

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 06.09.2016

+ **O.M.P.(I) 15/2016**

JYOTI STRUCTURE LTD

..... Petitioner

versus

**DAKSHINANCHAL VIDYUT VITRAN NIGAM
LTD & ORS.**

..... Respondents

WITH

+ **O.M.P.(I) 16/2016**

JYOTI STRUCTURE LTD

..... Petitioner

versus

**DAKSHINANCHAL VIDYUT VITRAN NIGAM
LTD & ORS.**

..... Respondents

WITH

+ **O.M.P.(I) 17/2016**

M/S JYOTI STRUCTURES LTD.

..... Petitioner

versus

**DAKSHINANCHAL VIDYUT VITRAN NIGAM
LTD & ORS**

..... Respondents

WITH

+ **O.M.P.(I) 18/2016**

M/S JYOTI STRUCTURES LTD.

..... Petitioner

versus

**DAKSHINANCHAL VIDYUT VITRAN NIGAM
LTD. & ORS.**

..... Respondents

WITH

+ **O.M.P.(I) 19/2016**

M/S JYOTI STRUCTURES LTD.

..... Petitioner

versus

**DAKSHINANCHAL VIDYUT VITRAN NIGAM
LTD & ORS.**

..... Respondents

WITH

+ **O.M.P.(I) 20/2016**

M/S JYOTI STRUCTURES LTD.

..... Petitioner

versus

**DAKSHINANCHAL VIDYUT VITRAN NIGAM
LTD & ORS.**

..... Respondents

WITH

+ **O.M.P.(I) 21/2016**

M/S JYOTI STRUCTURES LTD.

..... Petitioner

versus

**DAKSHINANCHAL VIDYUT VITRAN NIGAM
LTD & ORS.**

..... Respondents

AND

+ **O.M.P.(I) 22/2016**

M/S JYOTI STRUCTURES LTD.

..... Petitioner

versus

**DAKSHINANCHAL VIDYUT VITRAN NIGAM
LTD & ORS.**

..... Respondents

Advocates who appeared in these cases:

For the Petitioners : Mr P.V. Kapur, Senior Advocate with Mr V.K. Nagrath, Mr Rajiv K. Garg, Mr Ashish Garg and Mr Sanjay Gupta.

For the Respondents : Mr Pradeep Misra Mr Daleep Kumar Dhayani.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. M/s Jyoti Structures Limited (hereafter 'JSL') - a public company incorporated under the Companies Act, 1956 - has filed these petitions under Section 9 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, praying that Dakshinanchal Vidyut Vitran Nigam Ltd. (hereafter 'DVVNL') be restrained from invoking and the issuing banks be restrained from encashing the subject bank guarantees.

2. JSL is, *inter alia*, engaged in the business of Engineering, Procurement and Construction in the power transmission and distribution sector in India and abroad.

3. The Ministry of Power, Government of India has issued a scheme known as Rajiv Gandhi Grameen Vidyutikaran Yojna (RGGVY-12th Plan) for electrifying villages and habitations in the country. In 2015, DVVNL invited applications for rural electrification work, *inter alia*, in various districts of Uttar Pradesh (UP).

4. JSL participated in the aforesaid bidding process and was awarded the aforesaid contracts for electrification of villages and inhabitants in the Districts of Auraiya, Etawah, Farrukhabad and Chitrakoot in the State of UP.

5. The above captioned petitions have been filed in relation to the subject bank guarantees furnished by JSL in respect of the aforementioned contracts. OMP(I) 15/2016 and OMP(I) 16/2016 relate to the contract pertaining to Auraiya District; OMP(I) 17/2016 and OMP(I) 22/2016 relate to the contract pertaining to the Etawah District, OMP(I) 19/2016 and OMP(I) 21/2016 relate to the contract pertaining to the Farrukhabad District; and OMP(I) 18/2016 and OMP (I) 20/2016 relate to the contract pertaining to the Chitrakoot District.

6. The issues and material facts involved in the aforementioned petitions are similar and the learned counsel for the parties submitted that a decision in OMP(I) 15/2016 and OMP(I) 16/2016 - which pertains to contract for electrification of villages/habitations of Auraiya District, UP - would be determinative of the other petitions as well. Thus, with the consent of the parties OMP(I) 15/2016 and OMP(I) 16/2016 are taken as lead matters.

