the respondent through RTGS to the account of the appellant) and got released the Bank Guarantee Nos.15061 and 15062, totaling to Rs.10.60 lakhs and extended the Bank Guarantee No.15060 for Rs.5 lakhs. The same was confirmed by the Appellant under their letter, dated 30.08.2010. Thus the Bank Guarantees available with the appellant in respect of the Mobilization Advance was scaled down to Rs.25 lakhs, as against the original value of Rs.35.60 lakhs.

18. The respondent has further contended that that in pursuance of the said arrangement, the appellant got some of the works at Virudhachalam and Ariyalur sites, executed through third parties, in their name, for which, payments were made already directly by the appellant to the said parties, based on the specific request in writing by them. At the same time, the appellant claimed to have made substantial payments directly to the third parties, without the approval or knowledge of the respondent, in respect of the said works. In respect of Sirkazhi ROB, the appellant had arbitrarily engaged the services of various contractors and proceeded with the work without making even a basic assessment of the costs involved. The appellant has further hired hydraulic jacks on a monthly hire basis from one M/s.Usha Martin Limited and cranes from another Agency for launching the girders and had utilized the same, not only for

the work in the 3 ROB's, but also for the works in the other bridges at Thiruvannamalai and Polur, for which, the respondent was not the Contractor. The respondent has pointed out that the concreting/casting of PSC Girders were withdrawn from the scope of works allotted to them, insofar as the Sirkazhi ROB is concerned and therefore, the hire charges in respect of the same cannot be debited to their account. Further, the stressing of Girders as per the program laid by the respondent was done only at Virudhachalam site and the stressing of Girders at Ariyalur site was done, based on appellant's program. However, the respondent has been burdened with exorbitant testing charges allegedly incurred by the appellant, to test the strength of each girder casted by the third parties under the direct supervision/instructions of the appellant, which were found to be differing from the specifications. In any event, the appellant did not give any prior intimation or advised subsequently or obtain the approval of the respondent for carrying out the works directly done by them, in the two sites, in the name of the respondent.

19. It is the further case of the respondent that contractors usually raise running account bills on the appellant, from time to time, depending upon the stage of execution of works. However, the procedure for finalization of Bills by the appellant is that the Engineer-in-charge of the respondent would record the measurements in the M-Book and prepare the Bill, which shall be final and the same will be signed by the Engineer and the Contractor or his representative. This Bill will then be passed for payment by the Officer-in-charge of the project and the Manager/Finance shall release the payment to the Contractor. In the instant case, only 9 RA Bills, totalling a sum of Rs.55,92,023.16 for works completed upto 23.08.2010 has been finalized by the appellant. Thereafter, the respondent has submitted 13 RA Bills, totaling to a sum of Rs.69,56,627/-, for the works executed upto 27.12.2010. However, the appellant did not finalize the said bills or take the measurements and make entries in the M-Book in respect of the same. Instead, the appellant started to release ad-hoc payments directly to third parties for carrying out the works through them. The following payments made by the appellant to third parties have been made with the knowledge and consent of the respondent.

- (a) Sirkazhi ROB - Period 11.06.2010 to 3.11.2010
: Rs. 3,51,003/-
(b) Ariyalur ROB - Period 30.08.2010
to 25.01.2011 : Rs.22,35,042/-
(c) Virudhachalam ROB - Period
08.06.2010 to 27.05.2011 : Rs.30,70,481/-

Total: Rs.56,56,256/-

20. The respondent has further submitted that only the above sum of Rs.56,56,256/- has been accounted, towards payments made by the appellant to the third parties, on the request and with the knowledge of the consent of the appellant. This is apart from the sum of Rs.55,92,023.16, which has already been finalized and paid by the appellant. The appellant has not submitted the accounts/bills/ vouchers to substantiate the payments said to have been made by them to third parties over and above the said sum, till the date of filing of the counter affidavit. In fact the appellant had also made certain arbitrary payments to one M/s.Sheela Constructions, Bangalore, without even intimating the nature of works done or assessing the costs thereof.

