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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
CHAMBER SUMMONS NO. 486 OF 2016
IN
LEAVE PETITION NO. 255 OF 2015
IN
COMMERCIAL SUIT NO. 91 OF 2015

Gannon Dunkerly & Co Ltd …Plaintiff

~ versus ~

State Bank of India & Ors …Defendants

Mr Fredun DeVitre, Senior Advocate, *with Chirag Mody, Nirav Shah, Munaf Virjee, Vinay Kamodia & Prachi Garg i/b DSK Legal, for the Plaintiff.*
Mr P Kumar Jain, *i/b Prakash Panjabi, for Defendant No. 1.*
MrV.V. Tulzapurkar, Senior Advocate, *with Shubhabrata Chakraborti, Durgesh Khanapurkar, & Monil Chheda, i/b Juris Corp, for Defendant No. 2.*

CORAM: G.S. PATEL, J
DATED: 23rd February 2017

PC:-

1. It comes, I am sorry to say, as not much of a surprise, and is now increasingly common, to find Advocates on record arguing exactly contrary to what their briefed senior counsel had limited their arguments when they first argued the matter.

2. I have before me an application for revocation of leave granted under Clause XII. This is an application by Defendant No. 2, First Gulf Bank ("**First Gulf**"). When Mr Tulzapurkar for the Applicant opened the argument, despite what is stated in the Affidavit in Support, he clearly stated that he was not maintaining the plea that First Gulf did not do any business in Mumbai. He accepted that it did. This position remained unchanged. In the circumstances that will shortly appear, Mr Tulzapurkar argued that the jurisdiction in a case such as this would not be with the Courts in Mumbai but would be with the Court in Tripoli, Libya. The reason, shortly stated, and which I will expand on presently, is that the construction contract was between the Plaintiff and the 4th Defendant, a Libyan Government entity. That construction contract required the furnishing of bank guarantees. It was not possible to furnish a bank guarantee directly and, therefore, a series of back-to-back guarantees came to be issued. The 3rd Defendant issued the guarantee to the 4th Defendant. The 3rd Defendant is First Gulf but at its Tripoli, Libya office or in its Libyan arm. The 2nd Defendant in turn counter-guaranteed the 3rd Defendant and 1st Defendant, an Indian Bank counter-guaranteed the 2nd Defendant. At no point did Mr. Tulzapurkar argue that the jurisdiction would be with the courts in UAE, though one of the counter-guarantees in question says that UAE law will apply. The reason for not arguing this will become apparent shortly. Yet, today, an attempt is made to argue just this.

3. First, a quick look at the factual background. The Plaintiff was awarded a construction contract by the 4th Defendant. This was for the construction of a township near Tripoli Libya. The contract was awarded on 17th April 2010 in the amount of Lybian Dinar 988 million. The Plaintiff was to construct 3,600 housing units. Clause 6 of the Public Works Contract required the Plaintiff to provide a performance bank guarantee for 2% of the contract value (Libyan Dinar 19,773,425) favouring the 4th Defendant through a Libyan Bank. The Plaintiff asked Defendant No. 1, the State Bank of India to arrange this performance bank guarantee. The State Bank of India turned to First Gulf at its Mumbai Office. First Gulf in turn approached its Libyan counterpart to issue the performance bank guarantee in favour of the 4th Defendant. On 12th May 2010, the First Gulf's Libyan division (the 3rd Defendant) issued a bank guarantee in favour of the 4th Defendant. This was on the basis of the counter-guarantee by the 1st Defendant to the 2nd Defendant, and another by the 2nd Defendant to the 3rd Defendant, to ensure due execution of the performance of the Plaintiff's obligations. The 4th Defendant could encash this after terminating the Public Works Contract in accordance with Clause 31.

4. Defendant No. 3 then issued two separate advance payment guarantees (of about 5% of the contract value) in favour of the 4th Defendant on 29th August 2010. These were on the basis of back-to-back counter-guarantees issued by the 1st Defendant to the 2nd Defendant and by the 2nd Defendant to the 3rd Defendant. Encashment was again restricted by the terms of the contract itself.