7. DVVNL floated tender enquiries inviting applications for rural electrification work of villages of Auraiya District on 21.02.2015. JSL having submitted the lowest tender was issued a letter of intent dated 07.04.2015. The Notification of Award (NOA) was issued on 25.04.2015 and contract between the parties was executed on 22.06.2015. In terms of

the NOA, the electrification works were to be completed within a period of 24 months from the date of NOA, that is, on or before 24.04.2017. The contract was in two parts. One part was for procurement of material, inspection and testing, supply and storage of material; and the second part was for transportation, insurance, installment services and training.

8. In terms of the contract, JSL submitted bank guarantees - 7 in number - the details of which are as under:-

S. No.	Details	Amount (₹)	Bank
1	BG No. 116215IGADP0018 dated 24.07.2015 against advance mobilization (Supply - 1st Installment) valid upto 31.07.2017	9,81,29,041/-	Dena Bank
2	BG No. 116215IGADP0019 dated 24.07.2015 against advance mobilization for erection (1st Installment) valid upto 31.07.2017	2,68,03,345/-	Dena Bank
3	BG No. 00012IG150000049 dated 08.07.2015 against Contract Performance Guarantee (CPG) for Supply valid upto 31.07.2018	11,89,45,000/-	Indian Bank
4	BG No. 00012IG150000050 dated 08.07.2015 against Contract Performance Guarantee (CPG) for Erection valid upto 31.07.2018	4,87,34,000/-	Indian Bank
5	BG No. 00012IG150000051 dated 08.07.2015 against	3,20,75,000/-	Indian Bank

	Additional Bank Guarantee for meter and distribution transformers valid upto 31.07.2018		
6	BG No. 00012IG150000076 dated 24.09.2015 against advance mobilization (Supply - 2nd Installment) valid upto 31.07.2017	9,81,29,041/-	Indian Bank
7	B.G. No. 00012IG150000077 dated 24.09.2015 against advance mobilization (Erection - 2nd Installment) valid upto 31.07.2017	2,68,03,345/-	Indian Bank

9. BG No. 116215IGADP0018 dated 24.07.2015 for a sum of ₹9,81,29,041/- against advance mobilization (Supply 1st Installment) and BG No. 116215IGADP0019 dated 24.07.2015 for a sum of ₹2,68,03,345/- against advance mobilization for erection (1st Installment) are subject matter of OMP(I) 15/2016; B.G. No. 00012IG150000049 dated 08.07.2015 for a sum of ₹11,89,45,000/- against Contract Performance Guarantee (CPG) for supply, BG No. 00012IG150000050 dated 08.07.2015 for a sum of ₹4,87,34,000/- against Contract Performance Guarantee (CPG) for erection, BG No. 00012IG150000051 dated 08.07.2015 for a sum of ₹3,20,75,000/- against Additional Bank Guarantee for meter and distribution transformers, BG No. 00012IG150000076 dated 24.09.2015 for a sum of ₹9,81,29,041/- against advance mobilization (Supply 2nd

Installment) and B.G. No. 00012IG150000077 dated 24.09.2015 for a sum of ₹2,68,03,345/- against advance mobilization for erection (2nd Installment) are subject matter of OMP(I) 16/2016.

10. According to DVVNL, the progress of the rural electrification work being executed by JSL was poor and JSL had not achieved the requisite milestones within the specified time. Therefore, DVVNL issued two separate letters dated 16.05.2016, one letter pertaining to forfeiture of bank guarantees issued by Dena Bank against mobilisation advance and the second for forfeiture of the bank guarantees issued by Indian Bank. Copies of the said letters was also marked to the concerned banks with the request to encash the subject bank guarantees and remit the amount through RTGS to the account of DVVNL, the details of which were also indicated in the letters. Thereafter, formal letters of invocation of the bank guarantees dated 14.06.2016 for invocation of the subject bank guarantees were addressed to the concerned banks which led JSL to file the said petitions (OMP(I) 15/2016 and OMP(I) 16/2016) in this Court.

Submissions

11. At the outset, Mr Pradeep Misra, learned counsel appearing for DVVNL raised a preliminary objection as to the maintainability of the

present petitions. He referred to clause 2.14 of the contract which provided that the Courts at Allahabad shall have exclusive jurisdiction in all matters arising under the contract in question. On the strength of the said clause, he submitted that this court would not have the jurisdiction to entertain the present petitions. He relied upon the decision of the Supreme Court in **B.E. Simoes Von Staraburg Niedenthal and Anr. v. Chhattisgarh Investment Limited**: (2015) 12 SCC 225 in support of the aforesaid contention. He also referred to the decision of the Supreme Court in **State of West Bengal and Ors. v. Associated Contractors**: (2015) 1 SCC 32 in support of his contention that a petition under Section 9 of the Act would not be maintainable before the Court which does not have jurisdiction over the subject matter of dispute.