21. The respondent has further submitted that the total value of the contract originally awarded to them was Rs.3,44,30,707/-, which was subsequently revised by the Appellant based on actual quantities to Rs.3,00,04,362/-, thus scaling down the total value of the project to the said extent. The total value of the 22 RA Bills raised by the respondent is Rs. 1,25,48,650.16 and the amounts paid by the appellant to third parties with the approval of the respondent is Rs.56,56,256/-. Thus, a total sum of Rs. 1,82,04,906.16 has been accounted for till date in respect of the works done. Thus, a total sum of Rs. 1,82,04,906.16 has been accounted for till date in "espect of the works done. The balance amount to be accounted for under the contract value itself is a sum of Rs. 1,17,99,455.84.

22. It is the further case of the respondent states that the recovery of Mobilization Advance made by the appellant from the 9 RA Bills finalized is a sum of Rs.7,28,674/-. Over and above the same, the respondent had also remitted a sum of Rs.5,31,500/- through RTGS. The Appellant would also have recovered Rs.10,43,494 from the remaining 13 RA Bills submitted upto 21.12.2010. Further, the appellant would have recovered a sum of Rs.17.45 lakhs approximately towards Mobilization Advance from the remaining payments made to the tune of Rs.1,74,55,708/- for completing the remaining works in Ariyalur and Virudhachalam ROB's at the contracted rate. Thus the Appellant would have

recovered a sum of Rs.40,26,342/- apart from interest till date towards Mobilization Advance.

23. The respondent has further submitted that the appellant started making certain arbitrary claims on them and attempted to invoke the Bank Guarantees on 23.05.2011. The respondent was called for a meeting on 27.05.2011, which was attended by the DGM of the appellant, who had furnished a computerized print out of the Statement of Accounts, as on 25.05.2011 to the respondent. The said statement of accounts was not supported by any vouchers and the respondent could not reconcile the same in any manner whatsoever and the hence same was denied by them. As per the said Statement of Accounts as on 25.05.2011, the outstanding amounts shown to be payable by the respondent in Column 10 is a sum of Rs.57,46,886/-. Similarly, the Statement relating to Mobilization Advance annexed to the said Statement of Accounts reflects that the Appellant had already recovered a sum of Rs.22,43,333/- towards the Mobilization Advance as on the said date and only a sum of Rs 11,99,736/- remains to be recovered. The said Statement was not accepted by the respondent and the respondent requested the appellant to furnish the Supporting Vouchers, Bills, Measurements etc., which was not complied with by the appellant.

24. It is the further case of the respondent that the appellant further attempted to resolve the disputes through a Conciliation Meeting held on 29.06.2011 with the Senior Executives of the appellant. In the course of the said meeting, the appellant suddenly produced a one page Statement of Account, stating that a sum of Rs.1,85,24,615/- is due and payable by the respondent. It was not clarified, as to how, a sum of Rs.57,46,886/- said to be due on 25.05.2011 had taken a quantum leap to Rs.1,85,24,615/- within a period of one month. In Column 4 of the said Statement, dated 29.06.2011, the Mobilization Advance to be recovered is shown as Rs.34,43,070/-, whereas under the Statement, dated 25.05.2011, a sum of Rs.22,43,333/- is shown to be recovered and the balance is shown as Rs.11,99,736/-. Even as per the admission of the appellant, the claim made under the Statement, dated 29.06.2011 is erroneous, since, by the end of May 2011, more than 90% of the works were completed. The appellant failed to give any satisfactory answers to the queries raised by the respondent and instead demanded the acknowledgement of liability and settlement of the arbitrary claim of Rs.1,85,24,615/- under the threat of encashment of the Bank Guarantees.

25. The respondent has further submitted that while the original value of the contract was Rs.3,44,30,707/-, which was scaled down to Rs.3,00,04,362/- of which only a sum of Rs.1,82,04,906.16 has been accounted for till date. The appellant is now arbitrarily making a claim that the total

amounts expended by them for completing the remaining work on the three ROBs is Rs.4,86,48,977/-. The appellant has not furnished any detailed Statement of Accounts, Bills, Payment Vouchers, M-Book, reflecting the measurements or other particulars to the Respondent to substantiate its arbitrary claim. Therefore, the claim of the appellant that they have incurred a total expense of Rs.4,86,48,977/- for completing the projects shows that they have allegedly incurred a sum of Rs.1,86,44,615/- in excess of the contracted rate. This is almost 60% in excess over the agreed rates/value of the works executed which is highly exaggerated, baseless, unreasonable and arbitrary.