5. Thus, all three bank guarantees issued by the 3rd Defendant in favour of the 4th Defendant were ultimately daisy-chained to guarantees issued by the 2nd Defendant, First Gulf, and the 1st Defendant, the State Bank of India.

6. The Plaintiff's case is that due *inter alia* to domestic strife, civil war and widespread unrest in Libya it was unable to carry on the construction or to execute the contract. The specific complaint is that the project site itself was never handed over and it was impossible for the Plaintiff to move men, material and equipment safely to the project site near Tripoli. Paragraphs 6(k), 6(n), 7 and 8 of the plaint read thus:

> "6(k). **At or around the same time, civil war and hostilities erupted in Libya in February 2011 and the Plaintiff was constrained to evacuate its staff and workers from Libya. The first civil war in Libya began in the wake of the Arab sprint protests in 2011, and led to foreign military intervention culminating in the ousting of the then Libyan government. The aftermath of the first civil war was marked with continued instability and violence over the next three years, and finally resulted in the eruption of a second/renewed civil war in the year 2014.** <u>**The civil unrest continues till date and has resulted in economic activity being reduced to almost aero and one third of the country's citizens fleeing to neighbouring Tunisia.**</u> <u>**Even on account of such a Force Majeure event, the Plaintiff was prevented from executing the project in addition to Defendant No. 4's failure to obtain and handover possession of the site to the Plaintiff.**</u> In terms of Article 36 of the Public Works Contract, the Plaintiff was entitled to compensation from

the Defendant No. 4 in the event that it was prevented from continuing with and completing the Project on account of a force majeure event. By its letter dated May 24, 2011 to the Defendant No. 4, the Plaintiff recorded the aforesaid facts and claimed suitable compensation from it in view of Article 36 of the Public Works Contract. A copy of the said letter dated May 24, 2011 is annexed hereto and marked **Exhibit I**.

6(n). The Plaintiff was entitled to payment of compensation for the damages and financial losses suffered by it on account of the force majeure event. However, instead of paying any compensation whatsoever, the Defendant No. 4 arbitrarily and without any basis called upon the Defendant No. 3 to renew the Guarantees until December 31, 2016, failing which it should pay over the amount of the Guarantees to its account at the earliest. In turn, the Plaintiff was intimated about the same and being left with no choice, the Plaintiff caused renewal of the Guarantees for a period of only six months from their original due date of expiry. However, by its letter dated February 15, 2015, Defendant No. 4 objected to the renewal of the Guarantees for a period of only six months and once again arbitrarily demanded that the Guarantees be renewed until December 31, 2016, failing which the amounts thereof must be immediately paid over to the Defendant No. 4. **It must be pointed out that there was no basis or reason for the Defendant No. 4 to demand renewal of the Guarantees and/or seek encashment thereof, as it had failed to provide the land for the project for 4 years and was required to close the project by paying suitable compensation to the Plaintiff, and more so as the tenure of the Guarantees stipulated in the Public Works Contract had also expired by this time. The Plaintiff was intimated about the same and being left with no choice, and under duress and coercion, the Plaintiff caused**

