

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : **24.11.2017**

DELIVERED ON : **15.12.2017**

Coram

The Honourable **Mr.Justice RAJIV SHAKDHER**

and

The Honourable **Mr.Justice N.SATHISH KUMAR**

Original Side Appeal Nos.292 to 295 of 2017
and C.M.P.Nos.18285 to 18296 of 2017

M/s.BGR Energy Systems Limited,
Having its Reg. Office at:
A-5, Pannamgadu Industrial Estate,
Ramapuram Post,
Sullerpet Taluk, Nellore District,
Andhra Pradesh, India
Having its Corporate Office at
No.443, Anna Salai,
Teynampet,
Chennai-600 018.

.. Appellant in all OSAs.

Vs.

1. ICICI Bank Limited,
110, Prakash Presidium,
Nungambakkam High Road,
Chennai – 600 034.

2. Bank of Baghdad,
Private S.A. Co.,
Capital ID 52,973,256,470,
P.O.Box 3192,
Al Karada,
Baghdad,

Republic of Iraq.

3. Ministry of Electricity,
General Directorate for Gas Power Plant Projects,
Nile Quarter Borsaeed Street,
P.O.Box 3099, Baghdad,
Republic of Iraq.
4. Export Credit Guarantee Corporation of India Ltd.,
"The Metropolitan", 7th Floor,
Plot No.C-26/27, Bandra-Kurla Complex,
Bandra (E),
Mumbai – 400 051. ... Respondents in All OSAs

Prayer in all OSAs : Appeals filed under Order XXXVI Rule 9 of Original Side Rules read with Clause 15 of the Letters Patent, against the common Judgement and Order dated 20.10.2017 in O.A.Nos.977 & 978 of 2014 and A.Nos.1495 & 1496 of 2016 in C.S.No.788 of 2014 on the file of this Court.

* * *

For Appellant : Mr.Sathish Parasaran,
Senior Counsel
for Mr.R.Parthasarathy

For Respondent No.1 : Mr.A.L.Somayaji
Senior Counsel
for Mr.V.Adhivarahan

For Respondent No.2 : No appearance

For Respondent No.3 : Not served

For Respondent No.4 : Mr.Gaurav Nataraj for
M/s.Ramasubramaniam Assoc.,

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COMMON JUDGEMENT**RAJIV SHAKDHER, J.****Prefatory Facts :**

1. The captioned appeals are directed against a common judgement and order dated 20.10.2017. Via the impugned judgement, the learned Single Judge has disposed of four (4) applications, i.e. O.A.Nos.977 of 2014, 978 of 2014, 1495 of 2016 and 1496 of 2016.

1.1 While the first two (2) applications were filed by the appellant, who is the original plaintiff, the remaining two (2) applications were filed by the first respondent.

1.2. There are principally, four (4) protagonists in the matter. The appellant i.e. BGR Energy Systems Limited (hereafter referred to as "BGR"). The first respondent i.e., ICICI Bank Limited (hereafter referred to as "ICICI Bank"). The second respondent i.e. Bank of Baghdad (hereafter referred to as "BOB") and the third respondent i.e. the Ministry of Electricity, General Directorate for Gas Power Plants Projects, the Republic of Iraq (hereafter referred

to as "GOR"). There is a fifth entity also arrayed as party, which is the fourth respondent i.e., Export Credit Guarantee Corporation of India Limited (hereafter referred to as "ECGC"). Its role, if any, in the subject matter is only *de minimis*.

2. Before we proceed further, it may be necessary to note that the impugned judgement impacts BGR for the reason that the injunction which operated in its favour vis-a-vis the counter guarantee dated 11.09.2013, furnished by ICICI Bank in favour of BOB, equivalent to a value of USD 12.30 millions stands vacated.

3. The impugned judgement has, thus, given rise to the captioned four (4) appeals.

4. We had issued notice in the appeals on 25.10.2017, when, on behalf of ICICI Bank, a statement was made that it would not precipitate the issue pertaining to the subject bank guarantee i.e., counter guarantee in issue. This statement continues to operate to date.

5. The record shows that the other respondents i.e., BOB and

ECGC have already been served, while, GOR could not be served. As a matter of fact, ECGC has entered appearance through Mr.Gaurav Nataraj. In so far as BOB and GOR are concerned, they have not participated in the present proceedings despite service.

5.1. However, we proceeded to hear the matter on account of the urgency expressed on behalf of ICICI Bank. ICICI Bank, in fact, informed us that the counter guarantee furnished by them in favour of BOB stood already invoked. We would be referring to the proceedings pending in Iraq in respect of that aspect of the matter during the later part of the discussion immediately - though, in our view, the following broad facts need to be noticed in order to adjudicate upon the aforementioned appeals placed before us.

6. BGR, which is a company involved in engineering, procurement, construction and execution of turnkey projects, executed a contract with GOR for setting up of a gas turbine, for implementing a gas turbine power plant project at Nasiriyah, Iraq.

6.1. As a precursor to the contract, a tender was floated by GOR against which, BGR made an offer. Accordingly, a Letter Of

Intent dated 02.09.2013, was issued by GOR in favour of BGR. As indicated above, this was followed by a contract that was executed between BGR and GOR on 13.10.2013.

6.2. The total value of the contract was pegged at USD 246 million. As per the terms of the contract, the project was to commence within 28 days from the effective date as defined in Article 3 of the aforementioned contract. The tenure for completion of the project was 750 days, which was to be counted from the effective date as defined in the contract.

6.3. Thus, BGR was obliged to complete the contract within the period defined thereto.

6.4. As per the terms of the contract, BGR was required to submit a Performance Bond i.e., a Performance Bond Guarantee (in short "PBG") in favour of GOR. However, the PBG which had to be of a value equivalent to 5% of the total contract price was required to be issued by an accredited Iraqi Bank.

6.5. Resultantly, BOB, was roped into the arrangement subsisting between GOR and BGR.

6.6. Accordingly, BOB agreed to furnish a PBG, provided it was backed by a Bank in India. This resulted in ICICI Bank stepping into the picture and furnishing a counter guarantee in favour of BOB. The arrangement, as it worked out on ground, was simply this: BOB furnished a PBG equivalent to USD 12.30 million in favour of GOR, which was backed by a counter guarantee of an equivalent value, furnished by ICICI Bank in favour of BOB. The counter guarantee, in turn, was furnished at the behest of BGR against 110% margin money.

6.7. To begin with, the validity period of the PBG was required to expire on 08.10.2014. The validity period was, however, extended till 30.04.2015. Likewise, the counter guarantee, which was issued on 08.10.2013, was to expire on 30.04.2015, with an additional leeway of 15 days accorded in favour of BOB. With this arrangement in place, the interest of GOR was secured.

6.8. In so far as BGR was concerned, under Article 2.2, GOR was required to furnish an irrevocable Letter of Credit (LC) in favour of BGR, initially, for an amount equivalent to 50% of the total contract price, which was required to be enhanced to a value equivalent to the entire contract price. This enhancement in value was to be brought within the second quarter of 2014.

6.9. Undisputedly, BGR had a LC issued in its favour in terms of Article 2.2. of the contract. Evidently, the LC was opened by GOR on 21.01.2014.

7. For the purpose of completion of the narrative, it may be important to note that ECGC and BGR also executed a contract on 29.08.2013, which provided insurance cover to the former for execution of the contract.

7.1. It appears, upon perusal of the record, the relationship between BGR and GOR went awry. Though, the reasons for disruption in their relationship is not clearly known, what is clear is that it led to GOR informing Citi Bank, which had opened the LC in favour of BGR at its behest, to suspend payments under the LC. This event occurred on 16.06.2014.

7.2. BGR, evidently, did nothing for the next five (5) months till it received a letter from its own official located at the project site, suggestive of the fact that GOR intended to terminate the contract and invoke the PBG.

7.3. This piece of information propelled BGR to initiate the instant suit for permanent injunction.

7.4. In the suit, BGR, broadly, seeks three (3) prayers. The first prayer sought, is for grant of permanent injunction, to restrain the ICICI Bank from making payment under the PBG. The second prayer is a prayer for grant of permanent injunction; once again, against ICICI Bank from making any payment under the counter guarantee issued in favour of BOB. The third and last prayer is a mirror image of the first two prayers in as much as it seeks a relief of permanent injunction against BOB; in effect, restraining it from receiving payment either under the PBG or the counter guarantee.

7.5. The suit, which was instituted in and about November, 2014 along with O.A.No.977 and 978 of 2014, came up before a

learned Single Judge for hearing for the first time on 02.12.2014.

7.6. Along with the suit, BGR had filed an interlocutory application, being : A.No.7647 of 2014. Via this application, BGR sought leave to sue BOB, GOR and ECGC on the ground that the cause of action for filing the suit had arisen within the territorial jurisdiction of this Court, and that, no other Court in India had jurisdiction over the subject matter, since, apart from ICICI Bank, other defendants were situate outside the jurisdiction of this Court. BGR buttressed its plea for leave to sue with a submission that no prejudice and/or hardship would be caused to BOB and GOR if leave was granted in that behalf.

7.7. Importantly, though, the order granting leave was not placed before us, the unanimous stand of counsels appearing before us for various parties, is that, leave was, indeed, granted.

7.8. The troubling issue, if, one may say so, that arises for consideration is, as to whether at the time of seeking leave, BGR had disclosed all facts to the Court and in that behalf placed all documents on record.

7.9. As the facts narrated hereafter, by us, would show that this aspect became and is a major bone of contention between the contesting parties. ICICI Bank takes the stand that there had been suppression of facts and documents which, of course, BGR denies, inter alia, on the ground that facts and documents whether or not placed before the Court were not material.

8. Moving on with the facts, it is important to note that the suit along with the interlocutory applications i.e. O.A.No.977 and 978 of 2014 came up before the learned Single Judge, as indicated above, on 02.12.2014. On that date the learned Single Judge passed an ex parte order in terms of the prayers made in the two applications filed on behalf of BGR.

8.1. Apparently, between 2015-2016 negotiations were held between BGR and GOR which propelled BGR to seek extension of the counter guarantee. For this purpose, BGR wrote to ICICI Bank at least on three occasions, that is, on 17.04.2015, 12.10.2015 and 11.11.2015. The last letter, resulted in the counter guarantee being extended till 18.04.2016.

8.2. It appears that since negotiations failed, on 01.03.2016, BOB invoked the counter guarantee. ICICI Bank vide transmission dated 02.03.2016, informed BOB that it had been restrained from making payment under the counter guarantee.

8.3. Evidently, on the very same date, i.e., 01.03.2016, GOR had terminated the contract. The record also shows that BOB on 16.03.2016, wrote to ICICI Bank, that the beneficiary (i.e. GOR) was insisting on payment of the amount reflected in the PBG and that if it failed to pay, GOR would approach a Iraqi Court and have all its assets frozen, which would not only cause financial loss to it but would also damage its reputation.

