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

+ O.M.P.(I) 299/2015

% *Judgment dated 24.06.2015*

CORRTECH INTERNATIONAL PVT. LTD. Petitioner

Through : Mr.Jayanth Bhushan, Sr. Adv. with
Ms.Vandana Sehgal, Mr.Rohan Thawani, Mr.Dilip
Daga and Mr.Anand Daga, Advocate.

versus

GAIL INDIA LTD. Respondent

Through : Mr.Dhruv Mehta, Sr. Adv. with
Ms.Purnima Maheshwari, Advocate.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

G.S.SISTANI, J. (ORAL)

1. Present petition has been filed by petitioner under Section 9 of Arbitration and Conciliation Act, 1996, with the prayer that respondent no.1, GAIL (India) Limited, be restrained from invoking the bank guarantee No.1998IGPER0000914 for a sum of Rs.2,44,26,595/-, pending disposal of the arbitration proceedings between the parties.
2. Notice. Mr.Dhruv Mehta, learned senior counsel on instructions from Ms.Purnima Maheshwari, accepts notice.
3. The necessary facts, to be noticed for disposal of this petition, are that respondent no.1 floated a Bidding Document for Balance Pipeline Laying and Terminal Works for Part D and E of Vijaipur – Kota Pipeline Project. As per Clause 35.4 of the tender terms and conditions, a prospective bidder was required to submit an undertaking as to whether they were

under liquidation and Court Receivership or not. The same was to be done through an Integrity Pact, format of which was attached.

4. As per the petition, at the relevant time, the petitioner was facing a litigation initiated by Tata Capital Financial Services Limited before the Bombay High Court in respect of a commercial dispute and vide order dated 27.11.2013 a Court Receiver had been appointed against the petitioner. The petition also discloses that barring this disqualification the petitioner was fully qualified for the tender. It has also been averred in the petition that the failure of the petitioner to supply said information was inadvertent, there was no ulterior motive and the error was purely on account of a genuine oversight and the same would not influence petitioner's eligibility on technical or commercial grounds. Along with the submission of the bid, the petitioner was required to furnish an earnest money deposit vide a bank guarantee in the sum of Rs.26,50,000/-, the same was furnished by the petitioner vide bank guarantee No.15300100002309 through Axis Bank. After evaluation of the bids, respondent no.1 decided to award the contract to the petitioner and on 22.10.2014 sent a fax of acceptance of the bid to the petitioner signifying the same.
5. The petition also discloses that as per the terms of the tender, the petitioner was to submit a performance bank guarantee for the awarded contract in a specific format. The petitioner accordingly furnished a bank guarantee through UCO Bank for a sum of Rs.2,44,26,595/- (No.1998IGPER0000914) dated 31.10.2014 after the contract was awarded to the petitioner. The bank guarantee was submitted on 31.10.2011 (wrongly mentioned as 5.11.2014 in the petition) and amended at the request of GAIL on 7.11.2014. The petitioner signed the contract agreement sent by GAIL and returned it to GAIL, however,

according to the petitioner GAIL did not sign the same.

6. On 14.1.2015, the petitioner received a show cause notice informing the petitioner that GAIL had discovered through verification process that the petitioner was in fact under receivership and had not given the correct information. Petitioner was also asked to show cause as to why the petitioner be not black-listed and for other consequential action under the bid document. A reply to the notice was sent by the petitioner dated 29.1.2015 wherein it was admitted that the petitioner was under receivership, however, it was clarified that there was no intention to misrepresent. The reply was found to be unsatisfactory by the respondent. Accordingly the petitioner was black-listed for a period of 3 years; and one month's period was provided to file an appeal. In the meanwhile, respondents issued a letter of invocation of the performance bank guarantee, which is a subject matter of the present petition.
7. According to the petition, invocation of the bank guarantee would cause irreparable injury to the petitioner and the factum of a receiver being appointed was not disclosed inadvertently by the petitioner. It is also contended that the respondent cannot invoke the performance bank guarantee as the petitioner never got an opportunity to commence the work or the project for the reason that the petitioner was not permitted to carry out the work as the contract stood cancelled by the respondent and since the respondent did not permit the petitioner to commence the work, the performance bank guarantee could not have been invoked. Counsel for the petitioner has placed reliance on clause 35.4 of the bid document. Counsel submits that as per clause 35.4(a) in case any false information was provided at best the earnest money of the petitioner could have been forfeited, which is evident upon reading of the said clause. As far as clause 35.4 (b) is concerned, the same is to be read along with clause 10.3

of the Special Conditions of contract, which would show that the performance bank guarantee can only be invoked in case the contractor fails to honour any of the commitment entered into under the contract.