renewal of the Guarantees until December 31, 2016. The Plaintiff was never informed of reasons as to why the Defendant No. 4 is seeking to extend the Guarantees and the Defendant No. 4 also did not indicate of its true and *mala fide* intention behind seeking extension of the Guarantees i.e., invoking the same at a future point of time without any reason whatsoever. **It is respectfully submitted that there was no reason or cause for the Defendant No. 4 to seek extension of the Bank Guarantee considering that the project site was not available since the year 2011 and considering that there was civil war / revolution in Libya which made it impossible for any construction activity to be carried out. In any event, no alternative project site was offered by Defendant No. 4 as per the promises made to the Plaintiff.** Therefore, considering the circumstances under which the Guarantees was original procured (**knowing fully well that the project site would not be made available to the Plaintiff on account of the locals protesting against the project**) and the manner in which its **extension was sought for 2 years despite the civilian revolution and unrest going on in Libya, clearly evidences that Defendant No. 4 had sought for issuance of the Guarantees and Counter Guarantees with the *mala fide* and dishonest intention of playing fraud upon the Plaintiff. Therefore, clearly there is fraud in the manner in which the Public Works Contract was executed, the procurement of the original Guarantees and the manner in which extension of the Guarantees was sought and this being so the Plaintiff is entitled to reliefs as prayed for herein below.** Copies of the said letters in Arabic and English translation are annexed hereto and marked **Exhibit L.**

7. The Plaintiff states that the Public Works Contract was entered into by the Plaintiff and monies in excess of

INR 125 Crore invested therein **on the express promise and representation that the Defendant No. 4 would handover vacant possession of the site for construction of the Project thereon to the Plaintiff. The fact that more than 90% of the site was occupied by local residents, who were opposed to the construction and unwilling to vacate it, and also that there were disputes between the Defendant No. 4 and the local citizens in relation to the site was suppressed from the Plaintiff. The making and execution of the underlying Public Works Contract was therefore vitiated by such fraud, which is clearly of an egregious nature, and vitiated not only the underlying contract but also the furnishing of the Guarantees which were obtained in pursuance thereof, as the Defendant No. 4 clearly knew that the execution of the project on the site would not be possible in view of the occupation thereof by the local residents, but nevertheless it induced the Plaintiff to secure the performance of its obligations (*which were not possible*) by way of the Guarantees. Such fraud was compounded by the fact that the Plaintiff was made to expend further monies in performing its obligations under the Public Works Contract on the assurance that the Defendant No. 4 would take the requisite steps to handover possession of the site, but which was clearly a hollow and *mala fide* assurance intended to defraud the Plaintiff and deprive it of its monies.** The Plaintiff states that the manner in which the Guarantees were procured and extended and the purported invocation and request for encashment of the Guarantees is clearly fraudulent inasmuch as there was no question of performance and/or failure thereof by the Plaintiff in view of the fraud and failure of the Defendant No. 4 and the civil war and hostilities. **The Defendant No. 1 is well aware of the situation as the Plaintiff had put it on notice of the foregoing facts by its letter dated May**

24, 2011 and the Defendant Nos. 1 to 3 are well aware of the civil war and hostilities in Libya and the fact that there is no government in place and that the civil system has collapsed. As such, there is no question of the Guarantees being invoked.

8. **The Plaintiff further states that, if the guarantees are permitted to be encashed, it will suffer grave and irretrievable injustice** inasmuch as it will be impossible for the Plaintiff to sue and recover the amounts of the Guarantees from the Defendant No. 4, **in view of the facts that (I) civil war and hostilities have been prevailing in Libya for over 4 years now; (ii) two warring military factions claim to be controlling different parts of Libya and there is no government in place; (iii) the judicial system and rule of law has collapsed in Libya; (iv) that any decree passed by any court, whether Indian or otherwise in the Plaintiff's favour, will not be executable in Libya against the Defendant No. 4 in view of the foregoing facts; and (v) the composition/ownership structure of Defendant No. 4 is not known to the Plaintiff and is also not available in public domain.** It is in view of such exceptional and certain circumstances also that will cause irretrievable injury to the Plaintiff, as it will not be able to reimburse itself if it ultimately succeeds, that the encashment of the Guarantees ought not to be permitted."

