

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment Reserved on: 22nd May, 2015
Judgment Pronounced on: 29th May, 2015

OMP (I) 28/2015

M/S AIRWORTH TRAVEL & TOURS PVT. LTD.

.... Petitioner

Through: Mr. Dhruv Mehta, Sr. Adv. with
Mr. Saket Sikri, Ms. Ekta Kalra
Sikri, Mr. Vikalp Mudgal & Mr.
Aditya Sikka, Advs.

versus

INTERNATIONAL AIR TRANSPORT ASSOCIATION

.... Respondent

Through: Mr. Gopal Jain, Sr. Adv. with Ms.
Meenakshi Sood & Mr. Vidur Bhatia,
Advs.

**CORAM:
HON'BLE MR. JUSTICE P.S.TEJI**

P.S.TEJI, J.

1. By this order, I shall dispose of the application/petition under Section 9 of the Arbitration and Conciliation Act, 1996 filed with the prayer to restrain the respondent from invoking Bank Guarantee dated 24.12.2012 amounting Rs.4.10 crores, insurance cover amounting to Rs.14,28,72,000/- and directing the respondent to revoke the notice

of default dated 16.02.2015.

2. In the petition, it is averred that the petitioner is a private limited company incorporated under the Companies Act and is in the business of organising tour and travels. Mrs. Sonila Mehra, Authorized Representative of the petitioner has been duly authorized to present the present petition vide Board Resolution dated 17.02.2015. The respondent is a trade association for the world's airlines representing 250 airlines and 84% of total air traffic and is engaged in the operation of accreditation of Travel Agencies around the world. The respondent issued a Travel Agent's Handbook (Resolution 818g Edition) which governs the relation between the petitioner and respondent. On 14.05.2007, parties entered into an agreement whereby the petitioner was appointed as an agent for selling the passenger air tickets. As per Clause 14 of the Agreement, any matter reviewed by arbitration pursuant to Service Agency Rules shall be submitted to arbitration.
3. It is further averred in the petition that the petitioner company was allotted IATA code bearing No.14-3-6687-0. Sub-agent of the petitioner, namely, M/s Easy Trip Travels Pvt. Ltd. had been purchasing tickets through the petitioner since November, 2012. A bank guarantee bearing No.543/LG/12913 was issued by the petitioner in lieu of prospective default. During the period 23.01.2015 to 31.01.2015, the sub-agent had purchased tickets worth Rs.11.22 crores, whereas the petitioner purchased tickets worth Rs.60 lakhs. The respondent had raised a demand of

Rs.11,80,40,844/- which was payable on 11.02.2015. The petitioner had issued a cheque bearing No.401892 dated 09.02.2015 amounting to Rs.11,80,40,844/-, however the sub-agent did not remit its part of dues amounting to Rs.11.22 crores and had raised a frivolous dispute vide suit bearing CS(OS) No.406/2015. When the petitioner did not receive payment from the sub-agents, the petitioner immediately intimated to the Airlines and IATA for cancellation of those tickets for which money was not received from sub-agents. The petitioner cancelled/refunded tickets for Rs.1.50 crores. However, the Airlines stopped cancelling the tickets despite e-mails dated 13.02.2015 and 14.02.2015, which resulted in non-payment to IATA by the petitioner. There was no default on the part of the petitioner as it had taken every step to get the tickets cancelled, but the Airlines did not cancel the tickets. On 11.02.2015, the website link of the petitioner had been closed/shut down by the respondent.

4. On 12.02.2015, a notice was issued to the petitioner for non-payment of dues which was replied vide e-mail dated 12.02.2015 and request was made to cancel the unused tickets. On 14.02.2015, the petitioner had requested ISS, Operations and Service Centre not to declare the petitioner in default. Thereafter, the respondent issued the default notice dated 16.02.2015 and also a notification of potential claim to IFCO Tokio General Insurance. This Court in CS(OS) No.406/2015 vide order dated 15.02.2015 restrained the petitioner from cancelling any tickets. On 17.02.2015, the petitioner issued a legal notice to the Travel Agency Commissioner, Area 3 to restrain the respondent from

invoking the bank guarantee and insurance cover.