8. The sum and substance of the argument of counsel for the petitioner is that the invocation of the performance bank guarantee is bad in law, as the respondents are entitled to invoke the bank guarantee only on account of non-performance of the contract by the petitioner, whereas the respondents themselves are responsible for cancelling the contract and not permitting the petitioner to commence the work. Additionally, it is submitted that the bank guarantee was a conditional bank guarantee and the same could have been invoked only if the conditions of the contract were not fulfilled by the petitioner or contract being not performed by the petitioner. In the absence of anything to show that there was any lapse on the part of the petitioner to commence the work, this bank guarantee cannot be invoked. Counsel has placed reliance on **Hindustan Construction Company Ltd. Vs. State of Bihar and Ors.** reported at (1999) 8 SCC 436. Attention of the court is drawn to paragraph 6 of the said judgment where the submission of counsel for the petitioner in the said matter were noted by the Supreme Court and then paragraph 9 wherein the court has observed that the terms of the bank guarantee are to be considered and simply because the words agree unconditionally and irrevocably has been used by itself would not be enough to invoke the bank guarantee. Paragraphs 8, 9, 12, 13 and 14 of the judgment reads as under:

“8. Now, a bank guarantee is the common mode of securing payment of money in commercial dealings as the beneficiary, under the Guarantee, is entitled to realise the whole of the amount under that Guarantee in terms thereof irrespective of any pending dispute

between the person on whose behalf the Guarantee was given and the beneficiary. In contracts awarded to private individuals by the Government, which involve huge expenditure, as, for example, construction contracts, Bank Guarantees are usually required to be furnished in favour of the Government to secure payments made to the contractor as "Advance" from time to time during the course of the contract as also to secure performance of the work entrusted under the contract. Such Guarantees are encashable in terms thereof on the lapse of the contractor either in the performance of the work or in paying back to the Government "Advance", the Guarantee is invoked and the amount is recovered from the Bank. It is for this reason that the Courts are reluctant in granting an injunction against the invocation of Bank Guarantee, except in the case of fraud, which should be an established fraud, or where irretrievable injury was likely to be caused to the Guarantor. This was the principle laid down by this Court in various decisions. In U.P. Cooperative Federation Ltd. v. Singh Consultants & Engineers Pvt. Ltd. [1988] 1 SCC 174, the law laid down in *Bolivinter Oil SA v. Chase Manhattan Bank*, [1984] 1 All E.R. 351 was approved and it was held that an unconditional Bank Guarantee could be invoked in terms thereof by the person in whose favour the Bank Guarantee was given and the Courts would not grant any injunction restraining the invocation except in the case of fraud or irretrievable injury. In *Svenska Handelsbanken v. Indian Charge Chrome*, [1994] 1 SCC 502; *Larsen & Toubro Ltd. v. Maharashtra State Electricity Board*, [1995] 6 SCC 68; *Hindustan Steel Workers Construction Ltd. v. G.S. Atwal & Co. (Engineers) (P) Ltd.*, [1995] 6 SCC 76; *National Thermal Power Corporation Ltd. v. Flowmeore (P) Ltd.*, [1995] 4 SCC 515; *State of Maharashtra v. National Construction Co.*, [1996] 1 SCC 735; *Hindustan Steel Works Construction Ltd. v. Tarapore & Co.*, [1996] 5 SCC 34 as also in *U.P. State Sugar Corporation v. Sumac International Ltd.*, [1997] 1 SCC 568, the same principle has been laid down and reiterated.