8.4. The threat held out to ICICI bank was that if such action was taken by GOR qua BOB, then, ICICI Bank would be held liable for the damage caused to BOB. In the same vein, BOG also informed ICICI Bank that it would claim fee at the prevailing rate of interest, that is at 9% p.a on any amount paid to beneficiary (i.e. GOR) on its behalf.

8.5. It is, perhaps, in these circumstances, that ICICI Bank, was left with no choice but to approach this Court with applications for vacating the interim order.

8.6. Consequently, ICICI Bank, filed two applications being : A.No.1495 and 1496 of 2016. In the applications filed, broadly, the stand taken by ICICI Bank was as follows:

(i) First, that the Court had no jurisdiction in the matter, since, not only the contract, but also the PBG and the counter guarantee were governed by Iraqi laws.

(ii) Second, though, BGR had alleged "fraud on the documents" by GOR, it had not sought any relief against GOR or initiated legal proceedings against it.

(iii) Third, while, in the affidavit filed on behalf of BGR in support of its applications for injunction, which was common to all applications, relief was sought both against the ICICI Bank and BOB, BGR, had got only the application pertaining to ICICI Bank numbered. The application directed towards BOB though filed, had not been pressed. This, according to ICICI Bank, had created an anomalous situation, which is, that though ICICI Bank was

prevented from making payment under the counter guarantee, it was perfectly legitimate for both BOB and GOR to claim payments from ICICI Bank Limited.

8.7. It appears that based on the stand taken by ICICI Bank in its applications referred to above, BGR filed fresh applications seeking relief against BOB. Pertinently, around this time, BGR became aware of the fact that it had not filed a complete set of the contract documents. In this behalf, BGR was put on alert by assertions made in ICICI Bank's written submissions, filed with the learned Single Judge in support of its case.

8.8. Consequently, BGR via its authorised signatory filed an affidavit dated 27.04.2016 along with the Judge's Summons, wherein, it inter alia indicated that all material documents had been filed. In so far as "conditions of the contract" pertaining to change in law, force majeure, war risk, disputes and arbitration were concerned, the same had been, according to BGR, if at all, left out, inadvertently. It was reiterated on behalf of BGR in the affidavit that material facts had been disclosed in the pleadings filed before the Court.

8.9. It is pertinent to note that ordinarily the Court closes for summer break in the month of May of each year. However, in the Court working days which followed and preceded the summer break, the Judge's Summons were not placed before the Court. The Court in the usual course closed for vacations. The Registry in the meanwhile, apparently, had returned the applications / Judge's Summons, as they were incomplete. This somehow was not immediately noticed by the Advocates engaged on behalf of BGR.

9. Upon arguments being heard in the aforementioned four (4) applications, the learned Single Judge vide judgement and decree dated 01.06.2016, made the ad-interim injunction dated 02.12.2014, absolute. Consequently, the applications filed by ICICI Bank i.e., A.No.1495 and 1496 of 2016 were dismissed.

10. Being aggrieved, ICICI Bank preferred two (2) appeals with the Division Bench i.e., O.S.A.No.136 and 137 of 2016. These appeals were filed on 13.06.2016.

10.1. The Division Bench after hearing the contesting parties, vide judgement dated 26.04.2017, set aside the order dated 01.06.2016 and remanded the matter to the learned Single Judge to pass fresh orders qua all four (4) applications, *albeit*, after considering the issue of suppression of material documents and jurisdiction of the Court. The Division Bench also indicated that till further orders were passed in the applications, status quo as on that day shall be maintained by the contesting parties i.e., BGR and ICICI Bank.

11. It is in this background that the impugned judgement and order has been passed. In sum, the learned Single Judge has dismissed the applications filed on behalf of BGR for injunction and proceeded to allow the contra applications filed on behalf of ICICI Bank for vacating the injunction. The principal reason for doing so, is that, according to the learned Single Judge, BGR had suppressed vital portions of the contract which contained conditions pertaining to force majeure, war risk and arbitration.

12. Pertinently, this time around, BGR is aggrieved with the judgement of the learned Single Judge and, accordingly, has

preferred the captioned appeals.

Submissions of counsels :

13. In support of the instant appeals, arguments were advanced by Mr.Sathish Parasaran, learned senior counsel instructed by Mr.R.Parthasarathy, Advocate, while, on behalf of ICICI Bank, submissions were advanced by AL.Somaiyaji, learned senior counsel instructed by Mr.Adhivarahan, Advocate.

14. The arguments of Mr.Parasaran can, broadly, be paraphrased as follows:

(i) That the counter guarantee was an instrument, which was executed between ICICI Bank and BOB and therefore the jurisdiction clause incorporated in it would not bind BGR. In other words, the reach and extent of jurisdiction clause contained in the counter guarantee would not extend to the disputes raised by BGR in the instant suit.

(ii) Though, the counter guarantee issued by ICICI Bank contained a clause that settlement of disputes were subject to Iraqi laws, there was no specific clause pertaining to forum where the

disputes could be adjudicated upon.

(iii) The clause pertaining to jurisdiction, if at all, created a non-exclusive jurisdiction in the forums in Iraq and therefore did not exclude the jurisdiction of this Court.

(iv) The learned Single Judge erred in relying upon BGR's letter dated 05.10.2013, in coming to the conclusion that BGR was privy to the fact that the counter guarantee was subject to Iraqi laws.

(v) The learned Single Judge failed to take into account a vital fact, which is, counter guarantee was effective only on issuance of an irrevocable LC by GOR. The unilateral suspension of the irrevocable LC by GOR post the issuance of PBG and counter guarantee, negated the enforcement of PBG and thereby the counter guarantee.

(vi) ICICI Bank being aware of the fact that irrevocable LC had been suspended by GOR was duty bound not to honour the counter guarantee, as this was a fraud played upon BGR by GOR.

(vii) ICICI Bank having become aware of the fraud, the injunction should have followed almost as a matter of routine.

(viii) The instant claim was therefore an action in tort directed against ICICI Bank, if it were to honour the demand for payment

made by BOB qua the counter guarantee.

(ix) Since, the counter guarantee had been furnished in Chennai, this Court had jurisdiction over the matter ; an aspect which the learned Single Judge had failed to appreciate. In support of his submission, learned counsel placed reliance on the judgement of the Delhi High Court in ***Bhandari Engineers and Builders Pvt. Ltd., Vs. Vijaya Bank and others [168 (2010) DLT 47]***, as also on the judgement of this Court rendered in ***Premium Industries Vs. Quality Fabricators [1998 (2) CTC 492]***.

(x) The jurisdiction clause and/or arbitration clause which stand incorporated in the underlying contract are not relevant for the purpose of the instant suit and the applications for injunction filed by BGR. The PBG being a contract independent of the underlying contract, the learned Single Judge could not have used the jurisdiction clause to deny injunction to BGR in the matter.

(xi) The counter guarantee is a conditional bank guarantee in as much as it obliges GOR to keep the irrevocable LC alive. In this behalf, reference was made to Article 3 of the contract and furthermore reliance was also placed on the judgement of the Supreme Court in ***Hindustan Construction Co., Limited Vs. State of Bihar [1999 (3) CTC 618 (SC)]***.

(xii) Even if it is assumed that PBG and/or counter guarantee is unconditional, injunction ought to have been granted, as this was a case pertaining not only to “egregious fraud” but also “irretrievable injury”.

(xiii) The learned Single Judge failed to consider the present political situation in Iraq; which established beyond doubt that if payments are made under the counter guarantee, BGR would be left with no means to recover the amounts paid. In this behalf, reliance was placed on ***State Trading Corporation of India Limited Vs. State Bank of India and others [200 (2013) DLT 283]***

(xiv) The learned Single Judge failed to notice that the clause pertaining to war risk had been extracted in the plaint by BGR and therefore no prejudice was caused to ICICI Bank.

(xv) The learned Single Judge also failed to appreciate that the main contract was not the subject matter of dispute between BGR and ICICI Bank. BGR had made reference to the same only to bring to the notice of the Court that the PBG and the counter guarantee had been issued in connection with the said contract.

(xv)(a) The contract would be a material document only in respect of the proceedings, if any, obtaining between BGR and GOR.

Though BGR had placed the missing documents before the Court, after the Division Bench had remitted the matter, the learned Single Judge failed to consider as to whether or not the alleged suppression was material to the outcome of the matter.

(xvi) The learned Single Judge ought to have appreciated that the documents which were said to have been suppressed by BGR was available with ICICI Bank and, thus, did not cause any prejudice to ICICI Bank.

(xvii) The learned Single Judge failed to appreciate the true import of the "force majeure" clause obtaining in the contract. The said clause excluded only the "current situation" obtaining in Iraq, that is, the situation, which subsisted, at the time when the contract was first executed between BGR and GOR.

(xviii) The learned Single Judge ought to have appreciated that after mid-2014, a warlike situation had been created. A fact which the learned Single Judge failed to appreciate while deciding the injunction application. In this behalf, reliance was placed on the Travel Advisory issued by Government of India (in short "GOI"). It was also contended that during this period, the employees of BGR could not travel to Iraq and, therefore, any legal proceedings launched could not have been effectively prosecuted.

(xix) The learned Single Judge failed to appreciate that the arbitration clause was not relevant as the same obtained in the underlying contract executed between BGR and GOR and not in the counter guarantee.

(xx) Furthermore, what ought to have been appreciated by the learned Single Judge is that BGR had invoked the arbitration clause and sent a notice, in this behalf, which was returned by the postal department with an endorsement "service suspended". Assuming that arbitration clause was relevant, in the given situation, the underlying contract stood frustrated and, thus, BGR had no other recourse left with it, except to file a suit for injunction in the given circumstances.

(xxi) ICICI Bank had not challenged the order passed in favour of BGR granting it leave to sue. Therefore, the logical sequitur would be that ICICI Bank has submitted to the jurisdiction of this Court. Reliance in this behalf was placed on the judgement of a Division Bench of this Court rendered in ***P.T.Ummer Koya Vs. Tamil Nadu Chess Association, [2005 (3) CTC 86]***.

(xxii) The learned Single Judge failed to appreciate that an order of injunction was granted in favour of BGR on 02.12.2014, which was made absolute after ICICI Bank had put in an

appearance. Furthermore, what ought to have weighed with the learned Single Judge, was that ICICI Bank, thereafter did not move for vacating the injunction till mid-2016, when, nearly one and half years had passed, since, injunction was granted.

(xxiii) The learned Single Judge had travelled beyond the scope of the remand order dated 26.04.2017.

(xxiv) The learned Single Judge has questioned the grant of leave to sue itself, when, what he was required to determine was : whether suppression of documents and pleadings pertaining to jurisdiction and arbitration clause was material in the given fact situation.