(*Emphasis added*)

7. The jurisdictional averment in the plaint is in paragraph 20, and this is how it reads:

"20. The Plaintiff carries on business from its registered office in Mumbai. **The Defendant No. 1 also carries on**

> **business from its head and branch offices in Mumbai, and issued its guarantees through its Commercial Branch in Mumbai. The Defendant Nos. 2 also carries on business through their representative office in Mumbai.** The Defendant No. 3 in turn is partly owned by the Defendant No. 2 and since Defendant No. 2 has office in Mumbai, the Defendant No. 3 would also be amenable to the jurisdiction of this Hon'ble Court. **The Defendant No. 1 received notice of invocation of the Guarantees and the demand for encashment thereof in Mumbai and forwarded the same to the Plaintiff at its office in Mumbai. The Defendant No. 1, if not restrained, will pay the amounts of its counter guarantees from its office in Mumbai. The Defendant Nos. 3 and 4 are however having their offices outside the jurisdiction of this Hon'ble Court. A part of the cause of action has also arisen outside the jurisdiction of this Hon'ble Court, as the purported invocation was made by the Defendant No. 4 from its office in Libya.** With leave granted under Clause XII of the Letters Patent, this Hon'ble Court will have jurisdiction to entertain and dispose of the present Suit."

(*Emphasis added*)

8. Mr Tulzapurkar's argument when he first addressed me on 13th February 2017 was *inter alia* on the basis of the decision of the Supreme Court in *South East Asia Shipping Co Ltd v Nav Bharat Enterprises Pvt Ltd & Ors*.[1] The Supreme Court had before it a case of an application for injunction against enforcement of a bank guarantee. The Delhi High Court in appeal exercised jurisdiction after a learned Single Judge of that Court refused to do so. Before

1 (1993) 3 SCC 443.

the Supreme Court it was not disputed that the contract in question was executed here in Mumbai. This is where the contract was to be performed. The guarantee in question had only been *issued* in Delhi and transmitted to Mumbai for performance of the contract. The only question, therefore, was whether any part of the cause of action could be said to have arisen in Delhi. Now these factors are important because in my view, the finding of the Supreme Court is necessarily to be approached first in the facts of that case. We must next see if any larger, more omnibus principle of general applicability is set out, i.e., whether there is in that decision such a principle enunciated as would lend itself to an application in all circumstances irrespective of individual facts. This is not uncommon: we find such principles of universal applicability in many branches of the law. Indeed, in this very case (*South East Asia*), there is a reference to an earlier decision of the Supreme Court in *ABC Laminart (P) Ltd v A.P. Agencies*[2] that sets out precisely such a principle of general application, viz., that parties may not by consent confer jurisdiction on a Court that does not otherwise have it. This admits, today, of only one possible exception of which I am aware, and that is arbitration law, allowing parties to an arbitration agreement freedom to choose a jurisdictional venue. Before the Supreme Court in *South East Asia Shipping* reliance was placed on *ABC Laminart* to say that part of the cause of action had arisen in New Delhi, that is to say the bank guarantee had been *issued* in Delhi. In paragraph 3 of its judgment, the Supreme Court said:

2 (1989) 2 SCC 163.

> "3. It is settled law that cause of action consists of bundle of facts which give cause to enforce the legal injury for redress in court of law. The cause of action means, therefore, every fact, which if traversed, it would be necessary for the Plaintiff to prove in order to support his right to a judgment of the court. In other words, it is a bundle of facts, which taken with the law applicable to them, gives the Plaintiff a right to claim relief against the Defendant. It must include some act done by the Defendant since in the absence of such an act no cause of action would possibly accrue or would arise. In view of the admitted position that contract was executed in Bombay, i.e., within the jurisdiction of the High Court of Bombay, performance of the contract was also to be done within the jurisdiction of the Bombay High Court; **merely because bank guarantee was executed at Delhi and transmitted for performance to Bombay, it does not constitute a cause of action to give rise to the Respondent to lay the suit on the original side of the Delhi High Court.** The contention that the Division Bench was right in its finding and that since the bank guarantee was executed and liability was enforced from the bank at Delhi, the Court got jurisdiction, cannot be sustained."