9. What is important, therefore, is that the Bank Guarantee should be in unequivocal terms, unconditional and recite that the amount would be paid without demur or objection and irrespective

of any dispute that might have cropped up or might have been pending between the beneficiary under the Bank Guarantee or the person on whose behalf the Guarantee was furnished. The terms of the Bank Guarantee are, therefore, extremely material. Since the Bank Guarantee represents an independent contract between the Bank and the beneficiary, both the parties would be bound by the terms thereof. The invocation, therefore, will have to be in accordance with the terms of the Bank Guarantee; or else, the invocation itself would be bad.

12. It was in terms of the above clause that the Bank Guarantee was furnished by the HCCL. It provides as under:

"The Executive Engineer,
Kharkai Dam Division II, Icha,
Chaliama, Post Kesargarhia,
Dist. Singhbhum,
Bihar.

Ref.: Construction of Icha Dam -Subernarekha Multipurpose Project - Contract/Tender Notice No. SMP/ICC/CE-8/87 (Adityapur dt. 23.10.1987.

In accordance with the provisions of the Conditions of Contract, Clause 9 (advance mobilisation loan) of the abovementioned contract, the Hindustan Construction Co. Ltd., incorporated in Bombay under the Companies Act, 1956, and having their registered officer at Construction House, Walchand Hirachand Marg, Ballard Estate, Bombay - 400 038 (hereinafter called 'the Contractor') shall deposit with the Executive 'Engineer, Kharkai Dam Division II, Icha, Chaliama, Post Kesargarhia, Dist. Singhbhum, Bihar, a bank guarantee to guarantee their proper and faithful performance under the said clause of the contract in an amount of Rs. 10,00,000 (Rupees Ten lakhs only).

We, the State bank of India, incorporated under State bank of India Act, 1955, and having one of our branches at Nyayamurti C.N. Vaidya Marg, Fort, Bombay - 400 023

(hereinafter referred to as 'the said Bank'), as instructed by the Contractor, agree unconditionally and irrevocably to guarantee as primary obligator and not as Surety merely, the payment of the Executive Engineer, Kharkai Dam Division II, Icha, Chaliama, Post Kesargarhia, Dist. Singhbhum, Bihar, on his first demand without whatsoever right of objection on our part and without his first claim to the contractor, in the amount not exceeding Rs. 10,00,000 (Rupees Ten lakhs only) *in the event that the obligations expressed in the said clause of the abovementioned contract have not been fulfilled by the contractor giving the right of claim to the employer for recovery of the whole or part of the advance mobilisation loan from the contractor under the contract.*

We further agree that no change or addition to or other modification of the terms of the contract or of works to be performed thereunder or of any of the contract documents which may be made between the Executive Engineer, Kharkai Dam Division II, Icha, Chaliama, Post Kesargarhia, Dist. Singhbhum, Bihar, and the contractor, shall in any way release us from any liability under this guarantee, and we hereby waive notice of any such change, addition or modification.

Our liability under this guarantee is restricted to an amount not exceeding Rs.10,00,000 (Rupees Ten lakhs only) and the said guarantee shall remain in full force upto 11th October, 1990 with a claim period of six months thereafter i.e., upto 11th April, 1991 twelve months after the issuing of maintenance certificate, whichever is earlier. Unless demand or claim under this guarantee is made on us in writing on or before 11th April, 1991 we shall be relieved and discharged from all liabilities thereafter.

This guarantee shall remain valid and in full effect from the date of the advance payment under the contract until the Executive Engineer, Kharkai Dam Division II, Icha, Chaliama, Post Kesargarhia, Dist. Singhbhum, Bihar, receives full repayment of the same amount from the contractor, but not later than 11th April, 1991 in any case.

Dated at Bombay this 12.10.1989.

for STATE BANK OF INDIA

sd/-

MANAGER

Commercial Branch,
Bombay - 400 023"

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

".....in the event that the obligations expressed in the said clause of the abovementioned contract have not been fulfilled by the contractor giving the right of claim to the employer for recovery of the whole or part of the advance mobilisation loan from the contractor under the contract."