14.1. In support of his submissions, apart from placing reliance on Article 19 of the UN Convention of Independent Guarantees and Stand-by Letters of Credit, learned counsel relied upon the following judgements, in addition to those which have been referred to hereinabove :

- (i).ABC Laminart V. A.P.Agencies, Salem, (1989) 2 SCC 163 ;
- (ii).United Trading Corporation S.A. And Murray Clayton Ltd. V. Allied Arab Bank Ltd. (1985) 2 LLOYD's REP 554;
- (iii).Svenska Handelsbanken V. Indian Charge Chrome Ltd., (1994) 1 SCC 502 ;
- (iv).Gammon-OJSC Mosmetrostroy JV V. Chennai Metro Rail

Limited, 2015 (5) CTC 278.

(v).Himadri Chemicals Industries Ltd. V. Coal Tar Refining Company, (2007) 8 SCC 110.

(vi).U.P. State Sugar Corporation V. Sumac International Ltd., (1997) 1 SCC 568.

(vii).Satyabrata Ghose V. Mugneeram Bangur, AIR 1954 SC 44;

(viii).Sushila Devi V. Hari Singh, (1971) 2 SCC 288 ;

(ix).S.J.S. Business Enterprises Pvt. Ltd., V. State of Bihar, (2004) 7 SCC 166;

(x).TTI Team Telecom International Limited, Axarte Limited V. Hutchison 3G UK Limited, 2003 WL 1823104.

15. On the other hand, Mr.A.L.Somayaji, made the following, broad, submissions:

(i) There was no inter connect between the issuance of the PBG, the counter guarantee and the irrevocable LC.

(ii) The suspension of the irrevocable LC by GOR would not constitute fraud so as to prevent ICICI Bank from honouring its obligations to BOB.

(iii) The continued injunction qua the counter guarantee has exposed ICICI Bank to litigation which is rife with the possibility of it being mulct with damages. Moreover, each day's injunction was impinging upon its reputation in the international banking sphere.

(iv) BGR had suppressed vital documents which pertained to clauses relating to jurisdiction, force majeure and arbitration. The Court while adjudicating upon interlocutory applications for grant of injunction exercises equitable jurisdiction and, therefore, in the given facts and circumstances of the case, the injunction order was rightly vacated by the learned Single Judge.

(v) Though BGR had filed injunction applications, which sought relief against ICICI Bank, qua the counter guarantee, it failed to move applications vis-a-vis BOB, though, in the affidavit accompanying the applications pertaining to ICICI Bank, relief had been sought against both entities. This, in a sense, BGR had created a peculiar situation, that is, while ICICI Bank was prevented on account of injunction issued against it from paying the monies to BOB, BOB was faced with no impediment in claiming the monies from ICICI Bank.

(vi) The force majeure clause obtaining in the contract clearly factored in a difficult circumstance obtaining in Iraq. BGR had entered into the contract knowing fully well what the situation in Iraq was, and that, in the days to come, it could become worse.

(vii) Furthermore, in this behalf, reliance was placed on a letter dated 01.07.2015 addressed by BGR to the Contracts Department in GOR. Based on this letter, it was submitted, that even in July of 2015, BGR was portraying to the Iraqi authorities that it was in a position to defend legal proceedings instituted against it in Iraq.

(viii) Furthermore, in this connection, reliance was also placed on a letter dated 23.09.2015, addressed by BGR to the Director General of Ministry of Electricity in GOR, whereby, BGR had proposed that since the subject project was prestigious, they were negotiating with a Chinese Company, namely, Shanghai Electric Group Company Limited so that joint efforts could be made to execute the contract. The said letter was, apparently, written by BGR to obtain prior written consent of the aforementioned Ministry

in GOR before it moved further in the matter.

(ix) In the very same vein, another letter dated 07.10.2014, was addressed by BGR to the Director General of Ministry of Electricity, GOR, the objective being the same.

(x) The argument advanced on behalf of BGR that, since, the contract documents were in possession of ICICI Bank, it could not be held guilty of suppressing material documents was untenable, as it was contrary to the principles laid down by the Supreme Court in ***S.P.Chengalvaraya Naidu Vs. Jagannath* [AIR 1994 SC 853]**.

(xi) The submission advanced on behalf of BGR that since it was not party to the counter guarantee and, therefore, it was not bound by the clauses obtaining therein, in particular, clauses pertaining to jurisdiction and applicability of Iraqi laws was erroneous for the reason the format for PBG is given in Appendix-VIII of the contract, to which, the appellant, was a party. The consideration for issuing the PBG by BOB was the counter guarantee and therefore by implication, BGR was bound by the terms contained in the counter guarantee pertaining to jurisdiction

and applicability of Iraqi laws.

(xii) Furthermore, in its letter dated 05.10.2013, addressed by BGR to ICICI Bank it had itself indicated that it was aware that counter guarantee was governed by Iraqi laws.

(xiii) The argument advanced on behalf of BGR that since no revocation of leave to sue had been sought and, therefore, ICICI Bank could not question this Court's jurisdiction to entertain the suit was erroneous for the reason that leave to sue was obtained based on a singular ground that the counter guarantee had been issued in Chennai and that too contrary to the dictum of the Supreme Court in ***M/s.South East Asia Shipping Co. Ltd. Vs. Nav Bharat Enterprises Pvt Ltd., [1996 (3) SCC 443]***.

(xiv) The plaint being silent with regard to material clauses, obtaining in the contract, pertaining to arbitration and applicability of Iraqi laws raised a big question mark whether the order granting leave to sue could come in the way of ICICI bank objecting to the jurisdiction of this Court in entertaining and/or adjudicating upon the instant suit.

(xv) In so far as ICICI Bank is concerned, it has specifically taken objection to jurisdiction in the application filed for vacating the injunction order.

(xvi) There is no averment in the plaint that the remedy of arbitration was hit by "forum non-conveniens". As a matter of fact, as demonstrated, herein above, BGR was in correspondence with GOR for bringing about a novation in the then subsisting contract by introducing a Chinese company as a sub-contractor.

(xvii) The pertinent point which is lost sight of by BGR, is that, arbitration was to be conducted at a neutral venue in Amman, the capital of Jordan and not in Iraq.

15.1. In support of his submissions, Mr.Somayaji, relied upon the following judgements:

- (i).S.P.Chengalvaraya Naidu (Dead) by LRs V. Jagannath (Dead) by LRs and others, CDJ 1993 SC 657.
- (ii).Meghmala and others V. G.Narasimha Reddy and others, CDJ 2010 SC 710.

- (iii).Krishna Hare Gaur V. Vinod Kumar Tyagi and others, CDJ 2015 SC 119.
- (iv).State Trading Corporation of India V. Jainsons Clothing Corporation, (1994) 6 SCC 597.
- (v).Hindustan Steel Workers Construction Ltd. V. G.S.Atwal & Co., (1995) 6 SCC 76.
- (vi).M/s.Millennium Wires (P) Ltd. V. The State Trading Corporation of India, 2015 (4) L.W. 302.
- (vii).M/s.Omni Agate Systems Pvt. Ltd., V. Southern Railway, 2011 (3) L.W. 865.
- (viii).An order of the learned Single Judge, dated 29.06.2012, made in O.A.Nos.656 to 659 of 2011, titled : SEBC Projects Pvt. Ltd. V. BGR Energy Systems Limited.
- (ix).M/s.Gammon OJSC Mosmetrostroy JV V. Chennai Metro Rail Limited & others, CDJ 2015 MHC 6294.
- (x).South East Asia Shipping Co. V. Nav Bharat Enterprises Pvt. Ltd. & Ors., (1996) 3 SCC 443.
- (xi).Swastik Gases Pvt. Ltd. V. Indian Oil Corporation Ltd. (2013) 9 SCC 32.
- (xii).Progressive Construction V. Louis Berger Group INC., CDJ 2011 APHC 969.
- (xiii).South India Wire Ropes V. Usha Martin Industries Ltd., AIR 2007 Kant 59.
- (xiv).Gujarat Maritime Board V. L & T Infrastructure Development Projects Ltd. and Anr. (2016) 10 SCC 46.
- (xv).Himandir Chemicals Industries Ltd. V. Coal Tar Refining Co., (2007) 8 SCC 110.
- (xvi).Millennium Wires (P) Limited V. State Trading Corporation

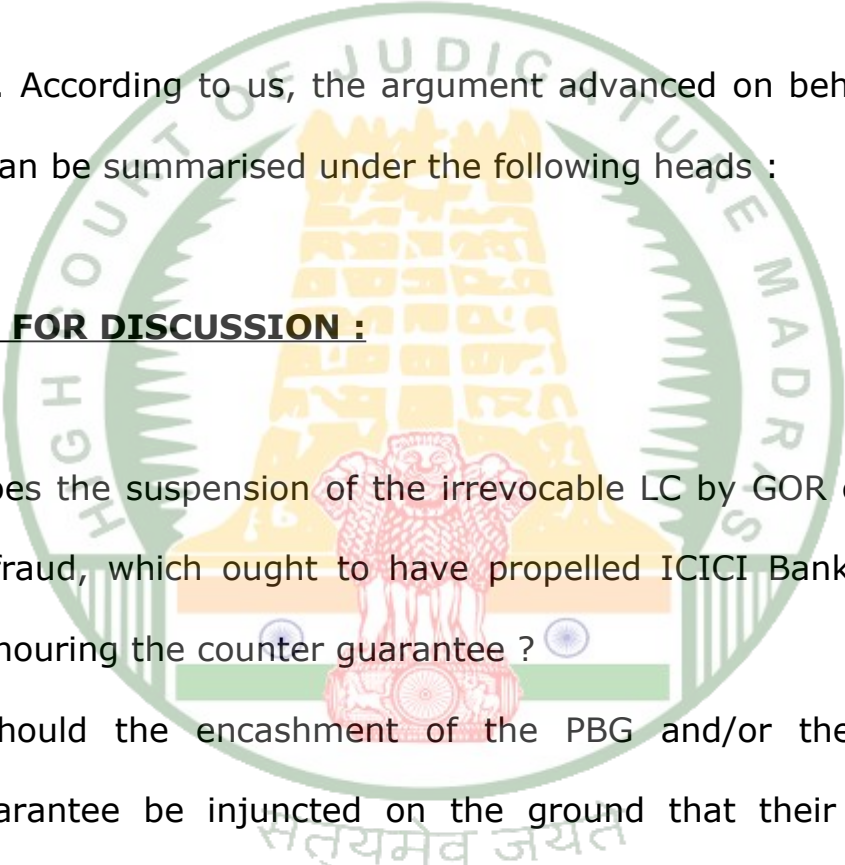
- of India Ltd. and others, (2015) 14 SCC 375.
- (xvii).Dwarikesh Sugar Industries Ltd. V. Prem Heavy Engineering Works (P) Ltd. and another, (1997) 6 SCC 450.
- (xviii).Svenska Handelsbanken V. M/s.Indian Charge Chrome and others, (1994) 1 SCC 502.
- (xix).Cambridge Solutions Ltd. V. Global Software Limited and others, (2016) 7 MLJ 641.
- (xx).Helm Dungemittel GMBH V. The State Trading Corporations of India Ltd., (2011) 182 DLT 415.
- (xxi).Vinitec Electronics Private Limited V. HCL Infosystems Limited, (2008) 1 SCC 544.
- (xxii).United Commercial Bank V. Bank of India and Others, (1981) 2 SCC 544.
- (xxiii).South East Asia Shipping Co. V. Nav Bharat Enterprises Pvt. Ltd. & others, (1996) 3 SCC 443.
- (xxiv).Hellenic Electricity Distribution Network Operator V. Bharath Heavy Electricals Limited and Others, 2016 SCC Online Delhi 2485.
- (xxv).Hargovind Das Shah V. Deputy Commissioner of Police, (2009) 7 SCC 186.
- (xxvi).Dalip Singh V. State of Uttra Pradesh and others, (2010) 2 SCC 114.
- (xxvii).Wheels India V. Nirmal Singh, 2010 SCC Online Del 2852.
- (xxviii).K.D.Sharma V. SAIL, (2008) 12 SCC 481.
- (xxix).Indus Mobile Distribution Private Limited V. Datawind Innovations Provate Limited and others, (2017) SCC 678.