(*Emphasis added*)

9. It is on this basis that the Supreme Court said that *mere issuance* of the bank guarantee would not constitute a cause of action sufficient to invoke jurisdiction. Mr. Tulzapurkar's argument was that *South East Asia* applied squarely to the facts of the case. The cause of action had to be derived from the Public Works Contract in question. That contract conferred jurisdiction (although without expressed words of limitation) on the Courts in Libya. The relevant article is Article 51 (plaint, page 87) and it says that the contract shall be subject to the laws and regulations in force in the Great Socialist People's Libyan Arab Jamahiriya — the Libyan Court is the competent Court to settle any disputes arising from this Contract.

10. The prayers sought are these:

> "(a) That this Hon'ble Court be pleased to order and declare that the invocation of the Counter Guarantees bearing Nos. 0607010FG0000960 dated May 12, 2010 for Performance and 0607010FG0001438 dated August 27, 2010 and 0607010FG0001439 dated August 28, 2010 for Advance given by Defendant No. 1 to Defendant Nos. 2 aggregating to USD 53,300,745 is illegal, bad-in-law and *non est*;
>
> (b) That this Hon'ble Court be pleased to order and direct the Defendant No.1 not to make any payments under the aforesaid the Counter Guarantees bearing Nos. 0607010FG0000960 dated May 12, 2010 for Performance and 0607010FG0001438 dated August 27, 2010 and 0607010FG0001439 dated August 28, 2010 for Advance given by Defendant No. 1 to Defendant Nos. 2 aggregating to USD 53,300,745 to Defendant Nos. 2 and 3;
>
> (c) That this Hon'ble Court be pleased to pass permanent order and mandatory injunction restraining the Defendant No. 1 and its officers, servants, agents or any person claiming through, by or under them from making any payment under the Counter Guarantees bearing Nos. 0607010FG0000960 dated May 12, 2010 for Performance and 0607010FG0001438 dated August 27, 2010 and 0607010FG0001439 dated August 28, 2010 for Advance

given by Defendant No. 1 to Defendant Nos. 2 aggregating to USD 53,300,745 to Defendant Nos. 2 and 3;

(d) That this Hon'ble Court be pleased to pass permanent order and mandatory injunction restraining the Defendant Nos. 2 and 3 from in any manner invoking and/or encashing and/or seeking monies from Defendant No.1 under the Counter Guarantees bearing Nos. 0607010FG0000960 dated May 12, 2010 for Performance and 0607010FG0001438 dated August 27, 2010 and 0607010FG0001439 dated August 28, 2010 for Advance given by Defendant No. 1 to Defendant Nos. 2 aggregating to USD 53,300,745 given by Defendant No. 1 on behalf of the Plaintiff;"

The orders sought are, therefore, against Defendant No. 1 and finally against Defendants Nos. 2 and 3.

11. Mr Tulzapurkar argued the Courts in Libya alone had have jurisdiction. At no point did Mr Tulzapurkar raise any argument about a Court in UAE having any parallel jurisdiction. He only said one of the counter-guarantees made UAE law applicable. It matters very little to me what is pleaded in the application. For instance, the application also insists that the 2nd Defendant does no business in Mumbai. Yet Mr Tulzapurkar at the head of his arguments immediately conceded that he was not pressing that point and that he accepted that the 2nd Defendant did in fact do business in Mumbai. It is only now after I have heard Mr DeVitre for the Plaintiffs for some time and to whose arguments I will return shortly that counsel today appearing for the Defendants raises the point of jurisdiction also being with the Court in UAE and insists that Mr

Tulzapurkar had argued this too. He had not. I will not permit this. terms. When counsel at my Bar and especially senior counsel advance an argument, they sometimes do not press a given point and they say so. That binds everybody on their side and it is not open to their instructing Advocate to resile from this position and argue something not pressed. If this is how the matters are to be argued, we might as well not have counsel at all.