14. This condition clearly refers to the original contract between the HCCL and the defendants and postulates that if the obligations, expressed in the contract, are not fulfilled by HCCL giving to the defendants the right to claim recovery of the whole or part of the "advance mobilisation loan", then the Bank would pay the amount due under the Guarantee to the Executive Engineer. By referring specifically to Clause 9, the Bank has qualified its liability to pay the amount covered by the Guarantee relating to "advance mobilisation loan" to the Executive Engineer only if the obligations under the contract were not fulfilled by HCCL or the HCCL has misappropriated any portion of the "advance mobilisation loan". It is in these circumstances that the aforesaid clause would operate and the whole of the amount covered by the "mobilisation advance" would become payable on demand. The Bank Guarantee thus could be invoked only in the circumstances referred to in Clause 9 whereunder the amount would become payable only if the obligations are not fulfilled or there is misappropriation. That being so, the Bank Guarantee could not be said to be unconditional or unequivocal in terms so that the defendants could be said to have had an unfettered right to invoke that Guarantee and demand

immediate payment thereof from the Bank. This aspect of the matter was wholly ignored by the High Court and it unnecessarily interfered with the order of injunction, granted by the Single Judge, by which the defendants were restrained from invoking the Bank Guarantee.”

9. Learned counsel for the petitioner submits that the work could not commence in view of clauses 25.2.2, 25.2.1.2 and 25.2.1.3 of the General Conditions of Contract. Reliance is also placed on the terms of the bank guarantee.
10. Mr.Dhruv Mehta, learned senior counsel for the respondent submits that the law with regard to grant of injunction in the cases of bank guarantees is well settled. Counsel submits that an order of injunction can only be passed in cases of fraud of an egregious nature. It is contended that it has nowhere been pleaded in this petition that any fraud has been played by the respondent, on the contrary the petitioner did not admittedly furnish true and correct information as per clause 35.4 of the tender terms and conditions. It is submitted that the petitioner admittedly did not furnish the correct information, resultantly the respondent is well within its right to invoke the performance bank guarantee. Reliance is placed on paragraph 35.4(b) of the bid document, as per which in case any false information is provided, respondent would be well within its right and without prejudice to other rights available under the contract forfeit the performance bank guarantee. Counsel also places reliance on clause 39(B) and 39(C) of the Instructions to Bidders for the same argument. While relying on clause 32.1 of the bid document, it is also submitted that on notifying the successful bidder in writing by fax / e-mail to be confirmed in writing that his bid has been accepted, would constitute confirmation of the contract, thus the submission made by counsel for the petitioner that GAIL has not signed the contract is without any merit.

11. Counsel for the respondent has strongly urged before this court that the bank guarantee is an unconditional bank guarantee and placed reliance on clause 1 and 8 of the Bank Guarantee for Contract Performance, which read as under:

“1. We UCO Bank hereby undertake to give the irrevocable and unconditional guarantee with you that if default shall be made by M/s. Corrtch International Pvt. Ltd. in performing any of the terms and conditions of the Contract or in payment of any money payable to GAIL (India) Limited. We shall on first demand without demur, reservation, contest, recourse or protest and/or without reference to the CONTRACTOR pay to OWNER in such manner as OWNER may direct the said amount of Rs.2,44,26,595/- (Rupees two crore forty four lac twenty six thousand five hundred ninety five only) or such portion thereof not exceeding the said sum as OWNER may from time to time require.

8. Therefore, we hereby affirm that we are guarantors and responsible to you on behalf of the Contractor up to a total amount of Rs.2,44,26,595/- (Rupees two crore forty four lac twenty six thousand five hundred ninety five only) and we undertake to pay you, upon your first written demand declaring the Contractor to be in default under the contract and without caveat or argument, any sum or sums within the limits of Rs.2,44,26,595/- (Rupees two crore forty four lac twenty six thousand five hundred ninety five only) as aforesaid, without your needing to prove or show grounds of reasons for your demand or the sum specified therein.”