5. In reply filed on behalf of the respondent, it is mentioned that the petitioner is governed by resolution 820e and made the claim and could make the claim accordingly. As per Article 3.4 of Resolution 820e, the petitioner obligated to approach the Travel Agency Commissioner and Federation of International Association of Agents for resolution of dispute before approaching this Court. The respondent is an international trade body which represents some 240 airlines. Respondent is a Billing and Settlement Plan Authority (BSP) under IATA Regulation 818g. Any accredited agent of IATA can sell on the inventory of the carrier airline under ticketing authority. Respondent provides neutral stock of electronic tickets to agents. Vide agreement dated 14.05.2007, the petitioner Company was appointed as an agent by the respondent and was allotted IATA code No.14-3-6687-0. As per Agreement, the petitioner must collect money for the tickets sold and hold them in trust for the Airlines until settled to the Airlines through the BSP on Remittance date. The petitioner is required to submit a financial security for the average amount of risk. The petitioner submitted a bank guarantee and paid premium for insurance cover in terms of the agreement. On 09.02.2015, the petitioner issued a cheque for an amount of Rs.11,80,40,844/- in pursuance to the demand raised by the respondent for the reporting period 23rd to 31st January, 2015. On 11.02.2015, the respondent received notice from the bank that the agent's cheque was dishonoured due to insufficient funds. The

petitioner did not give reasons for non-payment. Accordingly, the respondent invoked the covenants of Resolution 818g clause 1.8.1 and withdrew Standard Traffic documents and the petitioner was declared in default. On merits, the entire case of the petitioner has been denied. It is submitted that the dispute of the petitioner with the third party is no ground for failure to honour the fiscal obligations under the terms of the Agreement.

6. The respondent has taken the preliminary objections that the relief sought by the petitioner falls outside the ambit of Section 9 of the Act; invocation of bank guarantee can be stayed only in exceptional cases of fraud or resulting irretrievable injury and said conditions are not satisfied in the present case; the contract of bank guarantee is between bank and respondent; the bank guarantee furnished is unconditional and irrevocable.
7. The petitioner filed the rejoinder to the reply in which the facts mentioned in the petition/application have been reiterated and denied the averments made in the reply filed by the respondent.
8. The arguments advanced by Sh. Dhruv Mehta, Senior Advocate on behalf of the petitioner and Sh. Gopal Jain, Senior Advocate on behalf of the respondent heard.
9. The admitted position on the record is that the petitioner entered into a Passenger's Sales Agency Agreement with the respondent on 14.05.2007. The petitioner renewed its Bank Guarantee in January, 2015 for any prospective settlement of dues. The petitioner issued

a cheque bearing no.401892 dated 09.02.2015 in lieu of payment due to the respondent for the billing period 23rd to 31st January, 2015. Notice of irregularity dated 11.02.2015 was issued by the respondent in lieu of dishonoured payment. An e-mail dated 12.02.2015 was sent by the petitioner informing the respondent that the alleged dishonoured remittance was on account of sub-agent's failure to make the payment. On 12.02.2015, the BSP link of the petitioner was deactivated by the respondent. On 13.02.2015, the petitioner attempted to refund the passenger tickets, but the same could not be done as the BSP link of the petitioner was closed. The petitioner sent e-mails to the concerned airlines requesting to refund tickets on 13th and 14th February, 2015. On 14.02.2015 again, the petitioner sent e-mails to the concerned airlines to refund the passenger tickets. On the same day, the petitioner sent e-mail to the respondent requesting the respondent to re-activate its rights on the BSP link.

10. On 15.02.2015, civil suit bearing CS(OS) No.406/2015 filed by the so called sub-agent of the petitioner came up for hearing and this Court restrained the petitioner to cancel the passenger tickets. Civil Suit is pending for adjudication and the restrain order to cancel the passenger tickets is operative. On 16.02.2015, the respondent issued the Notice of Default and on the same day notice was also issued to insurance company for Potential Claim. On 17.02.2015, the petitioner approached Mr. Jo Foged, Travel Agency Commissioner, Area-3 for review. On 20.02.2015, the Travel