REASONS:

16. We have heard the learned counsels for parties and perused the record.

17. According to us, the argument advanced on behalf of the parties can be summarised under the following heads :

POINTS FOR DISCUSSION :

- 
- (I). Does the suspension of the irrevocable LC by GOR constitute a fraud, which ought to have propelled ICICI Bank into not honouring the counter guarantee ?
- (II). Should the encashment of the PBG and/or the counter guarantee be enjoined on the ground that their payment would result in an irretrievable injury being suffered by BGR, having regard to the situation obtaining in Iraq ?
- (III). Does this Court have jurisdiction to entertain and try the instant suit, when, concededly, the cause of action for filing the suit was based on one singular fact, which is, that the counter guarantee was issued in Chennai ?

(IV).Does the presence of the arbitration clause in the contract obtaining between BGR and GOR have any impact on the instant suit ?

(V).Would BGR's failure to file documents, in the very first instance, which contained clauses pertaining to jurisdiction, arbitration and force majeure amount to suppression of material facts and documents ?

18. Before we proceed further in respect of point No.(I) and (II), we may only reiterate the well-settled principle, which is, that in matters pertaining to grant of injunction on the invocation of a Bank Guarantee (BG), which is, ordinarily, construed as a contract separate and independent of the main contract, the Courts are, understandably, slow to oblige. The reason being injunctions, if granted, outside the sphere of known exceptions have the deleterious effect of impeding trade and commerce. Injunctions, therefore, are granted only in the following three (3) situations :

(i) First, if it is a case of egregious fraud known to the bank.

(ii) Second, when, the payment made under the BG could cause, irretrievable injury, or irretrievable harm or, injustice to one of the concerned parties.

(iii) Third, the invocation of the BG is not in accordance with the terms set forth therein.

18.1. These are only three (3) exceptions to the general rule evolved by the Courts over a period of time that BG's, when, invoked should be honoured as it otherwise, erodes the confidence of men of commerce in the banking system.

18.2. One of the first cases, which lays down this principle in no uncertain terms, is the judgement of the Supreme Court rendered in **U.P. Co-operative Federation Limited V. Singh Consultants and Engineers (P) Limited, 1988 (1) SCC 174.**

18.3. Though, a plethora of judgements on the issue have been cited by both sides, we do not wish to burden the judgement with other citations, as the principle over several decades has remained unshaken.

18.4. We may only note that so strong is the principle that when, injunction orders were passed by Courts contrary to known exceptions, the Supreme Court in **Dwarikesh Sugar Industries**

Limited V. Prem Heavy Engineering Works (P) Limited, 1997

(6) SCC 450, observed that it amounted to judicial impropriety to ignore the settled decisions, and then, proceed to pass judicial orders counter to the settled position. For the sake of convenience, the observations made by the Supreme Court, in this behalf, are set out hereafter :

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

18.5. That being said, it is equally clear, if, cases brought by aggrieved parties fall in the three (3) exceptions set forth above, then, injunction should follow, as prayed by such a party.

19. Thus, keeping in mind the aforesaid principle, what we need to decipher in this case, is that, does it fall in the exceptions set out above.

19.1. In this regard, we will first deal with the submission of Mr.Parasaran, as to whether this is case of egregious fraud.

19.2. Mr.Parasaran has submitted that suspension and/or withdrawal of the irrevocable LC opened by GOR in its favour amounted to fraud. This argument is based on the rationale that BGR's only security against wrongful invocation of the counter guarantee and/or PBG was the irrevocable LC. For this purpose, Mr.Parasaran, placed reliance on Clause 6 of the PBG, Article 2.2. of the Contract and Particular Conditions (PC) 13 of the contract, which supplement the General Conditions (GC) appended to the main contract. For the sake of convenience, the said provisions are extracted hereafter :

".... 6. *This Performance bond is not subject to any conditions other than those conditions stated above.*

This Performance Bond shall enter into

force and be valid upon (I) signature of the contract by the customer and the Ministry of Electricity, Baghdad, Iraq; and (II) Issuing of the irrevocable Letter of Credit as per contract between the customer and the Ministry of Electricity, Baghdad, Iraq.

2.2. Terms of Payment (Reference GC Clause 12)

The terms and procedures of payment according to which the Employer will reimburse the Contractor are set forth in Appendix 1 (Terms and Procedures of Payment) attached hereto.

The Employer shall instruct its bank to issue an irrevocable documentary letter of credit made available to the Contractor through the Trade Bank of Iraq with amount of (50%) Fifty Percent of total Contract Price and will be increased to full amount of contract price

(within the second quarter of the year 2014)

The credit shall be subject to the Uniform Customs and Practice for Documentary Credits (2007) Revision ICC Publication No.600. The Contractor shall be responsible for all bank fees and charges outside Iraq.

PC 13. Securities

- PC 13.3.1. The amount of performance security (in the form of a bank guaranty) as a percentage of the Contract Price for the Facility or for the part of the Facility for which a separate Time for Completion is provided, shall be : five percent (5%) of the total Contract Price, which amount shall be maintained until the end of the Defects Liability Period.
- PC 13.3.2. The performance security shall be in the form of the bank guaranty attached hereto in Section IX, Contract Forms.

19.3. Besides the aforesaid, one, may also, at this stage itself, quote, in entirety, the provisions of the counter guarantee, which are at the heart of the dispute obtaining between BGR and ICICI Bank :

"..... 1. In consideration of your issuing at our request the above mentioned guarantee as per your available standard text format acceptable to beneficiary, we ICICI Bank Limited, 110, Prakash Presidium, Nungambakkam High Road, Chennai-600 034, having registered office at Landmark, Race Course Circle, Vadodara 390 007 hereby give you our irrevocable counterguarantee and undertake to pay you any amount up to USD 12,300,000.00 (US Dollars Twelve Million Three Hundred Thousand only), upon our receipt of your first written demand by authenticated swift message addressed to 'ICICINBBCTS' to the Attn. of Bank Guarantee Dept. Confirming having been

called by beneficiary to pay upon your guarantee.

*2. By order of : (Principal/Applicant's name) :
BGR Energy Systems Limited.*

*3. In favour of : (Beneficiary's name) :
Ministry of Electricity, Baghdad, Iraq.*

4. Guarantee's subject : Performance Bond.

5. Your Guarantee's validity : 30.APR.2015.

*6. Our counterguarantee
No.0009BG00061914 shall remain valid until
15.MAY.2015 after which it will become
automatically null and void.*

*7. Your Commissions and Charges are on our
account.*

**8. Should you have been called upon to
extend the expiry date of your guarantee, we
hereby irrevocably undertake to promptly
either extend this counterguarantee to the
new expiry date under the same terms and
conditions, or pay you the full amount
available under this counter-guarantee if we
elect not to extend this counterguarantee to
the new expiry date beyond the expiry date
of your guarantee plus 15 days.**

**9. We hereby undertake to pay you, any
claim not exceeding the above mentioned
guaranteed amount, to indemnify you against
any damages that you may sustain, provided
that your written demand by authenticated**

swift message reaches us on or before this counterguarantee expiry date, otherwise, this counterguarantee shall be treated as null and void.

10. This counterguarantee is construed and understood to be a continuing commitment of our bank toward your bank, and shall not be affected, impaired, expired or waived during its validity by any court order, any attachment or injunction limitation or time barring laws or by any change in the legal status constitution bankruptcy insolvency winding up or liquidation of the principal of our counterguarantee and the beneficiary of your guarantee.

11. We undertake to pay you on your first written demand sent to us by authenticated swift message any amount you may be enforced to settle by reason of the application of the Iraqi laws and jurisdiction on your guarantee so issued, and we also renounce to any right to plea and/or demur any of the consequences resulting therefrom.

12. Your guarantee so issued, being solely in favour of said beneficiary, is not assignable or transferable to any other beneficiary or third party.

Likewise it is not transferable by the principal to any other beneficiary or third party whomsoever is not permissible, as same being personal to all parties concerned.

13. Our counterguarantee is subject to the Iraqi laws.

14. Please deliver your guarantee original instrument to :

1. Mr.Kamil Shawaili, ID No.00357483, or
2. Mr.Salah Saeed, ID No.00894176, Passport No.G 1516761.

Please provide us with a copy of your guarantee immediately upon its issuance.”

(emphasis is ours)

19.4. A perusal of the aforesaid provisions would show that BGR was required to furnish a performance security as a percentage of the contract price. The percentage fixed was 5% of the total contract value. The Performance Security was required to be kept alive till the end of the defect liability period, and furthermore, the same was to be given in the format provided for the said purpose.

19.5. The facts, as set out above by us, in respect of which there is no dispute, that BGR in order to furnish a PBG under the

contract to GOR approached BOB. BOB, in turn, called upon ICICI Bank to furnish a counter guarantee. The counter guarantee, on the other hand, was secured with BGR depositing 110% margin money.

19.6. Mr.Parasaran, based on clause 6 of the PBG, to which we have made a reference above, says that the continued operability of the irrevocable LC was a *sine qua non* for BGR to keep the counter guarantee alive. The argument advanced by Mr.Parasaran is, that since, the LC was suspended and/or withdrawn by GOR, a fraud was played upon BGR by GOR, qua which ICICI Bank had knowledge, and therefore, it ought not to pay moneys under the counter guarantee to BOB. In support of this submission, M.Parasaran, has also placed reliance on a letter dated 08.01.2014, addressed by ICICI Bank to the Reserve Bank of India (RBI). Based on this letter, it was contended by Mr.Parasaran that ICICI Bank itself had taken a stand before the RBI that the PBG would become operational only on the contract being signed between BGR and GOR and, on issuance of an irrevocable LC by GOR in favour of BGR. The letter, according to Mr.Parasaran, went on to further state that, since, as on that date, the irrevocable LC had not been issued, the Counter Guarantee issued by ICICI Bank

was not effective.