[Emphasis added]

12. Mr.Mehta, learned senior counsel for the respondent has also placed reliance on a decision of a Single Judge of this court in the case of **VRC Constructions (India) Pvt. Ltd. Vs. Gas Authority of India Ltd (Gail) And Anr.** [OMP No.564/2013] and more particularly, paragraphs 10, 13, 14 and 15 which are reproduced below, wherein in somewhat similar circumstances, where GAIL was a party, stay of bank guarantee was refused:

“10. The contention of the petitioner, namely, that the invocation of the bank guarantee has to be in accordance with the terms of the bank guarantee otherwise the invocation would be bad, is a contention that has no merits. Reference may be had to the terms of the bank guarantee dated 04.01.2013. Paragraph 1 of the bank guarantee reads as follows:-“

1. We Punjab National Bank hereby undertake to give the irrevocable and unconditional guarantee with you that if default shall be made by M/s. VRC constructions (I) Pvt. Ltd., in performing any of the terms and conditions of the Contract or in payment of any money payable to GATI (India) Limited. We shall on first demand without demur, reservation, contest, recourse or protest and/or without reference to the CONTRACTOR pay to OWNER in such manner as OWNER may direct the said amount of Rs.1,34,31,000/- (Rupees one crore thirty four lakh thirty one thousand only) or such portions thereof not exceeding the said sum as OWNER may from time to time require.

13. A perusal of the said communication dated 17.05.2013 reveals that the bank guarantee has been invoked by respondent No.1 for failure to fulfill the purchase/work order obligations as per the provisions of the order and bank guarantee? In view of clause 1 and clause 8, reproduced above of the bank guarantee dated 04.01.2013, it is obvious that the petitioner cannot submit that the invocation of the bank guarantee is not in accordance with the terms of the bank guarantee. It is the contention of respondent No.1 that there is breach of clause 37.1 of the contract by the petitioner and that clause 37 prohibits subletting of works directly or indirectly to any person, firm or corporation whatsoever without the consent in writing of respondent No.1. Though the petitioner has strongly refuted the correctness of the allegation, while invoking bank guarantee, it is not for the bankers to go into the merits of the contention of the person at whose instance the bank guarantee has been given. This is also obvious from a reading of clause 8 of the bank guarantee. Hence the contention of the petitioner that the encashment is not in terms of the Bank Guarantee is a contention without merits.

14. Further, the submission of the petitioner regarding non-execution of formal contract and the act of respondent No.1

in terminating the contract without issuing a show cause notice are not issues which are relevant for the purpose of adjudication on the legality of the invocation letter dated 17.05.2013.

15. The petitioner has failed to place on record or to show any fact which would demonstrate any fraud having been committed by respondent No.1 which is of such a nature as to vitiate the entire transaction. The petitioner has also failed to show any irreparable injustice being caused by invocation of the bank guarantee.”

13. Reliance is also placed by Mr.Mehta, in the case of *Mahatma Gandhi Sahakra Sakkare Karkhane Vs. National Heavy Engg. Coop. Ltd. & Anr.* reported at (2007) 6 SCC 470 and more particularly paragraphs 17 to 19 and 22 and 25:

“17. The relevant portion of the bank guarantee is extracted herein below :

"1. In consideration of the above premises, the Guarantor hereby undertakes to pay to the purchasers within 30 days of demand, without demur such a sum not exceeding Rs.92,40,000/- (Rupees Ninety two lakhs forty thousand only), representing 3% of the contract price as the purchasers may demand upon the failure of the supplier to conduct the trial test of the sugar plant by 24th July, 2003 and also upon the failure of the sellers to commission the Project (Plant and Machinery) before December 2003.

2. The Guarantor shall pay to the purchasers on demand the sum without demur and without requiring the purchasers to invoke any legal remedy that may be available to them, it being understood and agreed FIRSTLY that the purchasers shall be the sole judge of and as to whether the amount of bank guarantee has become recoverable from the sellers or whether the sellers have committed any breach(es) of the terms and conditions of the said agreement and the extent of losses, damages, costs, charges and expenses caused to or suffered by or that may be caused to or suffered by purchaser's from time to time shall be final and binding to the

Guarantor and SECONDLY that the right of the purchasers to recover from the guarantor any amount due to the purchasers under this guarantee shall not be affected or suspended by reasons of the fact that any dispute or disputes have been raised by the sellers with regard to their liability or that proceedings are pending before any tribunal/arbitrator(s) or court with regard thereto or in connection therewith and THIRDLY that the guarantor shall immediately pay the aforesaid guaranteed amount to the purchasers on demand and it shall not be open to the Guarantor to know the reasons of or to investigate or to go into the merits of the demands or to question or challenge the demand or to know any facts affecting the demand, and LASTLY that it shall not be open to the guarantor to require the proof of the liability of the sellers to pay the amount, before paying the sum demanded under clause 1 above.