12. The aforesaid contentions were countered by Mr Kapur, learned counsel appearing for JSL, who submitted that the Court having jurisdiction over the venue of arbitration would also exercise jurisdiction under Part-I of the Act and, thus, the present petitions are maintainable. He relied on the decision of the Supreme Court in **Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc**: (2012) 9 SCC 552 as well as the decision of the Division Bench of this Court in **Ion Exchange (India) Ltd. v. Panasonic Electric Works Co. Ltd.**: 208 (2014)

DLT 597 (DB) in support of his contention. He further argued that Courts at Allahabad would have no jurisdiction because neither any of the parties have their principal office of business at Allahabad nor any part of the cause of action arises within the territorial jurisdiction of the Courts at Allahabad.

13. On merits, Mr Kapur advanced submissions on four fronts. First, he contended that the bank guarantees in question were not unconditional bank guarantees and the letters of invocation were not in terms of the said bank guarantees. He referred to the bank guarantees issued by Dena Bank - the subject matter of OMP(I) 15/2016 - and submitted that the said bank guarantees could only be invoked if JSL failed to commence or fulfil its obligations under the terms of the contract; and in the event of such failure, refused to repay all or part of the advance payment to DVVNL. He submitted that since there was no allegation in the letter of invocation that JSL had failed to perform its obligations and had refused to repay the amount advanced by DVVNL, the banks ought to be restrained from making any payment pursuant to the letters of invocation. He strongly relied on the decision of the Supreme Court in **Hindustan Construction Co. Ltd. v. State of Bihar and Ors**: (1999) 8 SCC 436 as well as the decision of a Coordinate Bench of this Court in **Abir Infrastructure Pvt.**

Ltd v. Teestavalley Power Transmission Limited & Ors.: 214 (2014) DLT

235 in support of his contention.

14. Secondly, Mr Kapur contended that invocation of the subject bank guarantees was fraudulent and malafide. He contended that in terms of the contract between the parties, JSL was to execute the works within a period of 24 months from the date of NOA and the said period had not expired. He submitted that in the circumstances, the question of alleging that JSL had failed to perform its contract was *ex facie* untenable. He referred to a letter dated 05.05.2016 issued by DVVNL to JSL wherein DVVNL had indicated that the contract was to be completed by October 2016. He submitted that the said demand to complete the works by October 2016 was contrary to the expressed terms of the contract in question; nonetheless, JSL had responded to the letter dated 05.05.2016 by its letter dated 09.05.2016 indicating its month-wise target for completion of the works. He further submitted that insofar as the District of Auraiya is concerned, JSL had also met the target for electrification set for the month of May 2016. And, despite JSL meeting its target for the month of May 2016, DVVNL had still proceeded to invoke the subject bank guarantees. He contended that the same indicated that the bank guarantees were invoked for a collateral purpose.

15. He earnestly contended that time was not the essence of the contract as the contract had also envisaged consequences of delayed performance. He submitted that at best, DVVNL could have levied liquidated damages for delayed performance of the contract and even so the maximum amount of liquidated damages would be in the vicinity of ₹8.5 crores which is less than the amount already recovered by DVVNL. He referred to the decision of a Division Bench of this Court in **State Trading Corporation of India Ltd. v. State Bank of India & Ors.** : 2013 (5) R.A.J. 158 (Del) and on the strength of the said decision, contended that the scope of judicial intervention in interdicting bank guarantees has been expanded and now also includes cases of irretrievable injury, fraud, and extraordinary special equities. He also argued that the scope of fraud was no longer restricted to fraud affecting the underlying transaction but would also extend to fraud at any other stage of the contract as well; and, that would include the stage of invocation of bank guarantees.