12. Mr DeVitre's answer is to say *South East Asia Shipping* is of limited application for distinct reasons. First, the ratio has application in a domestic scenario where conceivably both the Delhi and the Mumbai Courts might have been able to validly exercise jurisdiction. A very different situation would arise if one of the Courts was a foreign Court. His submission is that the *South East Asia Shipping* principle applies to the jurisdiction exercised by courts governed by the Civil Procedure Code 1908 and are, therefore, subject to the hierarchical discipline of our domestic judiciary. Private international law considerations may change the conspectus.

13. His second argument is that closely read *South East Asia Shipping* indicates that the Delhi High Court's jurisdiction was sought to be invoked only on the basis of *issuance* of the bank guarantee, and not on the basis of its invocation. What separates the present case at hand is that in this case is not the issuance from Mumbai but that the invocation, on account of these peculiar back-to-back guarantees, is in Mumbai. The demand for payment is actually made here in Mumbai as against the Plaintiff and it is this, Mr DeVitre submits, that furnishes him with an immediate and proximate cause of action, that is to say, not the issuance of any of the bank guarantees alone but a direct linkage to the invocation. This is an important, and possibly dispositive, point of distinction. After all, the law is well-settled that a bank guarantee is a separate and independent contract. Thus, while the issue of a bank guarantee will not furnish a cause of action, its invocation well may, and nothing in *South East Asia Shipping* suggests it cannot.

14. Mr. Tulzapurkar's reliance on the decision of a Division Bench of the Calcutta High Court in *SPML Infra Ltd v South Bihar Power Distribution Co Ltd & Ors*,[3] which followed *South East Asia Shipping* is clearly distinguishable. There were two bank guarantees in that case. The wrong one was invoked. Reference had to be made to the underlying contract to ascertain the terms of invocation. It was in those circumstances that case was decided. Similarly, the decision of the Supreme Court in British India Steam Navigation Co Ltd v Shanmughavilas Cashew Industries & Ors is of little relevance given that it related to bills of lading, charterparties and affreightment contracts.

15. The other argument that is raised today by Mr DeVitre after some further reflection is that this kind of jurisdictional exclusivity or ouster cannot in equity be invoked if the other forum said to be available is in fact unavailable and inaccessible to a plaintiff. Specifically, he points out that even without requiring a great amendment to the plaint, the averments in the plaint clearly show that the Libyan Court's jurisdiction is not available to the Plaintiff.

3 Judgment dated 8th October 2015 in APO No 193 of 2015 in CS No 37 of 2015 dismissing an appeal from *SPML Infra Ltd v South Bihar Power Distribution Co Ltd*, (201) SCC Online Cal 639.

Merely to say that a Court in Tripoli has jurisdiction is of no use. International Courts have in parallel cases invoked the principle of f*orum non conveniens* or some variant of it. How far that principle is applicable is something that I need not examine at any great length today simply because this case distinguishes itself on its very peculiar facts from the other authorities cited by Mr Tulzapurkar. I will accept of course the general principles that follow from *ABC Laminart* and subsequent cases, viz., that parties cannot by consent confer jurisdiction on a Court that does not otherwise have it; that words of exclusion (such as "exclusively", "only" etc.) are useful but not necessarily determinative of a jurisdictional exclusion;[4] that each case turns on its own merits; and that parties will generally be held to their bargain in a contract of valid forum selection. There is no quarrel with any of these propositions and it is not necessary to multiply authorities in this regard. But where there are two courts of possible jurisdiction, and one is simply unavailable to a plaintiff, and this is not merely a question of hardship but actual prevention, then it is difficult to conceive of a plaintiff being wholly non-suited by telling him "you have chosen to sue there, and so you cannot sue here; and it matters not at all that you are unable to go there, to the other place, to sue."

16. Mr DeVitre is also correct in saying that an application for revocation of leave granted under Clause XII is to be treated exactly like an application for determination of a preliminary issue under Section 9A of the Code of Civil Procedure 1908.[5] The plaint has to be read as it stands, on a demurrer, and one must then see if there is

4 *Swastik Gases Pvt Ltd v Indian Oil Corporation Ltd*, (2013) 9 SCC 32.