* * * *

8. The invocation of this guarantee shall be by a letter as herein, signed by the purchasers and countersigned by the Commissioner of Sugar, Bangalore, Karnataka State."

18. A plain reading of Clauses (1) and (2) of the bank guarantee makes it abundantly clear that the guarantor had undertaken to pay to the appellant within 30 days of demand, without demur such an amount not exceeding Rs.92.40 lakhs. The sole discretion is conferred on the purchasers as to whether the amount of bank guarantee has become recoverable from the sellers or whether the sellers have committed any breach of the terms and conditions of the said agreement. The right of the purchaser to recover from the guarantor the guaranteed amount shall not be affected or suspended by the reasons of the fact that any dispute or disputes have been raised by the sellers with regard to their liability or that the proceedings are pending before any tribunal or court with regard thereto or in connection therewith.

19. However, Shri Jayant Bhushan, learned senior counsel submitted that the purchasers were entitled to invoke the bank guarantee and demand the payment of money only upon the failure of the supplier to conduct the trial test of the sugar plant by 24th July, 2003 and also upon the failure of the sellers to commission the project before December, 2003. This condition forms an integral

part of the bank guarantee was the submission. We find it difficult to accept the submission. The guarantee executed by the guarantor (PNB) in favour of the purchaser (appellant) cannot be dissected in the manner suggested by the learned senior counsel for the respondent. Clauses 1 and 2 of the guarantee executed by the banker in favour of the purchaser are required to be read together. The respondent cannot be allowed to contend that there is a dispute as to whether it had failed to conduct the trial test of the sugar plant by 24th July, 2003 and therefore bank guarantee cannot be invoked. The acceptance of the argument would make Clause 2 of the bank guarantee totally meaningless and inoperative. The guarantor essentially agreed that the purchasers alone shall be the sole judge in the matter as to whether the amount of bank guarantee has become recoverable from the sellers or whether the seller had committed any breach of the terms and conditions of the agreement. The dispute, if any, between the parties with regard to the liability in any proceedings either before the arbitral tribunal or court in no manner affects the right of the purchaser to invoke the bank guarantee and realise the guaranteed sum from the guarantor.

22. In our considered opinion if the bank guarantee furnished is an unconditional and irrevocable one, it is not open to the bank to raise any objection whatsoever to pay the amounts under the guarantee. The person in whose favour the guarantee is furnished by the bank cannot be prevented by way of an injunction in enforcing the guarantee on the pretext that the condition for enforcing the bank guarantee in terms of the agreement entered between the parties has not been fulfilled. Such a course is impermissible. The seller cannot raise the dispute of whatsoever nature and prevent the purchaser from enforcing the bank guarantee by way of injunction except on the ground of fraud and irretrievable injury.

25. In the present case the respondent in its application filed under Section 9 of the Arbitration and Conciliation Act, 1996 in the district court, Bidar mostly highlighted as to how the very vital conditions of the agreement have been breached by the appellant herein by not arranging the funds at the proper time. It is alleged that the appellant did not even complete their obligation in respect of providing storage facilities for valuable goods etc. It is specifically alleged that required funds were not available with the appellant. On account of non availability of funds there were two

halts of nine months and five months during the execution of the project from 03.12.2001 to 14.08.2002 and from 14.08.2002 to 10.01.2003. It is further alleged that the appellant failed to arrange for all the pre-requisites. It is not necessary for the purpose of disposal of this appeal to notice all the allegations and averments filed by the respondents except to note that the main thrust of the allegations relate to alleged breach of the conditions of the agreement by the appellant. It was further contended that the bank guarantees were conditional bank guarantees and not unconditional. We have referred to the substance of the allegations only to highlight that no factual foundation as such has been laid in the pleadings as regards the allegation of fraud. In fact there is no serious allegation of any fraud except using the word "fraud". It is also not stated as to how irreparable loss would be caused in case the appellant is allowed to encash the bank guarantee. The only two exceptions, namely fraud and irretrievable injury based on which injunction could be granted restraining encashment of bank guarantee are singularly absent in the pleadings. Once it is held that the bank guarantee furnished by the banker is an unconditional one, the appellant in our considered opinion cannot be restrained from encashing the bank guarantee on the ground that a serious dispute had arisen between the parties and on the allegations of breach of terms and conditions of the agreement entered between the parties.”