19.7. According to us, the argument advanced by Mr.Parasaran is flawed for several reasons :

(i) Clause 6 of the PBG, clearly, indicates that it was not subject to any conditions other than those conditions stated above, which means conditions 1 to 5 of the PBG. A perusal of conditions 1 to 5 of the PBG would show that it is an unconditional PBG, which BOB is required to honour on a demand being made regardless of any contestation between the parties concerned. The clause, on which Mr.Parasaran places reliance, as would be noticed from the extract above, follows thereafter. The clause simply states that PBG will come to force and would attain validity upon two (2) conditions being fulfilled : (a) when the contract is signed between BGR and GOR; and (b) when an irrevocable LC is issued by GOR in favour of BGR. Clearly, these two (2) conditions do nothing more than trigger the enforcement of PBG and do not, to our minds, have anything to do with the obligations undertaken by ICICI Bank under the counter guarantee. Furthermore, the continued validity of the PBG itself is not, in our opinion, dependent on, whether or not to the irrevocable LC is suspended or withdrawn; it is, as indicated

above, only a trigger for making the PBG operational.

(ii) Second, there is no condition in the counter guarantee, which, make its invocation dependent on continued validity, or, existence of the irrevocable LC. The counter guarantee is unconditional and payable on receipt of a first written demand from the beneficiary, via an authenticated swift messenger, directed to the given address of ICICI Bank.

19.8. Therefore, the submission that an egregious fraud has been committed by GOR in suspending and/or withdrawing the LC, and that, therefore, ICICI Bank should be enjoined from paying BOB under the counter guarantee is, according to us, an argument, which is, completely, untenable.

20. This aspect of the matter also becomes clear, if, one were to read carefully the letter dated 08.01.2014, addressed by ICICI Bank to RBI. Since, the letter is brief, and therefore, for the sake of convenience, the relevant parts are extracted hereafter :

“..... Considering the following, we had issued the Bank Guarantee prior to working group clearance of the project exports :

1. Submission of PBG is a condition precedent for signing of the contract.

2. Bank Guarantee contains a clause stating that the same shall be operational only on signing of the contract and issuance of irrevocable letter of credit favouring our constituent.

3. The guarantee issued by us is backed by 100% cash margin.

As on date, irrevocable letter of credit has not been issued and hence, the guarantee issued by us is not effective.

However, we note to comply for future transactions to obtain NOC from your good office before issuance of such guarantees.
....."

20.1. A careful reading of the extract would show that ICICI Bank, perhaps, had not obtained NOC from RBI, before issuance of the counter guarantee. It is in that context that ICICI Bank chose to explain to RBI that for PBG to become operational, twin conditions provided therein had to be fulfilled. The twin conditions referred to above were, accordingly, put forth by ICICI Bank to RBI. Based on this explanation ICICI Bank went on to state that because the irrevocable LC had not been issued, its counter guarantee was

not effective. The explanation, therefore, was that, since, the counter guarantee had been given to support the issuance of PBG by BOB to GOR, it would become effective only when PBG was triggered. The exposure of ICICI Bank would arise only if there was a live PBG in play. Clearly, BOB required security in the form of a counter guarantee to secure itself against a possible loss it may incur, if, when, PBG was invoked by GOR. The letter, did not, contrary to what has been submitted on behalf of BGR, imply in any way that ICICI Bank's obligation under the counter guarantee, once, triggered was dependent on the continued subsistence of the LC.

20.2. Furthermore, the record also shows that the Citi Bank, which had opened the LC in favour of BGR, albeit, at the say so of GOR had transmitted the following communication, pertaining to suspension of LC to ICICI Bank. This communication had been received, as it seems by Citi Bank from GOR.

".... Referring to your email dated 08/06/2014 **please be informed that applicant instructed us to hold any payment under the subject LC until beneficiary fulfill his obligations to**

complete the project and present the advance payment bank guarantee.....

(emphasis is ours)

20.3. A perusal of the aforesaid extract would show that GOR from its point of view had instructed Citi bank to hold payment under the subject LC, until BGR fulfilled its obligation to complete the project and present the Advanced Payment Bank Guarantee (APBG). Whether there was, indeed, a legal and factual basis for GOR to take such a step, and could, Citi Bank suspend the operation of an irrevocable LC, to our minds, can only be determined in an action, brought before an appropriate forum by BGR against GOR. Suffice it to say that *prima facie*, a dispute did obtain between GOR and BGR, in respect of the main contract.

20.4. Thus, for Mr.Parasaran to make an argument that the payment under the counter guarantee was dependent on the continued subsistence and/or existence of the LC, in our opinion, is an untenable submission, and hence is, accordingly, rejected.

Point No.(II) :

21. This brings us to the other issue as to whether this is a case, which falls under the category of irretrievable injury and/or irretrievable harm or injustice.

21.1. The argument with regard to irretrievable injury is advanced by BGR in the background of the situation obtaining in Iraq. To establish this submission, the following broad averments have been made by BGR in its plaint :

(i) First, that it had sought insurance cover from the ECGC qua the subject project, which also required BGR to furnish an ABPG. The Ministry of External Affairs, Government of India (MEA), had, on 17.11.2014, given its no objection to ECGC to proceed with the issuance of a comprehensive insurance cover to BGR so as to enable it to furnish an ABPG, and to arrange working capital funds from the scheduled banks.

(ii) Second, ECGC, on 24.11.2014, informed BGR that they had referred the matter, once again, to MEA, Government of India, and that, they intended not to issue a comprehensive insurance cover till such time, political situation in Iraq improved.

(iii) Third, the aforesaid facts would show that the force majeure provision had got triggered ; because of which, BGR, stopped work on the project, and had to, thereafter, take measures to bring its workers back to India.

(iv) Fourth, the employees of BGR are not now in a position to travel to Iraq, to undertake any work under the subject project.

(v) Fifth, that Clause 38 of the GC, which related to war risks, permitted either party to terminate the contract by giving notice to the other, provided the execution of the work on the facilities became impossible, or, is substantially prevented for a single period of more than sixty (60) days, or, an aggregate period of more than one hundred and twenty (120) days, on account of any war risks, and parties failing to develop a mutually satisfactory solution.

21.2. The record shows that "force majeure" forms part of PC of the contract, and accordingly, a provision is incorporated in that behalf under PC 37. The definition of "force majeure" clause is contained in PC 37.1. ; the relevant part of which, reads as follows :

"PC 37. Force Majeure

PC 37.1 Definition. "Force Majeure"
shall be limited to the following events :

(a) Acts of war or the public enemy, whether war be declared or not ;

(b) Public disorders, insurrections, rebellions, sabotage, riots or violent demonstrations ;

(c) Explosions, fires, earthquakes, Unusually Severe Weather or other natural calamities and acts of God ;

(d) XXXXX

(e) XXXXX

Provided, that Force Majeure shall not include any of the foregoing to the extent that :

(A) XXXXX

(B) XXXXX

(C) XXXXX

(D) XXXXX

(E) XXXXX

(F) XXXXX

(G) XXXXX

Provided further that the current situation in Iraq shall not be considered as Force Majeure".

(emphasis is ours)

21.3. The contract, in the instant case, was entered into between BGR and GOR on 13.10.2013. There was strife in Iraq even at that point in time. The project in issue was being executed in place known as "Nasiriyah". It is, perhaps, in this background that PC 37.1. provided that the "current situation" in Iraq would not be considered as a force majeure situation.

21.4. The concept of "force majeure" under Indian law is encapsulated in Section 56 of the Indian Contract Act, 1872. It, in sum, deals with the "doctrine of frustration". In other words, what a Court is required to ascertain is : whether or not, after the contract was executed between the parties, its performance became impossible, and therefore, the obligation undertaken stood discharged on account of changed circumstances. In coming to a conclusion one way or the other, the Court has to take into account the nature of the contract and the surrounding circumstances, in which, it was made, bearing in mind that parties would have entered into bargain based on a premise that a particular state of affairs would continue to subsist. The crucial aspect of this exercise, is that, the altered conditions are such that had they been factored in, would the parties have still entered into a contract. In

the instant case, parties had entered into the subject contract knowing fully well that there was strife in Iraq. It was not a circumstance which occurred after the contract was executed between BGR and GOR.

21.5. The argument advanced by Mr.Parasaran that the scale of the strife had increased with the introduction of ISIS, to our minds, cannot lead to the invocation of "doctrine of frustration" and thus, in a sense, relieve BGR from its obligations under the contract. The reason for this, is that, impossibility of performance, which stems from alteration of circumstances should be such that parties could not have contemplated the change at the time of execution of the contract. The observations made by the Supreme Court in this behalf in its judgement rendered in **Naihati Jute Mills V. Khyaliram, AIR 1968 SC 522**, being apposite, are extracted hereafter :

"..... 5. Section 56 of the Contract Act inter alia provides that a contract to do an act which, after the contract is made becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act

becomes impossible or unlawful. It also provides that where one person has promised to do something which he knew, or, with reasonable diligence might have known, and which the promisee did not know to be impossible or unlawful, such a promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance. **As envisaged by Section 56, impossibility of performance would be inferred by the courts from the nature of the contract and the surrounding circumstances in which it was made that the parties must have made their bargain upon the basis that a particular thing or state of things would continue to exist and because of the altered circumstances the bargain should no longer be held binding. The courts would also infer that the foundation of the contract had disappeared either by the destruction of the subject-matter or by reason of such long interruption or delay that the performance would really in effect be that of a different contract for which the parties had not agreed. Impossibility of performance may also arise where without any default of either party the contractual obligation had become incapable of being performed because the circumstances in which performance was**

called for was radically different from that undertaken by the contract. But the common law rule of contract is that a man is bound to perform the obligation which he has undertaken and cannot claim to be excused by the mere fact that performance has subsequently become impossible. Courts in England have, however, evolved from time to time various theories to soften the harshness of the aforesaid rule and for that purpose have tried to formulate the true basis of the doctrine of discharge of contract when its performance is made impossible by intervening causes over which the parties had no control. One of such theories is what has been called the theory of implied term as illustrated in *F.A. Tamplin Steamship Co. Ltd. v. Anglo Mexican Petroleum Products Co. Ltd.*, [(1916) 2 AC 397] where Lord Loreburn stated:

"A court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or a state of things would continue to exist. And if they must have done so, then a term to that effect would be implied; though it be not expressed in the contract."

He further observed:

"It is in my opinion the true principle, for no court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which was not expressed was a foundation on which the parties contracted ... Were the altered conditions such that, had they thought of them, they would have taken their chance of them, or such that as sensible men they would have said, "if that happens, of course, it is all over between us'."