Agency Commissioner forwarded the case of the petitioner to Mrs. Veronica Pacheco-Sanfuentes, Assistant Travel Agency Commissioner. On 23.02.2015, the respondent made submissions before the Travel Agency Commissioner seeking dismissal of the review filed by the petitioner. The petitioner communicated its submissions to the Commissioner along with status quo order dated 20.02.2015 passed by this Court. On 24.02.2015, the Travel Agency Commissioner dismissed the submissions of the respondent. On 02.03.2015, the Travel Agency Commissioner put the review proceedings on hold. On 03.03.2015, the Assistant Travel Agency Commissioner sought explanation from the respondent as to why the respondent had not reinstated the petitioner into the BSP system. As per Clause 7.1 of the Agreement, a Traffic Document (ticket) will be issued immediately when money is received by the petitioner and the petitioner shall be responsible for remittance to the Carrier. As per Clause 7.2 of the Agreement, all monies collected by the petitioner are the property of the Carrier and must be held in trust until satisfactorily accounted for. Clause 14 of the Agreement provides for resolution of dispute by way of arbitration. Clause 1.14 of Resolution 830a of IATA provides as under :

“all Agents be reminded that practices such as those listed herein, in other applicable Resolutions, or in Carrier’s written instructions, but not limited thereto, violate the governing conditions referred to above. They harm Members’ legitimate interests and can accordingly result in action being taken

under the provisions of the Sales Agency Rules and Passenger Sales Agency Agreement e.g. charging the Agent with the difference the fare applied and the fare applicable to the service in accordance with Members' tariff.

cancelling or amending a customer booking and/or Electronic Ticket without the express permission of that customer.”

11. Mr. Dhruv Mehta, Senior Advocate for the petitioner has argued that prima facie there exists dispute between the petitioner and the respondent as the respondent had issued a notice of default dated 16.02.2015 to the petitioner, despite having information that the petitioner did not receive payment from its sub-agent. It is further submitted that the petitioner sent several e-mails to the concerned airlines and the respondent to cancel the tickets issued from the BSP of the petitioner so that the disputed amount can be refunded and payment be made to the respondent, but despite same the BSP link of the petitioner was not reinstated nor the tickets issued from the BSP link of the petitioner were cancelled. Since there existed dispute, the petitioner approached the Travel Agency Commissioner for review who had marked the same to the Assistant Travel Agency Commissioner. The review is on hold in the light of status quo order dated 20.02.2015 passed by this Court. It is further submitted that the petitioner is likely to suffer grave and irretrievable injury if the reliefs as prayed for are not granted and protection is not extended.

12. Learned senior counsel for the petitioner has put reliance on

authority in case of *UP State Sugar Corporation vs. Sumac International (1997) 1 SCC 568* to press the contention to injunct the invocation of bank guarantee, insurance bond and revoke the notice of default dated 16.02.2015.

13. Next judgment relied upon is in case of *Sundaram Finance Ltd. vs. NEPC India Ltd. (1999) 2 SCC 479* in which it was observed that when a party applies under Section 9 of the 1996 Act, it is implicit that it accepts that there is a final and binding arbitration agreement in existence. It is also implicit that a dispute must have arisen which is referable to the Arbitral Tribunal. Section 9 further contemplates arbitration proceedings taking place between the parties. When an application under Section 9 is filed before the commencement of the arbitral proceedings, there has to be manifest intention on the part of the applicant to take recourse to the arbitral proceedings if, at the time when the application under Section 9 is filed, the proceedings have not commenced. In order to give full effect to the words “before or during arbitral proceedings”, it would not be necessary that a notice invoking the arbitration clause must be issued to the opposite party. A situation may demand that a party may choose to apply under Section 9 for an interim measure even before issuing a notice contemplated by Section 21 of the Act. If an application is so made, the court will first have to be satisfied that there exists a valid arbitration agreement and the applicant intends to take the dispute to arbitration. Once it is so satisfied, the court will have the jurisdiction to pass orders under Section 9

giving such interim protection as the facts and circumstances warrant. On similar point, judgments in case of *Steel Authority of India Ltd. vs. Engineers Project India Ltd. MANU/DE/2793/2014* and *Techman Shelters Pvt. Ltd. vs. Sh. Vijay Choudhary and Sh. Sanjeev Singh and Ors. MANU/DE/2439/2009* have been relied upon.