[Emphasis added]

14. In the present case, it is not in dispute that the petitioner was declared a successful bidder and the work for Balance Pipeline Laying and Terminal Works for Part D and E of Vijaipur – Kota Pipeline Project was awarded to the petitioner. The petitioner in the petition has also not denied that the petitioner did not furnish true and correct information in terms of clause 35.4 of the tender terms and conditions, and it has been stated in the petition that inadvertently and due to genuine oversight the petitioner could not inform the respondent that a receiver had been appointed by the Bombay High Court in a commercial dispute by an order dated 27.11.2013. It is also not in dispute that on account of non-furnishing of

requisite information, the contract between the parties stood cancelled and the petitioner has been black listed.

15. A performance bank guarantee was to be furnished by the petitioner in terms of Clause 34 of the Instructions to Bidders. Clause 34 of the Instructions to Bidders reads as under:

“Clause 34. PERFORMANCE GUARANTEE

34.1 Pursuant to clause no.24 of GCC-Works bidder will provide Performance Guarantee of appropriate value within 15 days of receipt of FOI from the Employer. The Performance Guarantee shall be in form of either Demand Draft or Banker’s Cheque or irrevocable Bank Guarantee and shall be in the currency of Contract.

Failure of the successful bidder to comply with the requirement of this clause shall constitute a breach of contract, cause for annulment of the award, forfeiture of the bid security and any such remedy the Employer may take under the Contract pursuant to Clause 32(C) of GCC-Works and the Employer may resort to awarding the Contract to the next ranked bidder.”

16. It may also be noticed that as per clause 35, a bidder was required to execute ‘integrity pact’ and in case a bidder did not execute the integrity pact, his bid was liable to be rejected. As per clause 35.4 (a) a bidder was required to furnish complete and correct information / documents required for evaluation of the bids and in case of false or forged documents were filed, the respondent was well within its right to reject the bid and forfeit the earnest money. As per clause 35.4 (b), in case information supplied was found to be false or forged after award of the contract, GAIL had a right to terminate the contract and get the remaining job executed at the risk and cost of a vendor/ contractor without prejudice to any other rights

available under the contract, such as forfeiture of CPBG / security deposit.
Clause 35, 35.4 (a) and (b) read as under:

“35. CORRUPT AND FRAULULENT PRACTICES

35.4 The bidder(s) are required to execute the “Integrity Pact” attached in the Bid Document. In case a bidder does not sign the Integrity Pact, his bid shall be liable for rejection.

a) Bidder is required to furnish the complete and correct information/documents required for evaluation of their bids. If the information/documents forming basis of evaluation is found to be false/forged, the same shall be considered adequate ground for rejection of the bids and forfeiture of Earnest Money Deposit.

b) In case, the information/document furnished by the vendor/contractor forming basis of evaluation of his bid is found to be false/forged after the award of the contract, GAIL shall have full right to terminate the contract and get the remaining job executed at the risk & cost of such vendor/contractor without any prejudice to other rights available to GAIL under the contract such as forfeiture of CPBG/Security Deposit, withholding of payment etc.

(Emphasis added) ”

17. Clause 39(A) and (C) are also relevant and the same are being reproduced below:

“39. SUBMISSION OF FALSE/FORGED DOCUMENTS

A) Bidder is required to furnish the complete and correct information/documents required for evaluation of their bids. If the information/documents forming basis of evaluation is found to be false/forged, the same shall be considered adequate ground for rejection of the Bids.

C) In case this issue of submission of false document comes to the notice after executing of work, GAIL shall have full right to forfeit any amount due to the vendor/contractor along with forfeiture of CPBG/Security Deposit furnished by the vendor/contractor.