26. The respondent has further submitted that the agreement clearly stipulates that the Bank Guarantees/Securities shall be offered specifically under each head. The Bank Guarantees securing the Mobilization Advance is intended to secure only the same and shall remain in force to the extent to which the said Mobilization Advance is due in terms of Cl.No.16.1.3 of Special Conditions of Contract. The Performance Guarantee computed at the rate of 2% of the contract value is given for ensuring the performance and further the Security Deposit is also recovered from each bill. The appellant is not entitled to encash the Bank Guarantees furnished to secure the Mobilization Advance and Performance Guarantee for the alleged recovery of moneys due under any other head. However in the instant case, the Appellant had blatantly threatened the Responuent to encash the Bank Guarantees offered for the Mobilization Advance and Performance Guarantee in an attempt to coerce the Respondent to make payments of the amounts arbitrarily claimed by the Appellant without any basis thereof. Hence, prayed for dismissal of the Civil Miscellaneous Appeal.

Heard the learned counsel appearing for the parties and perused the materials available on record.

27. A bank guarantee is a contract between the bank and the person holding the guarantee. As the Supreme Court and this Court have repeatedly held that the existence of disputes between the beneficiary and the bank's customer is wholly irrelevant and no injunction can be granted, unless under two exceptions, viz., fraud and irretrievable injury.

28. In Ansal Engineering Projects Ltd., v. Tehri Hydro Development Corporation Ltd., reported in (1996) 5 SCC 450, while considering the issue, as to whether, the beneficiaries of a bank guarantee can be restrained by an order of injunction from encashing the amount payable till the decision of the Arbitrator is made final, at Paragraphs 4 and 5, held as follows:

"4. It is settled law that bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction and the validity of the primary contract between the person at whose instance the bank guarantee was given and the beneficiary. Unless fraud or special equity exists, is pleaded and prima facie established by strong evidence as a triable issue, the beneficiary cannot be restrained from encashing the bank guarantee even if dispute between the beneficiary and the person at whose instance the bank guarantee was given by the bank, had arisen in performance of the contract or execution of the works undertaken in furtherance thereof. The bank unconditionally and irrevocably promised to pay, on demand, the amount of liability undertaken in the guarantee without any demur or dispute in terms of the bank guarantee. The object behind is to inculcate respect for free flow of commerce and trade and faith in the commercial banking transactions unhedged by pending disputes between the beneficiary and the contractor.

5. It is equally settled law that in terms of the bank guarantee the beneficiary is entitled to invoke the bank guarantee and seek encashment of the amount specified in the bank guarantee. It does not depend upon the result of the decision in the dispute between the parties, in case of the breach. The underlying object is that an irrevocable commitment either in the form of bank guarantee or letters of credit solemnly given by the bank must be honoured. The court exercising its power cannot interfere with enforcement of bank guarantee/letters of credit except only in cases where fraud or special equity is prima facie made out in the case as triable issue by strong evidence so as to prevent irretrievable injustice to the parties. The trading operation would not be jettisoned and faith of the people in the efficacy of banking transactions would not be eroded or brought to disbelief. The question, therefore, is whether the petitioner had made out any case of irreparable injury by proof of special equity or fraud so as to invoke the jurisdiction of the Court by way of injunction to restrain the first respondent from encashing the bank guarantee. The High Court held that the petitioner has not made out either. We have carefully scanned the reasons given by the High Court as well as the contentions raised by the parties. On the facts, we do not find that any case of fraud has been made out. The contention is that after promise to extend time for constructing the buildings and allotment of extra