16. Thirdly, Mr Kapur contended that in addition to an order restraining encashment of the subject bank guarantees, JSL had also prayed for stay of DVVNL's letter terminating the contract in question. He submitted that contract in question related to electrification of villages/habitations and the execution of the contract entailed delivery of electric poles as well as their

erection on sites. He submitted that after the poles are erected on land, they would assume the nature of immovable property. Therefore, the contract in question must also be construed as contract relating to immovable property which squarely falls within the exceptions to Section 10 of the Specific Relief Act, 1963. He further submitted that by virtue of Section 14(3)(c) of the Specific Relief Act, 1963, the contract in question falls within the exception to Section 14(1) of the said Act. Consequently, even though the contract in question is a determinable contract, it would, nonetheless, be specifically enforceable. Lastly, he contended that the letter of termination dated 26.05.2016 also debarred JSL from participating in other tenders for a year and this amounted to blacklisting. He emphasised that the said order would also effectively prevent JSL from bidding pursuant to tenders invited by other public sector enterprises as well. He contended that the said decision to debar JSL from participating in tenders was *malafide* and unsustainable.

17. Mr Misra countered the submissions advanced by Mr Kapur. He referred to the project completion schedule as provided under the contract and submitted that the contract provided specific milestones in terms of which 25% of the work was required to be completed within the first nine months; further 25% of the works was required to be completed in five

months thereafter; 25% of the works was to be completed in the next five months; and the balance 25% of the works were required to be completed within the following five months. He also drew the attention of this Court to a bar chart submitted by JSL immediately after being awarded the contract which indicated that JSL would commence works from August, 2015. After receiving the bar chart, DVVNL informed JSL that the schedule provided was not acceptable and that JSL was to adhere to the completion schedule as provided under the contract and start the work in the month of May 2015. He stated that JSL's progress in execution of the works was slow and this had been repeatedly pointed out by DVVNL as well as by Rural Electrification Corporation Ltd. (REC) – a public sector undertaking through which the Central Government had launched the rural electrification scheme.

18. Mr Misra referred to various letters issued by DVVNL/REC to show that JSL had been falling short in its performance. He contended that in the circumstances, it was not necessary for DVVNL to wait till the expiry of the period of 24 months and DVVNL was well within its right to terminate the contract as JSL had failed to perform the same. Insofar as debarring JSL from participating in other tenders for a period of one year is concerned, Mr Misra contended that the same did not amount to

blacklisting and did not debar JSL from participating in tenders launched by other agencies.

19. In response to the contention that the letters invoking the bank guarantees was not in terms thereof, Mr Misra contended that the letters dated 16.05.2016 invoking the bank guarantees had also been marked to the respective banks. He submitted that the said letters clearly mention that JSL's progress of the works was 'poor' and this clearly indicated that JSL had failed to perform the contract in question; thus, according to him, the letters of invocation were in terms of the bank guarantees.

Reasoning and conclusion

20. The preliminary objection raised by DVVNL that this Court does not have the jurisdiction to entertain the present petitions is not sustainable. In terms of the arbitration agreement (clause) between the parties, the venue of arbitration is Delhi. Thus, indisputably, the seat of arbitration is located within the jurisdiction of this Court. The question whether the Court having jurisdiction over the seat of arbitration would fall within the meaning of Court under section 2(1)(e) of the Act and have jurisdiction to entertain petitions/applications under Part-I of the Act and is no longer *res integra*. The Supreme Court in ***Bharat Aluminium*** (*supra*) held as under:-

“We are of the opinion, the term "subject matter of the arbitration" cannot be confused with "subject matter of the suit". The term "subject matter" in Section 2(1)(e) is confined to Part I. It has a reference and connection with the process of dispute resolution. Its purpose is to identify the courts having supervisory control over the arbitration proceedings. Hence, it refers to a court which would essentially be a court of the seat of the arbitration process. In our opinion, the provision in Section 2(1)(e) has to be construed keeping in view the provisions in Section 20 which give recognition to party autonomy. Accepting the narrow construction as projected by the Learned Counsel for the Appellants would, in fact, render Section 20 nugatory. In our view, the legislature has intentionally given jurisdiction to two courts i.e. the court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place. This was necessary as on many occasions the agreement may provide for a seat of arbitration at a place which would be neutral to both the parties. Therefore, the courts where the arbitration takes place would be required to exercise supervisory control over the arbitral process. For example, if the arbitration is held in Delhi, where neither of the parties are from Delhi, (Delhi having been chosen as a neutral place as between a party from Mumbai and the other from Kolkata) and the tribunal sitting in Delhi passes an interim order Under Section 17 of the Arbitration Act, 1996, the appeal against such an interim order under Section 37 must lie to the Courts of Delhi being the Courts having supervisory jurisdiction over the arbitration proceedings and the tribunal. This would be irrespective of the fact that the obligations to be performed under the contract were to be performed either at Mumbai or at Kolkata, and only arbitration is to take place in Delhi. In such circumstances, both the Courts would have jurisdiction, i.e., the Court within whose jurisdiction the subject matter of the suit is situated and the courts within the jurisdiction of which the dispute resolution, i.e., arbitration is located.”