14. On the other hand, submissions made by Sh. Gopal Jain, Senior Advocate for the respondent are that there is no prima facie case in favour of the petitioner for the grant of injunction. The benefit of Section 9 of the Act is not amenable to the petitioner. As per clause 1.7.2.1(a) of the IATA Regulation, the Notice of Irregularity was issued when the petitioner failed to remit the amount of dishonoured cheque. The cheque issued by the petitioner amounting to Rs.11,80,40,844/- dated 09.02.2015 was dishonoured on 11.02.2015. The notice of irregularity was issued on 12.02.2015 demanding immediate settlement of all amounts by 13.02.2015. Since the petitioner failed to make payment of the outstanding amount, the respondent issued a Notice of Default on 16.02.2015 and Billing Settlement Plan (BSP) was withdrawn. On the same day, the respondent issued Notification of Potential Claim to the insurance company. It is argued that no case is made out for restraining invocation of security inasmuch as the bank guarantees can be restrained only in exceptional cases of fraud or irretrievable injury as held by Courts in *U.P. State Sugar Corporation vs. Sumac International Ltd. (1997) 1 SCC 568* and *Himadri*

Chemicals Industries Ltd. vs. Coal Tar Refining Company (2007) 8 SCC 110. The bank guarantee furnished is an unconditional bank guarantee. It is further argued that there is no basis in the stand of the petitioner that since the sub-agent did not make the payment, they are unable to make the payment. Such non-payment by the sub-agent is of no relevance. The petitioner owes an amount of Rs.24,92,52,787/- to the respondent and admitted the said liability in I.A. No. No.5819 of 2015. The petitioner is required to seek review from the Commissioner as per clause 1 of resolution 820e of IATA and the remedy of arbitration is available only against the decision on review petition. He further argued that for seeking the arbitration, decision on the review is the condition precedent.

Further argument advanced is that the agent has no claim to claim refund against the ticket. As per Clause 7 of the Agreement, moment the tickets are sold the money vests with the Carrier airline and the passenger get the absolute right of travelling against the ticket. It is made clear in Clause 1.14 of Resolution 830a that no ticket can be cancelled or amended without the express permission of passenger/customer.

15. From the material submitted by the parties and arguments advanced by the learned Senior counsel, the position emerges on the file is as under:
 - (i) The petitioner issued a cheque dated 09.02.2015 for a sum of Rs.11,80,40,844/- which was dishonoured on 11.02.2015 and as a

consequence thereof, the notice of irregularity was issued to the petitioner on account of dishonour of cheque. Prior to 11.02.2015, the accounts were settled and the payment was made of the amount due against the sale of tickets upto 31.01.2015. The notice of default was issued on 16.02.2015 by the respondent to the petitioner to settle its account by 31.03.2015.

- (ii) On 17.02.2015, the request was made to the Travel Agency Commissioner to revoke the default notice issued by the respondent, restrain the respondent from invoking the bank guarantee amounting to Rs.4.10 crores and insurance cover amounting to Rs.14,28,72,000/- and the ground taken was of non-payment by the so called sub-agent against the tickets sold to the passengers. In the civil suit bearing CS(OS) No.406/2015, the petitioner had already been restrained from making recommendation seeking cancellation of passenger tickets vide order dated 15.02.2015.
- (iii) As per Resolution no.820e arbitration lie against the decision of review by the Commissioner. Clause 1 and 4.1 reads as under:

1. All disputes arising out of or in connection with matters enumerated in the present Section shall be finally settled, subject to review by arbitration pursuant to Section 4 herein, by the Commissioner, in accordance with this Resolution.

4.1 an Agent or applicant which considers itself aggrieved by a decision of the Commissioner taken under the provisions of this Resolution, shall have

the right to have such decision reviewed by arbitration, in accordance with the procedures set out in the Passenger Sales Agency Rules.

From clause 4.1 of resolution 820e of IATA, it is clear that the arbitration could have been claimed against the decision of the Travel Agency Commissioner in review petition. The matter is pending with the Commissioner and on 02.03.2015, the office of the Commissioner put the matter on hold observing as under :

“Consequently, unless you would substantiate a different course of action, I hereby declare this review **on hold**, until the referred Court procedures would have come to an end.”