houses and the term of bank guarantees was extended, the contract was terminated. It is not a case of fraud but one of acting in terms of contract. It is next contended by Shri G. Nageshwara Rao, the learned counsel for the petitioner, that unless the amount due and payable is determined by a competent court or tribunal by mere invocation of bank guarantee or letter of credit pleading that the amount is due and payable by the petitioner, which was disputed, cannot be held to be due and payable in a case. The Court has yet to go into the question and until a finding after trial, or decision is given by a court or tribunal that amount is due and payable by the petitioner, it cannot be held to be due and payable. Therefore, the High Court committed manifest error of law in refusing to grant injunction as the petitioner has made out a prima facie strong case. We find no force in the contention. All the clauses of the contract of the bank guarantee are to be read together. Bank guarantee/letters of credit is an independent contract between the bank and the beneficiary. It does not depend on the result of the dispute between the person on whose behalf the bank guarantee was given by the bank and the beneficiary. Though the question was not elaborately discussed, it was in sum answered by this Court in Hindustan Steel Workers Construction Ltd., v. G.S.Atwal & Co. (Engineers) (P) Ltd., [(1995) 6 SCC 76]. This Court had held in para 6 that the entire dispute was pending before the arbitrator. Whether, and if so, what is the amount due to the appellant was to be adjudicated in the arbitration proceedings. The order of the learned Single Judge proceeds on the basis that the amounts claimed were not and cannot be said to be due and the bank has violated the understanding between the respondent and the bank in giving unconditional guarantee to the appellant. The learned Judge held that the bank had issued a guarantee in a standard form, covering a wider spectrum than agreed to between the respondent and the bank and it cannot be a reason to hold that the appellant is in any way fettered in invoking the conditional bank guarantee. Similarly, the reasoning of the learned Single Judge that before invoking the performance guarantee the appellant should assess the quantum of loss and damages and mention the ascertained figure, cannot be put forward to restrain the appellant from invoking the unconditional guarantee. This reasoning would clearly indicate that the final adjudication is not a precondition to invoke the bank guarantee and that is not a ground to issue injunction restraining the beneficiary to enforce the

bank guarantee. In Hindustan Steelworks Construction Ltd., v. Tarapore & Co., [(1996) 5 SCC 34], it was contended that a contractor had a counter-claim against the appellant; that disputes had been referred to the arbitrator and no amount was said to be due and payable by the contractor to the appellant till the arbitrator declared the award. It was contended therein that those were exceptional circumstances justifying interference by restraining the appellant from enforcing the bank guarantee. The High Court had issued interim injunction from enforcing the bank guarantee. Interfering with and reversing the order of the High Court, this Court has held in para 23 that a bank must honour its commitment free from interference by the courts. The special circumstances or special equity pleaded in the case that there was a serious dispute on the question as to who has committed the breach of the contract and that whether the amount is due and payable by the contractor to the appellant till the arbitrator declares the award, was not sufficient to make the case an exceptional one justifying interference by restraining the appellant from enforcing the bank guarantee. The order of injunction, therefore, was reserved with certain directions with which we are not concerned in this case."

29. In Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineering Works (P) Ltd. and another, reported in AIR 1997 SC 2477, at Paragraph 21, held as follows:

"The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted the beneficiary is entitled to realise such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The Courts should, therefore, be slow in granting an injunction to restrain the realisation of such a bank guarantee. The Courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take the advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an

unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country."

In the above reported case, the Hon'ble Supreme Court, while dealing with two exceptional circumstances, where injunction may be granted against invocation of bank guarantee i.e., (i) fraud and (ii) irretrievable injury, held that fraud has to be an established fraud and resulting of irretrievable injury has to be such a circumstance which would make it impossible for the guarantor to reimburse himself, if ultimately succeeds and the same has to be decisively established and it must be proved to the satisfaction of the Court that there would be no possibility whatsoever of the recovery of the amount from the beneficiary by way of restitution. At paragraphs 30 to 32, the Hon'ble Supreme Court has strongly deprecated the tendency of the subordinate Courts in not applying the settled principles and in passing whimsical orders, which read as follows:

"30. We are constrained to make these observations with regard to the manner in which the High Court had dealt with this case because this is not an isolated case where the injustice contemplated under this head must Courts, while disobeying or not complying be of such an exceptional and irretrievable with the law laid down by this Court, have at times been liberal in granting injunction restraining encashment of bank guarantees.

31. It is unfortunate, that notwithstanding the authoritative pronouncements of this Court, the High Courts and the Courts subordinate thereto, still seen intent on affording to this Court innumerable opportunities for dealing with this area of law, thought by this Court to be well settled.