21. Mr Misra’s contention that this Court would not have jurisdiction by virtue of clause 2.14 of the contract is also without merit. Admittedly,

Courts at Allahabad did not have any jurisdiction either over the subject matter of dispute or on the seat of the arbitration. It is now well settled that parties by contract can neither confer jurisdiction nor denude the jurisdiction of Courts which is otherwise vested in law (See **Harshad Chiman Lal Modi v. DLF Universal Ltd. and Anr.**: (2005)7 SCC 791).

22. However, it is also well established that if two Courts have concurrent jurisdiction, the parties can agree that one of the Courts would have exclusive jurisdiction over the subject matter of dispute. This has been authoritatively held by the Supreme Court in the recent decision given in **Swastik Gases P. Ltd v. Indian Oil Corporation Ltd.**: (2013) 9 SCC 32.

In that case, the Supreme Court referring to its earlier decisions held that where agreement between the parties restricts jurisdiction to only one particular place, the Courts at that place alone would have jurisdiction. Thus, whilst it is correct that in cases where more than one Court exercises concurrent jurisdiction, the parties by an agreement can specify the Court which would exercise the jurisdiction over the subject matter, however, that does not mean that the parties by agreement can confer jurisdiction on a Court that cannot exercise any jurisdiction over the disputes. As stated earlier, in the present case, the Courts at Allahabad do not have the jurisdiction to entertain the present petitions and thus the jurisdiction of

this Court cannot be ousted on the ground that parties have agreed that Courts at Allahabad would have exclusive jurisdiction in matters relating to the contract in question.

23. The next question to consider is whether the letters of invocation were in terms of the bank guarantees. In order to address the controversy, it would be necessary to refer to the language of the subject bank guarantees. It is seen that the bank guarantees furnished by Indian Bank/Dena Bank – which are provided as security for advance – are, except for the value, similarly worded. The performance guarantees issued by Indian Bank are also similarly worded. The relevant extract of the said bank guarantees is reproduced below:-

**“ADVANCE (1st INSTALLMENT) PAYMENT
SECURITY - SUPPLY CONTRACT”**

XXXX

XXXXX

XXXXX

By this letter we, the undersigned, Dena Bank, Corporate Business Branch, C-10, G-Block, Bandra-Kurla Complex, Bandra (East), Mumbai-400051, a Bank (which expression shall Include Its successors, administrators, executors and assigns) organized under the laws of Banking Regulation Act, 1949, and having its Corporate Office at C-10, G-Block, Bandra-Kurla Complex, Bandra (East), Mumbai-400051 do hereby Irrevocably guarantee repayment of the said amounts upon the first demand of the Employer without cavil or argument *In the event that the Contractor falls to commence or fulfill Its obligations under the terms of the said Contract, and In the event of such failure, refuses to repay all or part (as the case may be) of the said advance payment to the Employer.*

Provided always that the Bank's obligation shall be limited to an amount equal to the outstanding balance of the advance payment, taking Into account such amounts, which have been repaid by the Contract or from time to time in accordance with the terms of payment of the said Contract as evidenced by appropriate payment certificates.

XXXX

XXXXX

XXXXX”

“PERFORMANCE SECURITY - SUPPLY CONTRACT

XXXX

XXXXX

XXXXX

By this letter we, the undersigned, Indian Bank, Mumbai Fort Branch, United India Building, Sir P.M. Raod, Fort, Mumbai-400001, a Bank (which expression shall Include Its successors, administrators, executors and assigns) a body corporate constituted under the Banking Companies (Acquisition and Transfer of Undertakings) Act 1970, and having its Registered/Head Office at 254-260, Avvaishannugam Saslai, Royapettah, Chennai-600014 do hereby irrevocably guarantee payment to the Employer up to Rs.11,89,45,000/- (Rupees Eleven Crores Eighty Nine Lacs Forty Five Thousand Only) i.e. Ten percent, (10%) of the Contract price until ninety (90) days beyond the Defect Liability Period i.e., upto and Inclusive of 31.07.2018.