Admittedly, three matters are pending before this Court i.e. one civil suit bearing CS(OS) No.406/2015 in which the petitioner has been restrained for making the recommendation for cancellation of passenger tickets, second is the present application under Section 9 of the Act seeking the injunction during the pendency of the dispute and third is the suit bearing CS(OS) No.576/2015 for the recovery of sum of Rs.9,25,50,502/- by the so called sub-agent against the petitioner-herein. In suit bearing CS(OS) No.406/2015, the question with regard to cancellation of passenger tickets is pending and restrain order issued is operative since 15.02.2015.

The judgments referred by the petitioner in case of *U.P. State Sugar Corporation* (supra), *Sundaram Finance Ltd.* (supra), *Steel Authority of India Ltd.* (supra) and *Techman Shelters Pvt. Ltd.* (supra) do not render any help claiming that the arbitration in the

present case is dealt in two faces i.e. clause 1 of Resolution 820e seeking the review and secondly claiming arbitration thereof. I do not find any substance in the arguments advanced. Firstly, the question in the judgment cited *Sundaram Finance Ltd.* (supra) are the two different remedies under two different systems, whereas the petitioner is governed by Resolution 820e in which the pre-condition is seeking the review under clause 1 and only thereafter against the decision in review, the petitioner could seek the arbitration. Admittedly, the case has not even crossed the first stage as the matter has been put on hold on account of the pendency of the present petition. From the totality of the discussion made above, the question of cancellation of passenger tickets could only be dealt with by the Commissioner as provided vide Resolution 820e of IATA and the civil suit bearing CS(OS) No.406/2015 is pending before this Court in which the matter is sub-judice.

- (iv) The respondent-herein had filed an appeal bearing FAO(OS) No.193/2015 against order dated 15.02.2015 vide which this Court has restrained the petitioner to make recommendation to cancel the passenger tickets. While deciding the said appeal, the Division Bench of this Court on 21.04.2015 has observed as under :

“Declining relief as prayed for, we direct the learned Single Judge to hear arguments in OMP filed by the respondent on April 24, 2015 and pronounce decision as early as possible for the reason judicial interference in Trade and Commerce and especially in matters relating to bank guarantees warrants speedy disposal of the lis brought before the Court.”

Similar view has been taken by Hon'ble Apex Court in case of ***U.P. State Sugar Corporation vs. Sumac International Ltd. (1997)*** **1 SCC 568**, in which it was observed as under:

“The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country. The two grounds are not necessarily connected, though both may co-exist in some cases. In the case of *U.P. Coop. Federation Ltd. v. Singh Consultants and Engineers (P) Ltd.* which was the case of works contract where the performance guarantee given under the contract was

sought to be invoked, this Court, after referring extensively to English and Indian cases on the subject, said that the guarantee must be honoured in accordance with its terms. The bank which gives the guarantee is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contractual obligation or not, nor with the question whether the supplier is in default or not. The bank must pay according to the tenor of its guarantee on demand without proof or condition. There are only two exceptions to this rule. The first exception is a case when there is a clear fraud of which the bank has notice. The fraud must be of an egregious nature such as to vitiate the entire underlying transaction. Explaining the kind of fraud that may absolve a bank from honouring its guarantee, this Court in the above case quoted with approval the observations of Sir John Donaldson, M.R. in *Bolivinter Oil SA v. Chase Manhattan Bank* (All ER at p.352) : (at SCC p.197)

The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear both as to the fact of fraud and as to the bank's knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it charged.”

In case of *Himadri Chemicals Industries Ltd.* (supra), it was observed as under :

“10.The law relating to grant or refusal to grant injunction in the matter of invocation of a Bank Guarantee or a Letter of Credit is now well settled by a plethora of decisions not only of this court but also of the different High Courts in India. In U.P. State Sugar Corporation Vs. Sumac International Ltd. [(1997) 1 SCC 568], this court considered its various earlier decisions. In this decision, the principle that has been laid down clearly on the enforcement of a Bank guarantee or a Letter of Credit is that in respect of a Bank Guarantee or a Letter of Credit which is sought to be encashed by a beneficiary, the bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. Accordingly this Court held that the courts should be slow in granting an order of injunction to restrain the realization of such a Bank Guarantee. It has also been held by this court in that decision that the existence of any dispute between the parties to the contract is not a ground to restrain the enforcement of Bank guarantees or Letters of Credit. However this court made two exceptions for grant of an order of injunction to restrain the enforcement of a Bank Guarantee or a Letter of Credit. (i) Fraud committed in the notice of the bank which would vitiate the very foundation of guarantee; (ii) injustice of the kind which would make it impossible for the guarantor to reimburse himself.

