

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF
ANDHRA PRADESH**

CIVIL MISCELLANEOUS APPEAL Nos.359 to 362 of 2017

C.M.A. No.359 of 2017:

NCC Limited

.... Appellant

v.

Sembcorp Gayatri Power Limited and another

.... Respondents

DATE OF JUDGMENT PRONOUNCED: 24.10.2017.

SUBMITTED FOR APPROVAL:

**THE HON'BLE THE ACTING CHIEF JUSTICE RAMESH RANGANATHAN
AND
THE HON'BLE SMT. JUSTICE T.RAJANI**

1. Whether Reporters of Local newspapers may be allowed to see the Judgments? -
2. Whether the copies of judgment may be marked to Law Reports/Journals Yes
3. Whether Their Ladyship/Lordship wish to see the fair copy of the Judgment? Yes

RAMESH RANGANATHAN, ACJ

*** THE HON'BLE THE ACTING CHIEF JUSTICE RAMESH RANGANATHAN
AND**

*** THE HON'BLE SMT. JUSTICE T.RAJANI**

+ CIVIL MISCELLANEOUS APPEAL Nos.359 to 362 of 2017

% Dated: 24-10-2017

C.M.A. No.359 of 2017:

N.C.C. Limited

.... Appellant

v.

\$ Sembcorp Gayatri Power Limited and another

.... Respondents

! Counsel for Appellant: Sri D. Prakash Reddy, Learned Senior Counsel,
Sri Avinash Desai.

^ Counsel for respondent No.1: Sri C.V. Monan Reddy, Learned Senior Counsel, Sri Thoom Srinivas.

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> HEAD NOTE:

? Citations:

- 1) (1996) 5 SCC 450
- 2) (2016) 10 SCC 46 = MANUPATRA/SC/1105/2016
- 3) (1996) 5 SCC 34
- 4) (2016) 11 SCC 720
- 5) (1974) 2 SCC 231
- 6) (1997) 1 SCC 568
- 7) (1988) 1 SCC 174
- 8) [1982] 2 All E.R. 720
- 9) [1978] 1 All E.R. 976
- 10) (1986) 4 SCC 136
- 11) (1996) 1 SCC 735
- 12) (1981) 2 SCC 766 = (1981) 3 SCR 300
- 13) 2015 (6) ALD 486 (DB)
- 14) (1999) 8 SCC 436
- 15) (1984) 1 ALLER 351 (CA)
- 16) (1994) 1 SCC 502
- 17) (1995) 6 SCC 68
- 18) (1995) 6 SCC 76

- 19) (1995) 4 SCC 515
- 20) 2015 (1) ALT 275 (DB)
- 21) (2007) 8 SCC 110
- 22) AIR 2006 DELHI 256 = MANU/DAE/8543/2006 (Delhi HC (DB))
- 23) MANU/DE/0214/1987: AIR 1988 Delhi 2007
- 24) AIR 2006 Delhi 169
- 25) 200 (2013) DLT 289 = MANU/DE/1273/2013
- 26) (Judgment of the Division bench of the Bombay High Court in Appeal (L) No.764 of 2012 dated 24.01.2013)
- 27) (2010) 10 SCC 677
- 28) (1988) 4 SCC 534
- 29) (2006) 5 SCC 282
- 30) (1997) 6 SCC 450
- 31) 2015 (4) SCALE 62
- 32) 1977 2 All ER 862
- 33) 2006 (1) ARBLR 321 (DELHI) = MANU/DE/8175/2006 (Delhi HC)
- 34) (1991 (4) SCC 230
- 35) (2006) 13 SCC 599
- 36) AIR 1941 P.C. 93
- 37) 168 (2010) DLT 47 = MANU/DE/0120/2010
- 38) 566 F. Supp.1210 (1983).
- 39) MANU/TN/2876/2015 (Mad) = 2015(6) ARBLR 340
- 40) 1998 (1) ARBLR 566 (Delhi) = MANU/DE/0504/1998
- 41) (2013) NSWSC 2021
- 42) (2011) 7 SCC 69
- 43) 42 ER 89 = (1950) 2 Mac & G 231
- 44) (2010) 2 SCC 114
- 45) AIR 1963 SC 1558
- 46) (1983) 4 SCC 575
- 47) (1991) 3 SCC 261
- 48) (1994) 1 SCC 1
- 49) (2007) 4 SCC 221
- 50) (2007) 8 SCC 449
- 51) (2008) 2 SCC 326
- 52) (2008) 12 SCC 481
- 53) (2009) 3 SCC 141
- 54) 68 ER 36 = (1849) 7 Hare 89
- 55) 38 Ch D 348 = 55 LT 802
- 56) (1917) 1 KB 486 (CA)