We undertake to make payment under this Letter of Guarantee upon receipt by us of your first *written demand signed by the Employer duly authorized officer or the authorised officer or Owner declaring the Contractor to be in default under the Contract* and without cavil or argument any sum or sums within the above named limits, without your need to prove or show grounds or reasons for your demand and without the right of the Contractor to dispute or question such demand.

Our liability under this Letter of Guarantee shall be to pay to the Employer whichever is the lesser of the sum so requested or the amount then guaranteed hereunder In respect of any demand duly made hereunder prior to expiry of the Letter of Guarantee, without being entitled to Inquire whether or not this payment is lawfully demanded.

XXXX

XXXXX

XXXXX”

[Italics for emphasis]

24. In so far as the invocation of the bank guarantees provided for securing the advance payment is concerned, the same can be invoked only in the event that the contractor fails to commence or fulfil its obligation under the terms of the contract and in the event of such failure, refuses to repay all or part of the advance payment. It is necessary that the aforesaid condition be met before the said bank guarantees can be invoked. Similarly, insofar as performance bank guarantees are concerned, the same can be invoked in the event JSL is in default under the contract. It is well settled that a bank guarantee is an independent contract between the bank and the beneficiary. Banks are not concerned with the disputes between the beneficiary and person at whose instance, the guarantees have been furnished; in this case, JSL and DVVNL. A bank has also no means to ascertain whether the conditions as specified in the bank guarantee have been met and is obliged to make payments against the bank guarantee on a demand being made. However, the demands must be in terms of the bank guarantee.

25. The decision of the Supreme Court in **United Commercial Bank v. Bank of India and Ors.**: AIR 1981 SC 1426, underscores the importance

of claims being made in the terms of the letter of credit/bank guarantee. In that decision, the Court referred to the following passage from the Paget's Law of Banking, 8th Edition:-

"Unless documents tendered under a credit are in accordance with those for which the credit calls and which are embodied in the promise of the intermediary or issuing banker, the beneficiary cannot claim against him; and it is the banker's duty to refuse payment. The documents must be those called for and not documents which are almost the same or which seem to do just as well."

The Court also quoted the following passage from the decision in **English Scottish and Australian Bank Ltd. v. Bank of South Africa: 1922 13 LI L Rep 21, 24** given as under :-

"It is elementary to say that a person who ships in reliance on a letter of credit must do so in exact compliance with its terms. It is also elementary to say that a bank is not bound or indeed entitled to honour drafts presented to it under a letter of credit unless those drafts with the accompanying documents are in strict accord with the credit as opened. "

After referring to the law as applicable to a letter of credit, the Court held that the said principles were applicable to a bank guarantee as well.

26. In **M/s Ansal Properties & Industries P Ltd v. Engineering Projects (India) Ltd: 1997 (41) DRJ 618**, the letter of invocation issued did not specifically state that any loss was caused and, therefore, this Court held

that the invocation letter did not fulfil the requirements for invoking the bank guarantee. A similar view was also held by this Court in **Punj Sons (P) Ltd. v. Hong Kong & Shanghai Banking Corporation and Anr.:** 1991 (20) DRJ 154., **Puri International Ltd. v National Building Construction Co. Ltd.:** (1997) 41 DRJ 592 and **Basic Tele Services Ltd.v. Union of India (UOI) and Anr:** (2009) 112 DRJ 688.

27. Thus, it is now well established that the letter invoking the bank guarantee must be strictly in terms thereof.

28. In the present case, the letters dated 16.05.2016 and 14.06.2016 sent by DVVNL clearly do not satisfy the conditions as stated in the bank guarantees. In its letter to the Dena/Indian Bank, DVVNL has simply alleged that the performance of JSL was poor; this is not the condition as mentioned in the bank guarantees. In order to invoke the bank guarantees for advance payment security, DVVNL would have to assert in clear terms that JSL has failed to commence or fulfil its obligations under the contract and has further refused to repay all or part of the advance payment to the employer. Therefore, plainly two conditions have to be met. First, that JSL has failed to commence or fulfil its obligations; and second, that JSL has refused to repay all or part of the advance payment to DVVNL. In the absence of DVVNL alleging the same in its letters of invocation, the banks

cannot pay the amount guaranteed.

29. In order to invoke the performance bank guarantees, it is expressly provided that the bank shall pay on receipt of a letter from the authorised officer of the *Owner declaring the Contractor to be in default under the Contract*. Thus, a letter of invocation, which does not unequivocally declares that JSL is in default of the contract, will not meet the necessary requirement for invocation of the performance bank guarantees.