The same theory in a slightly different form was expressed by Lord Watson in *Dahl v. Nelson, Donkin & Co.* [(1881) 6 AC 38] in the following words:

"The meaning of the contract must be taken to be, not what the parties did intend (for they had neither thought nor intention regarding it), but that which the parties, as fair and sensible men, would presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence."

(emphasis is ours)

21.6. Furthermore, as correctly pointed out on behalf of ICICI Bank, BGR had communicated to Government of Iraq, vide letters dated 23.09.2015 and 07.10.2015, that it was negotiating with a Chinese company, namely, Shanghai Electric Group Company Limited, to enable the execution of the work at Nasiriyah. As a matter of fact, even prior to issuance of the aforesaid letters, there were, perhaps, talks on between BGR and GOR for bringing about a novation in the contract. This aspect is clearly discernable from the letter dated 21.06.2015, issued by GOR to BGR.

21.7. As far as ICICI Bank is concerned, it appears that it has been taking steps to protect its interest by taking recourse to remedies available under the Iraqi laws. Because, ICICI Bank could not pay BOB against the counter guarantee, despite it being invoked on 01.03.2016, proceedings were initiated against it by BOB in the court of first instance at Baghdad, in and about, August 2016.

21.8. It appears that ICICI Bank was not able to lodge a vakalatnama in time, because formalities at the Indian Embassy could not be fulfilled in time.

21.9. Consequently, it was proceed against as a defendant in default, and thus, directed to pay a sum of Rs.12.36 Million, with interest at the rate of 9% per annum, commencing from 22.05.2016, till the date of payment. This decision, we are told, was rendered on 30.10.2016. Suffice it to say, ICICI Bank challenged the default judgement rendered on 30.10.2016. However, the default judgement dated 30.10.2016 (which is referred to as Decision No.640/Objection/2016), was confirmed against ICICI Bank on 13.09.2017, after the matter was heard on merits. It appears that the concerned Court in Iraq, *inter alia*, has held that the dispute is subject to Iraqi laws and that, fora's in Iraq have jurisdiction over it.

22. Against this decision, ICICI Bank, it appears preferred an appeal on 26.09.2017. We are told that the Court of Appeal in Baghdad has heard arguments in the matter and had indicated 28.11.2017, as the date for pronouncement of its decision. We are further informed that the decision, if any, rendered by the Court of Appeal has not been communicated to the parties, which includes ICICI Bank.

22.1. The aforesaid circumstances, according to us, more than anything else show that there is access available to legal fora in Iraq, contrary to what has been portrayed before us by BGR. Therefore, the submission advanced on behalf of BGR that conditions in Iraq were such that BGR's employees could not visit Iraq, and thus, ensure that the project was executed, *prima facie*, does not appear to be correct.

22.2. Furthermore, in response to the letter dated 21.06.2015, BGR, in its letter dated 23.06.2015, *inter alia*, indicated to GOR that in order to bring about novation, its personnel were willing to travel to Iraq. Therefore, what emerges from this correspondence is that, the situation, where the project is located, i.e., Nasiriyah, had not reached a point, from which, the project could not be taken forward. The fact that a Chinese company could step into BGR's shoes to take the project forward shows that the execution of the project had not reached a point of frustration, as was sought to be projected before us by Mr.Parasaran.

22.3. This apart, what has to be borne in mind in arriving at a conclusion either way, an aspect which we had also put to Mr.Parasaran is, as to why BGR had not taken any steps towards securing its interest, if its contention was that payment under the counter guarantee by ICICI Bank and/or qua the PBG by BOB to GOR, would cause irretrievable injury. We received no satisfactory answer to this question, instead what we have is a suit for injunction being instituted to restrain payment under an unconditional counter guarantee. BGR, admittedly, has taken no steps qua Citi Bank which according to it had collaborated with GOR in suspending and/or withdrawing unilaterally an unconditional LC.

22.4. To our minds, therefore this submission of Mr.Parasaran is flawed, as in order to obtain an injunction against invocation of an unconditional BG, the party concerned should be able to show that if money is paid by the concerned Bank, there is no way it could retrieve the money or, in other words, repair, the damage caused to it.

22.5. It is BGR's own stand that under the contract executed with GOR, the provision for security in the form of an irrevocable LC

was provided, precisely, for the reasons that if, its interest were harmed, on account of violation of the terms of the contract, which would include, to our minds, the purported unlawful invocation of the BG, it would be able to protect itself against such harm and/or injury by calling upon the bank, which had furnished the irrevocable LC to pay the equivalent money value to it. However, the withdrawal of LC, which may or may not be legal, as that part of the matter is not before us, cannot be the reason to prevent ICICI Bank from honouring what was, an unconditional counter guarantee. As alluded hereinabove, the condition pertaining to opening of LC does not find mention in the counter guarantee. The said condition obtains only in the PBG, and as indicated hitherto, the factum of opening of the LC, apart from the execution of the contract, was only a trigger for infusing life into the PBG and not to ensure its continued operability.

22.1. Therefore, the refusal by ECGC, to grant insurance cover for the project at Iraq, in our view, has no bearing on this aspect of the matter. The ECGC's refusal to enter into a contract with BGR, to grant insurance cover cannot lead us to conclude that irretrievable injury, or, injustice would be caused to BGR, if

payment is made by ICICI Bank under the counter guarantee to BOB. ECGC's refusal to give insurance cover could well be pivoted on commercials which may have nothing to do with the then prevailing situation in Iraq.

Point No.III :

23. On the aspect of jurisdiction, BGR avers that it has obtained leave to sue, by taking recourse to appropriate proceedings. It is argued that ICICI Bank, to date, has not approached the Court for recall of the order, despite, its objection to the jurisdiction of this Court in entertaining the suit.

23.1. On the other hand, Mr.A.L.Somayaji, has argued that the only ground, on which leave to sue was sought was that the counter guarantee had been issued in Chennai. The fact that as per the counter guarantee, the jurisdiction was vested in an appropriate forum in Iraq, or the fact that the counter guarantee was subject to Iraqi laws was not disclosed in the plaint filed by BGR.

23.2. To that extent Mr.A.L.Somayaji, is right, in his contentions, which is that, the plaint does not disclose the fact that the counter guarantee was subject to Iraqi laws (See Clause 13 and 14 of the said guarantee) and that, jurisdiction with respect to the settlement of disputes was also vested in an appropriate forum in Iraq.

23.3. To counter this, Mr.Parasaran, says that jurisdiction qua the instant action, in the very least, obtained both in Iraq and in Chennai, in India, and since, Iraq was not agreed upon by parties as a place of exclusive jurisdiction, the suit could have been instituted in this Court as well.

23.4. The record in the instant matter shows that apart from the factum of issuance of counter guarantee, no other part of the cause of action has accrued in Chennai. As correctly argued on behalf of ICICI Bank, the Supreme Court in **South East Asia Shipping Company Limited V. Nav Bharat Enterprises Private Limited and others, 1996 (3) SCC 443**, has categorically held that if all other ingredients which form part of the cause of action, which includes, the place, where the contract is executed and the

place where it is required to be performed fall outside the jurisdiction of the Court, which entertains the suit, the suit cannot be sustained on the mere ground that the BG, which is issued, pursuant to the main contract is issued from a place, falling within the territorial jurisdiction of the Court in which the action is instituted. The relevant observations made by the Supreme Court in this behalf are set forth hereafter :

".... 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 a court of law. The cause of action means, therefore, every fact, which is traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgement 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.

4. We, therefore, hold that the learned Single Judge was right in his conclusion that no part of the cause of action had arisen within the jurisdiction on the original side of the High Court of Delhi and direct to return the plaint for presentation to the proper Court."

23.5. Mr.Parasaran, however, has relied upon, in response to this objection, on the following judgements : (i) A Division Bench judgement of the Delhi High Court rendered in : **Bhandari Engineers and Builders Private Limited V. Vijaya Bank and others, 168 (2010) DLT 47** ; and (ii) a judgement of the learned

Single Judge of this Court rendered in : **Premium Industries V. Quality Fabricators, 1998 (2) CTC 492.**

23.6. Pertinently, in **Bhandari Engineers**, the Court does not notice the decision rendered by the Supreme Court in **South East Asia Shipping Company Limited V. Nav Bharat Enterprises Private Limited and others, 1996 (3) SCC 443.** Apart from this, a perusal of paragraph 3 of the judgement rendered in : **Bhandari Engineers and Builders Private Limited** would show that the Division Bench, after noticing that the learned Single Judge had denied relief to the plaintiff on the ground that there were serious misrepresentations, and that, the Courts in India do not possess territorial jurisdiction to adjudicate upon the suit, observed that, since, the suit was dismissed, it would desist from making any observation with regard to the conclusion reached by the learned Single Judge in so far as the absence of territorial jurisdiction was concerned. However, the Court, in its discussion, in paragraph 6 onwards, did advert to the aspect of the territorial jurisdiction, but based on the clause obtaining in the contract came to the conclusion that there was no exclusion of jurisdiction of Courts in India. In paragraph 7 of the very same judgement, the Division

Bench also adverts to the fact that, since, the Bank Guarantee was issued in New Delhi, a part of the cause of action arose in New Delhi. However, while making this observation, the Division Bench also noticed that the counsel for the respondents, who was opposing the appeal, did not support the judgement of the learned Single Judge on this aspect. Therefore, according to us, the Division Bench apart from not noticing the judgement of the Supreme Court in **South East Asia Shipping Company Limited**, has not given its view in the matter of jurisdiction, which could be treated as a dicta, applicable to the facts obtaining in the instant case.

23.7. In so far as the judgement in **Premium Industries V. Quality Fabricators, 1998 (2) CTC 492** is concerned, it distinguished the judgement of the Supreme Court in **South East Asia Shipping Company Limited**, by applying other judgements of the Supreme Court, namely, **A.B.C. Laminari Private Limited V. A.P. Agencies, AIR 1989 SC 1239** and **R.S.D.V. Finance Co. Pvt. Ltd. V. Shree Vallabh Glass Works Ltd., AIR 1993 SC 2094**, which, inter alia ruled that the ouster clause in a contract had to, clearly, unambiguously and specifically exclude the

jurisdiction of all other Courts. It would be relevant to note that the Supreme Court in these very cases went on to say that in construing whether or not jurisdiction of other Courts is excluded, if, words such as "alone", "only" and "exclusive" are used, then, the Courts would have no difficulty in coming to the conclusion that jurisdiction of other Courts apart from the one specified stands, excluded. The learned Single Judge, thus, based on the aforesaid judgements construed the clause obtaining in that case, as not ousting the jurisdiction of the City Civil Court in Madras.