32. When a position, in law, is well settled as a result of judicial pronouncement of this Court, it would amount to judicial impropriety to say the least, for the subordinate Courts including the High Courts to ignore the settled decisions and then to pass a judicial order which is clearly contrary to the settled legal position. Such judicial adventurisms cannot be permitted and we strongly deprecate the tendency of the subordinate Courts in not applying the settled principles and in passing whimsical orders which necessarily has the effect of granting wrongful and unwarranted relief to one of the parties. It is time that this tendency stops."

30. In Oil & Natural Gas Corporation Ltd., v. SBI, Overseas Branch, Bombay, reported in (2000) 6 SCC 385, the Supreme Court held that encashment of unconditional bank guarantee is not depending upon the adjudication proceedings between the parties and if any fraud is alleged in obtaining the bank guarantee, it must be pleaded and proved.

31. In Federal Bank Ltd., v. V.M.Jog Engineering Ltd., and others reported in (2001) 10 SCC 663, the Supreme Court held as under:

"Courts ought not to grant injunction to restrain encashment of bank guarantees or letters of credit. Two exceptions have been mentioned (i) fraud, and (ii) irretrievable damage. If the plaintiff is prima facie able to establish that the case comes within these two exceptions, temporary injunction under Order 39 Rule 1 CPC can be issued. The contract of the bank guarantee or the letter of credit is independent of the main contract between the seller and the buyer. In case of an irrevocable bank guarantee or letter of credit the buyer cannot obtain injunction against the banker on the ground that there was a breach of the contract by the seller. The bank is to honour the demand for encashment if the seller prima facie complies with the terms of the bank guarantee or the letter of credit, namely, if the seller produces the documents enumerated in the bank guarantee or the letter of credit...."

32. In Mahatma Gandhi Sahakra Sakkare Karkharne v. National Heavy Engineering Co.op, Ltd., reported in (2007) 6 SCC 470, the Supreme Court reiterated that two exceptional cases for granting injunction against invocation of bank guarantee are fraud and irretrievable injury.

33. In Himadri Chemicals Industries Ltd., v. Coal Tar Refining Co., reported in (2007) 8 SCC 110, the Supreme Court held as under:

"While dealing with an application for injunction in the course of commercial dealings, and when an unconditional bank guarantee or letter of credit is given or accepted, the beneficiary is entitled to realise such a bank guarantee or a letter of credit in terms thereof irrespective of any pending disputes relating to the terms of the contract. In the matter of invocation of a bank guarantee or a letter of credit, it is not open to the bank to rely upon the terms of the underlying contract between the parties. The bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by

its customer. Since a bank guarantee or a letter of credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of bank guarantees or letters of credit.

The courts should be slow in granting an order of injunction to restrain the realisation of a bank guarantee or a letter of credit. There are two exceptions for grant of an order of injunction to restrain the enforcement of an unconditional bank guarantee or a letter of credit: (i) fraud of an egregious nature committed in the notice of the bank which would vitiate the very foundation of the guarantee or letter of credit and the beneficiary seeks to take advantage of the situation; and (ii) injustice of the kind which would make it impossible for the guarantor to reimburse himself or would result in irretrievable harm or injustice to one of the parties concerned. Except under these circumstances, the courts should not readily issue injunction to restrain the realisation of a bank guarantee or a letter of credit.

So far as the first exception is concerned i.e., of fraud, one has to satisfy the court that the fraud in connection with the bank guarantee or letter of credit would vitiate the very foundation of such a bank guarantee or letter of credit. But the evidence must be clear, both as to the fact of fraud and as to the bank's knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it discharged....

To avail of the second exception, it has to be decisively established that there exist exceptional circumstances which would make it impossible for the guarantor to reimburse himself if he ultimately succeeds. Clearly, a mere apprehension that the other party will not be able to pay, is not enough."