30. It is also important to mention that the bank guarantees furnished for securing the advances provided by DVVNL can only be invoked after the unadjusted/recovered amount of advances is quantified and only to that extent.

31. In view of the above, there is much merit in Mr Kapur's contention that the bank guarantees cannot be encashed on the letters of invocation sent by DVVNL.

32. The next issue to be addressed is whether the encashment of the bank guarantees can be interdicted on the ground of fraud.

33. The facts of the present case *prima facie* indicate that JSL has not been able to perform the contract to achieve the milestones as required under the contract. Much emphasis was laid by Mr Kapur on the letter

dated 05.05.2016 which mentions that the work of rural electrification was to be completed by October 2016 and that JSL had failed to complete the works as per target. According to JSL, the same was fraudulent as the contract was to be performed within 24 months and thus the date of completion was April 2017 and not October 2016. However, it is relevant to note that in the letter dated 09.05.2016 sent by JSL in response to the aforesaid letter, it did not object, dispute or counter the assertion that the works were to be completed by October 2016; on the contrary JSL accepted that it had not met the targets as required and also provided several reasons for falling short in meeting the targets. JSL also assured that it would cover the gap in the coming months. It is thus apparent, that although there may be a dispute as to the quantum of work done, there is no dispute that JSL had fallen short of the targets. And, this is the only reason indicated by DVVNL for terminating the contract and invoking the bank guarantees. Although JSL has pleaded that the invocation of bank guarantees is fraudulent, it is difficult to accept the same. In order to seek an injunction against encashment of a bank guarantee, JSL has to establish a *prima facie* case of fraud. In **U.P. Cooperative Federation Ltd v. Singh Consultants and Engineers (P) Ltd.**: (1988) 1 SCC 174, the Supreme Court had further clarified that:

“The nature of the fraud that the Courts talk about is fraud of an "egregious nature as to vitiate the entire underlying transaction". It is fraud of the beneficiary, not the fraud of somebody else.”

34. In **Larsen & Toubro Limited v Maharashtra State Electricity**

Board and Others: (1995) 6 SCC 68, the Supreme Court referred to the

earlier decision in **Svenska Handelsbanken v. M/s. Indian Charge**

Chrome and others: (1994) 1 SCC 502 and held as under:-

“5. Before we adjudicate the rival pleas urged before us by counsel for the parties, it will be useful to bear in mind the salient principles to be borne in mind by the court in the matter of grant of injunction against the enforcement of a bank guarantee / irrevocable letter of credit. After survey of the earlier decisions of this Court in *United Commercial Bank v Bank of India*, *U.P. Coop. Federation Ltd. v Singh Consultants & Engineers (P) Ltd.*, *General Electric Technical Services Co. Inc v Punj Sons (P) Ltd.* and the decision of the Court of Appeal in England in *Eliau and Rabbath v Matsas and Matsas* and a few American decisions, this Court in *Svenska Handelsbanken v. Indian Charge Chrome* AIR 1994 SC 626, laid down the law thus:

“...in case of confirmed bank guarantees/irrevocable letters of credit, it cannot be interfered with unless there is fraud and irretrievable injustice involved in the case and fraud has to be an established fraud...

...irretrievable injustice which was made the basis for grant of injunction really was on the ground that the guarantee was not encashable on its terms...

...there should be prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Mere irretrievable injustice without prima facie case of established fraud is of no consequence in restraining the encashment of bank guarantee.””

35. The contention that the above position of law has been diluted and the scope of interference has been expanded is not merited. The contention that fraud need not necessarily be one that is perpetuated at the initial stage but could also be fraud at a later stage is merited but this does not mean that fraud on which invocation of bank guarantees can be interdicted is fraud other than one affecting the underlying transaction. The grounds on which invocation of bank guarantees can be restrained essentially remain the same as summarised in *Larsen and Toubro (supra)* and *Svenska Handelsbanken (supra)*.

36. It is also well settled that merely alleging fraud would not meet the standard of pleading required to sustain such allegation and the person alleging fraud must plead full particulars of the same. In the present case, neither the pleadings nor the facts as indicated even remotely establish that any fraud has been perpetuated; on the contrary, it *prima facie* appears that JSL is in breach of the contract as it had admitted that its progress had not measured up to the milestones as specified in the contract.