11. Except under these circumstances, the courts should not readily issue injunction to restrain the realization 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. So far as the second exception is concerned, this court has held in that decision that it relates to cases where allowing encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. While dealing with the case of fraud, this court in the case of U.P. Coop. Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd. (1988) 1 SCC 174 held as follows:

“The fraud must be of an egregious nature such as to vitiate the entire underlying transaction. While coming to a conclusion as to what constitutes fraud, this court in the above case quoted with approval the observations of Sir John Donaldson, M.R. in *Bolivinter Oil SA V/s. Chase Manhattan Bank* (1984) 1 All ER 351 at p. 352 which is as follows,

The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear both as to the fact of fraud and as to the bank's knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank's Credit in the relatively brief time which must elapse between the granting of such an injunction and an

application by the bank to have it charged.”
(Emphasis supplied)

12. In *Svenska Handelsbanken Vs. Indian Charge Chrome* [(1994) 1 SCC 502], it has also been held that a confirmed Bank Guarantee/irrevocable Letter of Credit cannot be interfered with unless there is established fraud or irretrievable injustice involved in the case. In fact, on the question of fraud, this decision approved the observations made by this court in the case of *U.P. Coop. Federation Ltd Vs. Singh Consultants and Engineers (P) Ltd.* [(1988) 1 SCC 174].

13. So far as the second exception is concerned, this court in *U.P. State Sugar Corporation Vs. Sumac International Ltd.* [(1997) 1 SCC as considered herein earlier, at para 14 on page 575 observed as follows :

“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 realized 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* (566 Fed Supp 1210). In that case an exporter in USA entered into an agreement with the Imperial government of Iran and sought an order terminating its liability on stand by letter of credit issued by an American Bank in favour of an Iranian Bank as part of the contract. The relief was sought on account

of the situation created after the Iranian revolution when the American Government cancelled the export licences in relation to Iran and the Iranian government had forcibly taken 52 American citizens as hostages. The US Government had blocked all Iranian assets under the jurisdiction of United States and had cancelled the export contract. The court upheld the contention of the exporter that any claim for damages against the purchaser if decreed by the American courts would not be executable in Iran under these circumstances and realization of the bank guarantee/letters of credit would cause irreparable harm to the Plaintiff. This contention was upheld. To avail of this exception, therefore, exceptional circumstances which make it impossible for the guarantor to reimburse himself if he ultimately succeeds, will have to be decisively established. Clearly, a mere apprehension that the other party will not be able to pay, is not enough. In *Itek* case, there was certainty on this issue. Secondly, there was good reason, in that case for the Court to be *prima facie* satisfied that the guarantors i.e. the bank and its customer would be found entitled to receive the amount paid under the guarantee.” (Emphasis supplied)

14. From the discussions made hereinabove relating to the principles for grant or refusal to grant of injunction to restrain enforcement of a Bank

Guarantee or a Letter of Credit, we find that the following principles should be noted in the matter of injunction to restrain the encashment of a Bank Guarantee or a Letter of Credit :-

(i) 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 realize such a Bank Guarantee or a Letter of Credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.

(ii) The Bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.

(iii) The Courts should be slow in granting an order of injunction to restrain the realization of a Bank Guarantee or a Letter of Credit.

(iv) 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.

(v) Fraud of an egregious nature which would vitiate the very foundation of such a Bank Guarantee or Letter of Credit and the beneficiary seeks to take advantage of the situation.

(vi) Allowing encashment of an unconditional Bank Guarantee or a Letter of Credit would result in

irretrievable harm or injustice to one of the parties concerned.”