5 *ICICI Ltd v Sri Durga Bansal Fertilizers Ltd & Ors*, 1999 (3) Mh LJ 20.

that lack of jurisdiction. Mr. Tulzapurkar's argument is that *no* part of the cause of action has arisen here. If there is even a fractional part, and the amount he agrees is irrelevant, then the challenge must fail. Therefore, if the invocation provides a cause of action and it is found to provide a cause of action here, that is surely enough.

17. To my mind, one of the most telling arguments that Mr DeVitre makes is that the entity is best placed to counter or traverse the Plaintiff's allegations about the unavailability of the Libyan forum, Defendant No. 4, has chosen not to set foot in this Court. It is not even entered appearance and the Suit itself is set down against Defendant Nos. 3 and 4 as an undefended Suit. Mr. DeVitre relies on the decision of the Supreme Court in *Modi Entertainment Network & Anr v WSG Cricket PTE Ltd*[6] for its ratio set out in paragraph 24. That was a case Court seeking an anti-suit injunction. In sub paragraph (4) of paragraph 24, this is what the Supreme Court said:

> "(4) a court of natural jurisdiction will not normally grant anti-suit injunction against a Defendant before it where parties have agreed to submit to the exclusive jurisdiction of a court including a foreign court, a forum of their choice in regard to the commencement or continuance of proceedings in the court of choice, save in an exceptional case for good and sufficient reasons, with a view to prevent injustice in circumstances such as which permit a contracting party to be relieved of the burden of the contract; **<u>or since the date of the contract the circumstances or subsequent events have made it impossible for the party seeking injunction to prosecute</u>**

6 (2003) 4 SCC 341.

> **<u>the case in the court of choice</u>** because the essence of the jurisdiction of the court does not exist or because of a vis major or force majeure and the like;"
>
> (*Emphasis added*)

18. I believe Mr DeVitre to be correct. Since the date of this Public Works Contract, the situation on the ground in Libya, Syria and other countries is such that it requires no great evidence to determine that it is impossible for a party or an entity to safely enter those countries, let alone do any business or conduct a litigation there. There are other circumstances that will come into play and the somewhat doctrinaire approach of merely pointing to this or that jurisdictional clause without reference to the surrounding facts and circumstances is I think completely incorrect. To illustrate, if this forum selection clause had for instance validly chosen London as the alternative forum, it is conceivable that Mr DeVitre's clients may have had to go there. But even that would not necessarily have robbed this Court of its jurisdiction. A more detailed examination of the law on *forum non conveniens* might then have been necessary. But where the alternative forum is wholly unavailable, to my mind, it defies logic and undermines equity to tell a Plaintiff that he should go to a Court to which he physically cannot go and that he is otherwise to be left without a remedy.

19. The UAE law clause applies to the counter guarantees. It is not a forum selection clause at all. All that it says is that the counter guarantee in question will be governed by the laws of the UAE. Thus, the present argument sought to be raised is completely without substance or basis. In any case, nobody has argued that the laws of the UAE if applied by an Indian Court would prevent the grant of an injunction, which would necessarily be corollary to this argument which cannot otherwise be left dangling like this. Further, this argument is not just inconsistent with, but is destructive of the first argument that in a situation where there are guarantees the only jurisdictional clause would be the one under the Public Works Contract. Surely the 2nd Defendant cannot have it both ways. This is possibly the reason Mr Tulzapurkar did not press this point at all.

20. I do not believe that any Court in equity would ever countenance such a situation. The Chamber Summons is dismissed.

21. But for Mr Tulzapurkar's fairness of approach and since he wasted not a moment arguing the very many things that are on Affidavit, at least some of which are probably indefensible, that I do not award costs against the 2nd Defendant.

(G. S. PATEL, J.)