37. The contention that the liquidated damages for delay in performance of the contract were less than the amount already recovered and therefore the invocation of subject bank guarantees is fraudulent is also without merit. The contract has been terminated and it is apparent that DVVNL is

claiming damages for breach of the contract. In the circumstances, *prima facie*, DVVNL's claims cannot be restricted to liquidated damages for delay in performance of the contract. Further, the subject bank guarantees also include guarantees for securing the advances provided to JSL; and DVVNL would be entitled to invoke those bank guarantees to recover the unadjusted advances.

38. The next issue to be considered is regarding stay of letter of termination dated 26.05.2016 issued by DVVNL. In addition, to seeking stay of invocation of the bank guarantees, JSL has also prayed for stay of the letter of termination. The aforesaid prayer cannot be granted; first of all, for the reason that JSL has failed to *prima facie* establish that the termination is wrongful. The contention that since liquidated damages for delay in performance have been provided under the contract, the same cannot be terminated for non performance cannot be accepted. The communications issued by REC and DVVNL have amply underscored the necessity to complete the contract within time and, *prima facie*, failure to maintain the requisite progress would entitle DVVNL to terminate the contract in question. Secondly, the contract in question is determinable and therefore by virtue of Section 14(1) (d) of the Specific Relief Act, 1963, the contract cannot be specifically enforced. The contention that the

contract in question falls within the explanation to Section 10 of the Specific Relief Act, 1963 is also bereft of any merit. The said explanation reads as under:

“Explanation: Unless and until the contrary is proved, the court shall presume-

- (i) that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money; and
- (ii) that the breach of a contract to transfer movable property can be so relieved except in the following cases:
 - (a) where the property is not an ordinary article of commerce, or is of special value or interest to the plaintiff, or consists of goods which are not easily obtainable in the market;
 - (b) where the property is held by the defendant as the agent or trustee of the plaintiff.”

39. The contract in question is not a contract to transfer immovable property and the reliance placed by Mr Kapur on Clause (i) of Explanation to Section 10 of the Specific Relief Act, 1963 is misplaced; so as his reliance on clause (ii) of the Explanation. By virtue of the aforesaid Explanation, it is to be presumed that a breach of contract for transfer of movable property can be relieved. The exception to the aforesaid rule is where the property is not an ordinary article of commerce, or is of special value or interest to the plaintiff. The explanation under clause (ii)(a) of Section 10 of the Specific Relief Act, 1963 contemplates a case where the

party requires specific performance of a contract to transfer movable property which is of interest to the plaintiff. In other words, it is applicable where the plaintiff is seeking to acquire a movable asset which is of a special value and not an ordinary article of commerce; in other words, is not readily available. In the present case, the contract is an ordinary contract, in the usual course of commerce; the electrification work can be performed by all entities engaged in the said business. There is no special value or special interest that can be imputed to the electric poles or other articles used in electrification works and required to be transferred under the contract in question.

40. The contention that the contract in question falls within the scope of Section 14 (3)(c) of the Specific Relief Act, 1963 is also without merit as none of the provisions are applicable. Thus, the termination of the contract in question cannot be stayed.

41. Before concluding it would also be necessary to consider the contention that by virtue of the letter of termination, JSL has been effectively blacklisted. Although Mr Misra contended that debarring JSL from participating in future tenders for a period of one year did not amount to blacklisting, I am unable to accept the same. Clearly the direction to debar JSL from participating in future tenders is a punitive measure and

would amount to blacklisting. It is well settled that such punitive measures cannot be taken without issuing a show cause notice and without affording the concerned party an opportunity to be heard (See *Erusian Equipment & Chemicals Ltd. v. State of West Bengal.*: (1975) 2 SCR 674 and *Grosons Pharmaceuticals (P) Ltd. and Anr v. The State of Uttar Pradesh and Ors.*: (2001) 8 SCC 604).

42. In view of the aforesaid, the letter of termination dated 26.05.2016 to the extent that it debars JSL from participating in future tenders for a period of one year is set aside. Further, Dena Bank and Indian Bank are restrained from encashing the bank guarantees on the basis of the letters of invocation issued by DVVNL. However, it is clarified that this would not preclude DVVNL to issue fresh letters of invocation in accordance with the terms of the bank guarantees. DVVNL is also not precluded from taking any action for blacklisting the petitioner, but after following the due procedure and in accordance with law.

43. The petitions are disposed of in the above terms.

VIBHU BAKHRU, J

SEPTEMBER 06, 2016
RK/pkv