- (v) The payment made by the passengers while selling the tickets is not questioned at any point of time. The plea taken is that the so called sub-agent sold the tickets on behalf of the petitioner but did not account for the money. Apparently, no authorization or the consent of the respondent had been obtained prior to involvement of so called sub-agent to whom the tickets were authorized to sell and to make the entry on Billing and Settlement Plan (BSP), rather as per the Agreement and the Resolution of IATA, it is the responsibility of the petitioner/agent to clear the payment to IATA for the tickets sold. The petitioner has not demonstrated at any point of time that they could run its business through any so called sub-agent to permit him to use the slot at the BSP and share the key of the same with any person except the authorized agent.
- (vi) Apparently, the dispute in the present case is settlement of account on account of dishonouring the cheque dated 09.02.2015 on 11.02.2015 against the admitted liability. During the pendency of civil suit bearing CS(OS) No.406/2015 in which the restrain order restraining the petitioner-herein to cancel the passenger tickets was already in operation, the plea of the cancellation of passenger tickets has been put forward on 17.02.2015 after passing of restrain order dated 15.02.2015 by this Court when the matter was already sub-judice before this Court and it was so observed by the Travel

Agency Commissioner vide its order dated 02.03.2015.

- (vii) It is apparent that the petitioner has issued a cheque dated 09.02.2015 for a sum of Rs.11,80,40,844/- and had not honoured its commitment; the cheque was dishonoured on 11.02.2015; thereafter, so the notice for settlement of account was given for the period till 31.03.2015; during the pendency of the petition, an application bearing I.A. No.5819/2015 was moved by the petitioner on 19.03.2015 with the request to restrain the respondent from further representing the cheque dated 09.02.2015; the said application came up for hearing on 20.03.2015 which was adjourned to 10.04.2015 on the request of the petitioner; the said application was withdrawn by the petitioner on 10.04.2015; the cheque was again presented; again on 30.03.2015 the cheque was dishonoured and the validity of the cheque has come to an end on 09.05.2015. So, the balance of convenience as well as equity does not favour the petitioner. The claim made before the Travel Agency Commissioner is to direct the IATA and other travel agencies to cancel the passenger tickets and adjustment of amount against the dues payable to the respondent on the account that the so called sub-agent has not made the payment of the amount collected from the passengers. Admittedly, civil suit bearing CS(OS) No.406/2015 filed by the so called sub-agent restraining the petitioner-herein to cancel the passenger tickets is pending having interim injunction dated 15.02.2015 against the petitioner-herein not to cancel the passenger tickets. Apart from the above

mentioned CS(OS) No.406/2015, the so-called sub-agent has also filed a civil suit bearing CS(OS) No.576/2015 for recovery of a sum of Rs.9,25,50,502/- including Rs.5,00,00,000/- on account of dishonouring of cheque No.988676, dated 21.01.2015 amounting Rs.5,00,00,000/- issued by the petitioner.

- (viii) The petitioner despite the restrain order dated 15.02.2015 by this Court restraining them from seeking the cancellation of passenger tickets, does not deserve any discretionary relief. The petitioner has failed to establish the prima facie case and irreparable loss as the subject-matter is only the settlement of account, the payment due on the account of dishonour of cheque amounting Rs.11,80,40,844/-
 - (ix) The prayer of the petitioner for continuation of the status quo order till the decision of the matter before the Travel Agency Commissioner is not acceptable since the insurance bond amounting to Rs.14,28,72,000/- is operative upto 30.06.2015. The same is case of bank guarantee which is of total amount of Rs.4.10 crores against the claim due of Rs.24,92,52,787/-.
16. In the given circumstances, the petitioner has failed to demonstrate the balance of convenience in its favour and its entitlement for the relief under Section 9 of the Arbitration and Conciliation Act, 1996. More the reason, as per clause 1.14 of Resolution 830a of IATA, no passenger ticket can be cancelled or amended without the express permission of the passenger/customer, particularly when the matter is sub-judice before this Court in CS(OS) No.406/2015 in which the

restrain order is operating and the same culminated into disentitlement of the petitioner to claim any relief under Section 9 of the Arbitration and Conciliation Act, 1996.

17. Consequently, the present petition is dismissed. No order as to costs.
18. Copy of order be given dasti to the parties under the signature of Court Master.

P.S.TEJI, J.

May 29, 2015
dd