23.8. According to us, with respect, the basis, on which the learned Single Judge in **Premium Industries** distinguished the judgement of the Supreme Court **South East Asia Shipping Limited** was not, wholly satisfactory. Notwithstanding this aspect, the judgements in **A.B.C. Laminart Private Limited** and **R.S.D.V. Finance Co. Pvt. Ltd.** have to be read alongside the observations made by the Supreme Court in **Swastik Gases Private Limited Vs. Indian Oil Corporation Limited, (2013) 9 SCC 32**, where, it is, clearly, observed that the absence of the words such as "alone", "only", or "exclusive" or even "exclusive jurisdiction" are not decisive in determining whether the jurisdiction of other Courts,

other than, the Court, which is mentioned in the agreement will have jurisdiction to deal with the dispute.

23.9. In **Swastik Gases Private Limited**, the jurisdiction clause read as follows : "the agreement shall be subject to jurisdiction of the Courts at Kolkata".

24. The Court noted that the fact that there was nothing to the contrary stated in the said provision, which, even impliedly, excluded the jurisdiction of other Courts. The Court's emphasis was, on the intention of the parties being discerned from the provisions of the contract, and not otherwise. The absence of the words such as "alone", "only", "exclusive" etcetera according to the Court would not make any material difference in coming to the conclusion either way.

25. Pertinently, the Supreme Court in **Swastik Gases Private Limited**, has not only noticed its earlier decision in **A.B.C. Laminart Private Limited**, but also referred to some of its other decisions, which includes **Angile Insulations V. Davy Ashmore India Ltd., 1995 (4) SCC 153.**

26. In the instant case, the counter guarantee even, according to BGR, provides for applicability of Iraqi laws and jurisdiction of foras in Iraq. Both BOB and GOR, are located in Iraq and the contract in issue was also possibly executed in Iraq, as nothing has been stated to the contrary in the plaint. The fact that arbitration was provided at an neutral venue in Amman, Jordan, only goes to show that it was never the intention of the parties that if disputes arose with regard to the counter guarantee or the PBG, the matter could be adjudicated in the Courts in India. In this behalf, one may also notice the letter dated 05.10.2013, addressed by BGR to ICICI Bank, which, clearly, states that it was aware of the fact that the counter guarantee is governed by Iraqi laws. For the sake of convenience, the relevant part of the said letter is extracted hereafter :

"With reference to the captioned subject and in continuation of our earlier letter, we advise you that the counter guarantee is governed by Iraqi laws. In case, the opinion on the Iraqi laws proposed to be obtained by ICICI Bank is adverse, we undertake to substitute the Bank Guarantee."

(emphasis is ours)

27. Therefore, given the position of law, as it obtains today, there is a strong argument advanced on behalf of ICICI Bank that this Court, perhaps, has no jurisdiction to entertain the suit.

28. But the more important question, which has arisen in the course of litigation is that, when, leave to sue was taken by BGR, these aspects were not referred to in the plaint. As indicated by us, in our narration of facts above, the order passed by the Court granting leave to sue has not placed before the Court. We have, however, obtained the Court record. The court record shows that leave to sue was granted vide order dated 28.11.2014, by the learned Single Judge, *albeit*, *ex-parte*, based solely on the assertions made by BGR that the counter guarantee was issued by ICICI Bank, which was situate within the territorial jurisdiction of this Court. Be that as it may, it is not disputed before us, as it cannot be, that there are provisions in the counter guarantee with regard to the applicability of Iraq laws and/or jurisdiction.

28.1. In rebuttal to this stand taken by ICICI Bank, BGR says that ICICI Bank, could have moved applications for recall of the

order passed by this Court granting it leave to sue and therefore, it has, in a sense, acquiesced to the jurisdiction of this Court. In support of this submission, learned counsel has relied upon the judgement of the Division Bench of this Court rendered in **P.T.Ummer Koya V. Tamil Nadu Chess Association, 2005 (3) CTC 86**. Based on this judgement, it is submitted that if, a party is aggrieved by an order granting leave to sue it should immediately, approach the Court for recall of such an order. Having not done so, it cannot take up this objection, at this juncture.

28.2. In our view, the facts of that judgement are distinguishable from those obtaining in this case. As indicated hereinabove, after BGR had obtained an ex parte injunction on 02.12.2014, negotiations were on between whole of 2015 and early part of 2016, with regard to finding ways and means of resolving the disputes between BGR and GOR. Once negotiations failed on 01.03.2016, GOR terminated the contract and invoked, simultaneously, the PBG and the counter guarantee. It is because of these events, that ICICI Bank approached this Court only on 15.03.2016, with applications seeking vacation of the interim order. Therefore, according to us, the objection qua jurisdiction taken,

albeit, in an application for vacation of stay had been raised at the earliest, after negotiations had failed, as during the relevant period, i.e., 2015 and 2016, at the behest of BGR, and with the concurrence of BOB, the validity of the counter guarantee was extended. ICICI Bank at that point in time, as correctly argued did not feel the need to approach the Court, as, concededly, at that juncture the representatives of BGR and GOR were attempting to resolve their inter se disputes.

29. The question, therefore, is, will the decision of the Court on an application for leave to sue, which was deficient in material particulars, disentitle ICICI Bank from raising an objection with regard to jurisdiction. In our view, it cannot be so. The objection qua jurisdiction can be raised at any stage and, even in, collateral proceedings. The relevant observation of the Supreme Court in the judgement rendered in ***Kiran Singh and others Vs. Chaman Paswan and others AIR 1954 SC 340***, in this behalf, being pertinent are extracted hereafter :

"6..... It is a fundamental principle well established that a decree passed by a Court without jurisdiction is a nullity, and that its invalidity could be set up

whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties."

(emphasis is ours)

29.1. Therefore, we are of the view that there is a serious doubt created as to whether this Court will have jurisdiction to entertain and deal with the matter.

Point No.IV :

30. In so far as this aspect of the matter is concerned, in our view, BGR is right to the extent that the arbitration clause, if, at all could impact the contract executed between itself and GOR. However, having said so, the moot question is : had this aspect been disclosed in the plaint, which, it was not, would this Court have granted leave to sue?

30.1. Furthermore, would the Court have raised a red flag, so to speak, had it noticed the arbitration clause and, perhaps, relegated BGR to an appropriate remedy for seeking interim relief.

30.2. That being said, these are aspects, which, at the present juncture, are in the realm of speculation. But one thing is clear that BGR had no business in not disclosing this aspect of the matter to the Court. Neither was the contract document filed in full nor was this fact adverted to in the plaint. We may also state that, when, queried as to why this disclosure was not made, Mr.Parasaran, submitted that since, the arbitration agreement obtained only between BGR and GOR, the suit was the only remedy, as against ICICI Bank.

30.3. We may only note this may not, possibly, be the correct articulation of the law. Even in cases involving domestic arbitration between parties, where, in the main agreement, an arbitration clause stands incorporated, recourse is taken to section 9 of the Arbitration and Conciliation Act, 1996, to injunct the beneficiary from invoking and/or encashing a BG with concerned bank as the other respondent.

30.4. Therefore, more than anything else, in our opinion, BGR's failure in not disclosing the existence of an arbitration clause does show that it was economical with truth and short on candour, which are essential features of any action and, more particularly, when, a party approaches the Court for an equitable relief.

Point No.V :

31. As regards failure to produce documents pertaining to jurisdiction, arbitration and force majeure clause is concerned, our observation is the same as what is made above, qua jurisdiction and arbitration clause. However, in so far as the force majeure clause is concerned, as noticed above, it contained a proviso, which was undoubtedly material, and ought to have been brought to the notice of the Court, when, leave to sue was obtained.

31.1. The proviso to PC 37.1., as alluded to above by us, clearly, excluded from "force majeure" definition, the "current situation" obtaining in Iraq. Whether or not, this would have impacted the decision of the Judge in granting leave to sue is something which one could only guess at this stage. But, as

observed above, the fact that the contract document was not complete defeats the cause of BGR, which is to seek an equitable relief of injunction against ICICI Bank. The mere mention of clause 38.5. would not help, as what the Court needed to know was the contents of PC 37.1. as well. This information was kept back by BGR, including information pertaining to jurisdiction and arbitration clause.

32. The net result of our discussion above, is that, BGR, in our view, has failed to establish a *prima facie* case for grant of injunction. This case, according to us, is not a case, which would fall in either of the two exceptions out of three (3), on which, reliance was placed by BGR, that is, egregious fraud, or irretrievable injury. We may only add that the case of BGR would not fall even within the ambit of third exception ; an aspect we have elaborated upon in the later part of our judgement, which is, that the counter guarantee was conditional, as according to us, a plain reading of the counter guarantee would show that it is an unconditional guarantee, which ICICI Bank is required to honour on receipt of first written demand.

32.1. Furthermore, there being a serious doubt as to whether or not this Court would have jurisdiction, only fortifies this view. The fact that BGR did not file a complete set of documents, which, according to us, was material, at least, at the stage, when, leave to sue, was obtained, would disentitle BGR from obtaining interim relief of injunction.

32.2. It is trite to say, when, a party seeks equitable relief, it should display candour while approaching the Court. In this behalf, we may advert to the following apposite observations made by the Supreme Court in the judgement rendered in : **Amar Singh V. Union of India, (2011) 7 SCC 69** :

"..... 53. **Courts have, over the centuries, frowned upon litigants who, with intent to deceive and mislead the courts, initiated proceedings without full disclosure of facts. Courts held that such litigants have come with "unclean hands" and are not entitled to be heard on the merits of their case.**

54. In *Dalglish v. Jarvie* [(1850) 2 Mac & G 231 : 42 ER 89] the Court, speaking through Lord Langdale and Rolfe B., laid down: (Mac & G p. 231: ER p. 89)

"It is the duty of a party asking for an injunction to bring under the notice of the Court all facts material to the determination of his right to that injunction; and it is no excuse for him to say that he was not aware of the importance of any facts which he has omitted to bring forward."

55. In *Castelli v. Cook* [(1849) 7 Hare 89 : 68 ER 36] Vice-Chancellor Wigram, formulated the same principles as follows: (Hare p. 94: ER p. 38)

"... a plaintiff applying ex parte comes (as it has been expressed) under a contract with the Court that he will state the whole case fully and fairly to the Court. If he fails to do that, and the Court finds, when the other party applies to dissolve the injunction, that any material fact has been suppressed or not properly brought forward, the plaintiff is told that the Court will not decide on the merits, and that, as he has broken faith with the Court, the injunction must go."

56. In *Republic of Peru v. Dreyfus Bros. & Co.* [38 Ch D 348 : 55 LT 802] Kay, J. reminded

us of the same position by holding: (LT p. 803)

"...If there is an important misstatement, speaking for myself, I have never hesitated, and never shall hesitate until the rule is altered, to discharge the order at once, so as to impress upon all persons who are suitors in this Court the importance of dealing in good faith with the Court when ex parte applications are made."