34. In *BSES Limited (Now Reliance Energy Ltd.) v. Fenner India Ltd.* and another reported in AIR 2006 SC 1148, the Hon'ble Supreme Court dealt with the relief of injunction sought against the beneficiary seeking to enforce his/her rights under a bank guarantee on the ground that 'lack of good faith' or 'enforcing with an oblique purpose' constituted further exceptions to the

general rule against intervention of the Court. The Hon'ble Supreme Court, at Paragraph 9, dealt with the general rules and exceptions relating to intervention of Court against invocation of bank guarantee. The general rule is, a bank guarantee is an independent contract between the bank and the beneficiary thereof and irrespective of any dispute between the beneficiary and the party at whose instance the bank has given the guarantee, the bank is obliged to honour its guarantee, as long as the guarantee is unconditional and irrevocable. Two exceptions to this rule are (i) clear fraud of which the bank has notice and a fraud of the beneficiary from which it seeks to benefit. The fraud must be of an egregious nature as to vitiate the entire underlying transaction and (ii) When there are special equities in favour of injunction, such as when 'irretrievable injury' or 'irretrievable injustice' would occur, if such an injunction were not granted.

35. In *Vinitec Electronics Private Ltd., v. HCL Infosystems Ltd.*, reported in (2008) 1 SCC 544, the Hon'ble Supreme Court held that unless the bank guarantee incorporates any particular clause of the agreement, the guarantee furnished should be considered as unconditional guarantee. It was also held that a mere reference of principal agreement in any of the portions of bank guarantee does not make the bank guarantee as conditional. At Paragraph 11, the Hon'ble Supreme Court held as follows:

"11. The law relating to invocation of bank guarantees is by now well settled by a catena of decisions of this Court. The bank guarantees which provided that they are payable by the guarantor on demand is considered to be an unconditional bank guarantee. When in the course of commercial dealings, unconditional guarantees have been given or accepted the beneficiary is entitled to realise such a bank guarantee in terms thereof irrespective of any pending disputes. In *U.P.State Sugar Corpn., v. Sumac International Ltd.*, ((1997) 1 SCC 568) this Court observed that: "The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realise such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realisation of such a bank guarantee. The courts have carved out only two exceptions. A

fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country. The two grounds are not necessarily connected, though both may coexist in some cases."

36. A Hon'ble Division Bench of this Court in *Hydroair Tectonics (PCD) Ltd. v. Sirupooluvaptti Common Effluent Treatment Plant Private Limited*, reported in MANU/TN/1180/2011, by relying upon the judgment of Supreme Court in *Hindustan Steelworks Construction Ltd. v. Tarapore & Co.*, reported in (1996) 5 SCC 34 : AIR 1996 SC 2268, held that an invocation of an arbitration clause or a pendency of arbitration would not be a ground to prevent the beneficiary to get the benefits of a bank guarantee and dismissed the appeals. Thus, the well settled legal position laid down by the Hon'ble Supreme Court in the above judgments and followed by this Court, is that intervention of the Court by way of injunction order against invocation of bank guarantees is totally uncalled for, except under two situations of fraud and irretrievable injury of special equities.

37. Admittedly delay in carrying out the project and both the parties have been blaming each other for such delay and for breach of material contractual obligations and the dispute has been referred to arbitration. However, pending determination of the dispute through arbitration, the respondent cannot seek injunction, restraining the appellant from encashing the bank guarantee. Notwithstanding the nature of the dispute between the parties, this Court is of the view that the issue relating to invocation of bank guarantee can be resolved, by applying the legal principles laid down by the Supreme Court and this Court, cited supra.

38. The general principles laid down are that the banks are bound to honour their commitments, as and when sought for by the person in whose favour bank guarantee is given and there can be no intervention of this Court against invocation of bank

guarantee except under two circumstances i.e., fraud and irretrievable injury. On the facts and circumstances of this case, there is no fraud in obtaining bank guarantee. irretrievable injury pleaded is not substantiated. As rightly contended by the learned counsel for the appellant, injunction against invocation of bank guarantee or injunction against utilisation of the amount, cannot be granted simply.

39. In view of the above, the Civil Miscellaneous Appeal is allowed. No costs. Consequently, connected Miscellaneous Petitions are also closed.

s/d-
Assistant Registrar (CS-III)

True Copy

Sub-Assistant Registrar

skm

To

The Principal District Judge,
Cuddalore

copy to:
The Section Officer
VR Section
High Court Madras

+3 ccs to M/s.Waraon & SaiRam Advocate sr.18580
+1 cc to M/s.V.Niranjan Advocate sr.18593

सत्यमेव जयते

C.M.A.No.3872 of 2011

aa11/07/2016

WEB COPY