(Emphasis added)”

18. A careful reading of clause 34, 35.4 (a) and (b), 39 (A) and (C) and other relevant clauses, leaves no room for doubt that a bidder was cautioned that in case any forged document or false information was supplied, he would be strongly penalized by forfeiture of the bid security and by invocation of the performance bank guarantee. The petitioner had signed the contract and accepted the terms and conditions and only thereafter the performance bank guarantee was furnished. In the present case, furnishing of false information has been detected after the bid of the petitioner was accepted and after the petitioner was informed about its being successful bidder.
19. It is not disputed that the petitioner had concealed the fact that a Receiver was appointed by the Bombay High Court and thus after issuance of show cause notice the contract was cancelled and the petitioner was black listed.
20. I find there is not a whisper in the pleading that any fraud has been played by the respondent upon the petitioner, much less a fraud of an egregious nature.
21. In the case of ***U.P. State Sugar Corporation Vs. Sumac International Ltd.*** reported at (1997) 1 SCC 568, in paragraph 12 it was held as under:

“12. 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.”

22. The short question which thus comes up for consideration before this Court is whether the present case falls under any of the two exceptions i.e. case of fraud or special equity in law for grant of injunction. In the case of *State of Orissa & Ors. Vs. Harapriya Bisoi* reported at AIR 2009 SC 2991, fraud was defined as under:

“33. By "fraud" is meant an intention to deceive; whether it is from any expectation of advantage to the party himself or from the ill will towards the other is immaterial. The expression "fraud" involves two elements, deceit and injury to the person deceived. Injury is something other than economic loss, that is, deprivation of property, whether movable or immovable or of money and it will include and any harm whatever caused to any person in body, mind, reputation or such others. In short, it is a non-economic or non-pecuniary loss. A benefit or advantage to the deceiver, will almost always cause loss or detriment to the deceived. Even in those rare cases where there is a benefit or advantage to the deceiver, but no corresponding loss to the deceived, the second condition is satisfied. (See *Dr. Vimla v. Delhi Administration* (1963 Supp. 2 SCR 585) and *Indian Bank v. Satyam Febres (India) Pvt. Ltd.* (1996 (5) SCC 550).

34. A "fraud" is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended

to get an advantage. (See S.P. Changalvaraya Naidu v. Jagannath (1994 (1) SCC 1).”

23. The real purpose of extracting the above clauses is to show that the bidders were fully familiar and aware that in case of submitting any false information or document not only the bid of a bidder was liable to be rejected, but in case even after contract was executed the respondent would be well within their right and without prejudice to any other right available, to forfeit the performance guarantee. The apparent rationale behind this clause is evident to deter a person from furnishing any false information or filing forged documents as the penalty would be rather harsh and also to bring to the notice of the bidder the consequences including the consequences of cancellation of the bid amount and also the invocation of the performance bank guarantee.
24. To say that the respondent did not permit the petitioner to carry out the work and thus the petitioner could not perform the work and in view thereof the performance bank guarantee cannot be invoked, in my view is without any force. The respondents have cancelled the contract on account of information not being supplied by the petitioner, may be inadvertently or otherwise. In view thereof the petitioner has incurred a disqualification for being a contractor or a bidder for the respondent and, thus, the petitioner alone is responsible for the cancellation of the contract.
25. As far as the terms of the bank guarantee are concerned, the same have been extracted hereinabove which would *primarily* show that it is an unconditional bank guarantee. As per clause 1 of the Bank Guarantee for Contract Performance would show that the bank is given an irrevocable and unconditional guarantee in case of default having been made by the petitioner in performing the terms and conditions of the contract. The

default on the part of the petitioner is, *prima facie*, not open for debate as the petitioner himself has candidly admitted that incorrect information was supplied inadvertently without any *mala fide* intention and on account of genuine mistake, thus they incurred a disqualification. Once they have incurred a disqualification they would obviously not be in a position to perform the terms of the contract and if the terms of the contract are not performed according to the agreement between the parties and the terms of the bank guarantee, the respondents are well within their right to invoke the same. Resultantly the petition is dismissed. Needless to say that should the petitioner approach the arbitrator the question of invocation of this bank guarantee would be subject to the final award, which may be pronounced. The petition is accordingly disposed of.

26. Any observations made in this order are for the purpose of deciding the present petition under Section 9 of the Arbitration & Conciliation Act and would not influence the arbitrator in any way in final adjudication.

**G.S.SISTANI
(VACATION JUDGE)**

JUNE 24, 2015

msr /ssn