57. In one of the most celebrated cases upholding this principle, in the Court of Appeal in *R.V.Kensington Income Tax Commr., ex p Princess de Polignac* [(1917) 1 K.B. 486 (CA)] K.B. Scrutton, L.J. formulated as under: (KB p. 514)

"... and it has been for many years the rule of the court, and one which it is of the greatest importance to maintain, that when an applicant comes to the court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts—facts, not law. He must not misstate the law if he can help it—the court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the court enforces

that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside any action which it has taken on the faith of the imperfect statement."

58. ***It is one of the fundamental principles of jurisprudence that litigants must observe total clarity and candour in their pleadings and especially when it contains a prayer for injunction. A prayer for injunction, which is an equitable remedy, must be governed by the principles of "uberrima fides"***

(emphasis is ours)

32.3. The argument of Mr.Parasaran, in this behalf, that ICICI Bank had a complete set of papers, and therefore, inadvertent failure to supply complete set of documents did not impact its interest is untenable. The reason being the party which seeks equitable relief should make a complete disclosure and not depend upon what the defendant chooses to do, as more often than not ex parte interlocutory reliefs are sought when the opposite side is not present in Court to assist, which is, exactly, what happened in this case. Besides in this case, ICICI Bank not being a party to the

contract obtaining between BGR and GOR suffered the handicap of, perhaps, being unfamiliar with the nuances of each clause obtaining in the main contract. For instance, the exception provided in the force majeure clause may not have come to the notice of ICICI Bank, immediately, and therefore it did not act with sufficient alacrity. But, would that condone the infraction committed by BGR. In our view, the answer has to be in the negative. A party seeking relief in equity - should on its own, show candour in disclosing every aspect of the matter, without relying upon the information, which may or may not be in possession of the defendant.

32.4. We may also note that ICICI Bank, in this behalf, did furnish an explanation, which is that, since, the documents were voluminous, it did not notice this aspect of the matter, to begin with, as they assumed that BGR would have placed on record, the entire contract and not exclude portions, which did not further its interest.

32.5. We must indicate herein that on the aspect of materiality, on behalf of BGR, reliance has been placed on the judgement of the Supreme Court rendered in the case of :

S.J.S.Business Enterprises (P) Ltd. V. State of Bihar and Others, (2004) 7 SCC 166.

32.6. According to us, the judgement is, completely, distinguishable on facts. In that case, the appellant before the Court was aggrieved by the fact that the learned Single Judge had dismissed its writ petition on the ground that a suit had been preferred by it for a similar relief. The Supreme Court noted the fact that at the relevant point in time, when, the writ petition came up for hearing, the suit had already been withdrawn, though, it was pending, when, the interim order was passed by the learned Single Judge of the High Court. It is, in this context, that the Supreme Court ruled that the failure to mention this aspect of the matter did not amount to material suppression. The rationale furnished by the Supreme Court was that, a suit was an alternative remedy, and that, merely because an alternative remedy existed, it did not bar the Writ Court from entertaining a petition under Article 226 of the Constitution.

32.7. Furthermore, it was noted that an alternative remedy in that case, though, taken recourse to, had not been pursued, and

therefore, was not a material fact, which could not have impacted the view that the Writ Court would have taken in the petition before it. In the instant case, the contrary is true. The leave to sue was obtained by suppressing documents and clauses obtaining in the contract, which, *inter alia*, adverted to jurisdiction, arbitration and force majeure conditions. Thus, as indicated above, the decision in **S.J.S.Business Enterprises** would not help the cause of the appellant.

32.8. We may indicate that during the course of arguments on behalf of BGR, no submission was made that the counter guarantee was conditional in nature. In the written submission, an argument has been advanced on this score. According to us, a mere perusal of the terms of the counter guarantee would show that it is an unconditional guarantee, which is required to be honoured by ICICI Bank on a first written demand made in that behalf. The argument advanced on behalf of BGR, albeit, to the contrary is, completely, unsustainable.

32.9. Furthermore, the reliance placed on the letter dated 08.01.2014, in this regard, is completely, misconceived. As noticed above by us, this is a letter sent by the ICICI Bank to RBI explaining as to why NOC had not been obtained by it before

issuance of the counter guarantee. A perusal of the letter would show that ICICI Bank has adverted to the terms of the PBG to establish that the PBG would become operational only on signing of the main contract and upon issuance of an irrevocable LC. The reason being the counter guarantee was issued to secure the interest of BOB, in case PBG was invoked by GOR. As discussed above, this would not make the counter guarantee conditional, as is sought to be contended on behalf of BGR.

33. In addition, according to us, even the balance of convenience is not in BGR's favour, as, if, ICICI Bank were not to honour the counter guarantee, it would possibly suffer a huge loss both monetarily and otherwise. BOB has already indicated to ICICI Bank, as noted above, that it would be charging interest at the rate of 9% per annum and may, also perhaps, sue ICICI Bank for damages, including loss caused to its reputation. Therefore, the balance of convenience is squarely in favour of ICICI Bank, and against BGR.

34. As regards, the last aspect, which is, whether lifting the injunction, would cause irretrievable harm to BGR, has already been answered by us.

35. We emphasise though that we are not persuaded to hold that BGR would suffer irretrievable harm at the end of the day. The claim is monetary in nature. ICICI Bank is located within the jurisdiction of this Court. The matter is still to be tried. Furthermore, as indicated above, BGR has not as yet, for reasons best known to it, taken recourse to an appropriate remedy vis-a-vis suspension and/or withdrawal of LC, which is, irrevocable, against parties concerned, including Citi Bank.

36. For the foregoing reasons, we are in agreement with the conclusion reached by the learned Single Judge, via the impugned judgement and decree.

37. The appeals are, accordingly, dismissed. Resultantly, all pending applications shall stand closed and order dated 25.10.2017, shall stand dissolved. There shall, however, be no order as to costs.

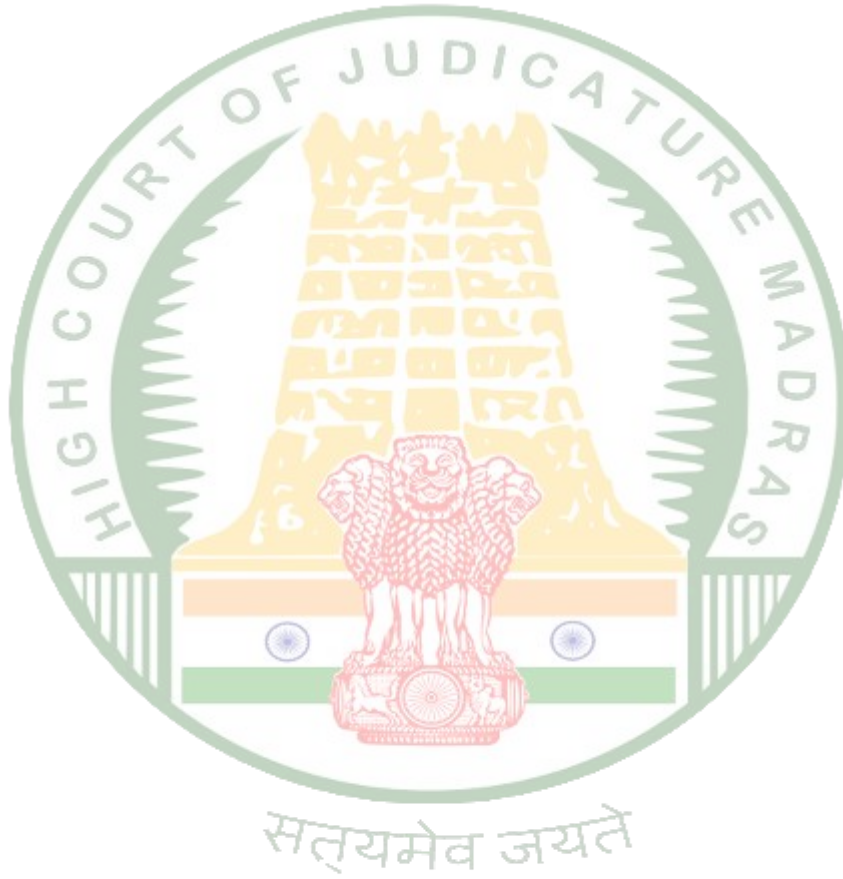
(R.S.A.,J) (N.S.K.,J)
15.12.2017

Speaking Order/
Non-speaking order
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Internet : Yes
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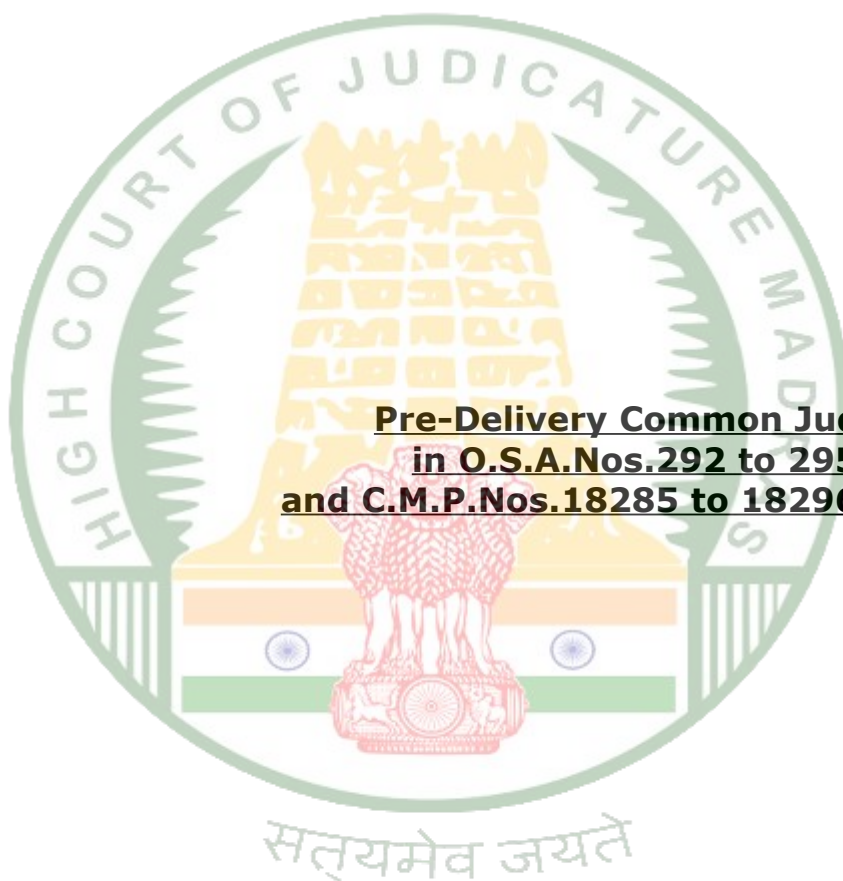
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High Court, Madras.



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RAJIV SHAKDHER,J.
AND
N.SATHISH KUMAR,J.

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Pre-Delivery Common Judgement
in O.S.A.Nos.292 to 295 of 2017
and C.M.P.Nos.18285 to 18296 of 2017

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