**THE HON'BLE THE ACTING CHIEF JUSTICE RAMESH RANGANATHAN
AND
THE HON'BLE SMT. JUSTICE T.RAJANI**

CIVIL MISCELLANEOUS APPEAL Nos.359 to 362 of 2017

COMMON JUDGMENT: (per Hon'ble the Acting Chief Justice Sri Ramesh Ranganathan)

C.M.A. No.359 of 2017 is filed by the appellant (petitioner in C.O.P. No.63 of 2017) under Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (hereinafter called the "2015 Act") r/w. Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter called the "1996 Act") aggrieved by the order passed by the XXIV Additional Chief Judge-cum-Commercial Court, City Civil Court, Hyderabad, in C.O.P. No.63 of 2017 dated 18.04.2017. Parties shall, hereinafter, be referred to as they are arrayed in these appeals.

The appellant filed four C.O.Ps. under Section 9 of the 1996 Act requesting the Commercial Court to grant an injunction restraining the 1st respondent, its agents, servants, or any other persons claiming through or under it, from taking coercive action pursuant to the letter dated 23.02.2017 or otherwise, including but not limited to, restraining it from invoking or encashing the schedule bank guarantees issued by the 2nd respondent; and to further restrain the 2nd respondent from honouring/encashing the schedule bank guarantees at the request of the 1st respondent.

In the petition filed by them under Section 9 of the 1996 Act, the appellant had stated that they had entered into various contracts in respect of the design, engineering, procurement, supply, assembly, construction, erection, mechanical completion, pre-commissioning, commissioning and full performance testing of

a pulverized coal fired power plant consisting of 2 x 660 MW supercritical boiler based plant with NCC Power Projects Limited, and a consortium of China National Technical I & E Corporation and Tianjin Electric Power Construction Company ("CTC" for short); the equity stake of the first respondent-NCC Power Projects Limited was acquired by SembCorp Utilities Pte Ltd, consequent to which its name was changed to Sembcorp Gayatri Power Limited; the 1st respondent was the owner of the project, the petitioner had to execute the work, and CTC had to supply the material to be used for execution of the project; seven independent contracts, in EPC mode, were entered into between the petitioner and the 1st respondent to facilitate the aforementioned project along with their amendments; the scope of the co-ordination agreement, entered into between the parties, was to co-ordinate and administer all the other six contracts; the supply contract agreement (FOB) was entered into between the parties thereto, as the 1st respondent wanted CTC to supply the material; the appellant was required to execute the work using the supplies made by CTC which was approved as the supplier by the 1st respondent; the appellant was not given the choice to change the supplier, even though there were delays in supplies; the 1st respondent and the appellant had entered into an On-Shore Service Contract dated 10.04.2011 to provide certain construction works for the purpose of the projects; the scheduled completion date of Unit-1 and Unit-2 had to be achieved, ordinarily, within 42 months and 45 months, from the date of issuance of notice to proceed, respectively; under the co-ordination agreement, ordinarily, the provisional acceptance test, for Unit-1 and Unit-2, should have been achieved, and duly

completed, by 10.11.2015 (inclusive of a 3 month grace period from 10.08.2015) and 10.02.2016 (inclusive of a 3 month grace period from 10.11.2015), respectively; all these time-lines were necessarily subject to the equipment being supplied on time by the approved supplier; provisional acceptance was achieved for Unit-1 on 26.05.2016, and for Unit-2 on 18.02.2017; the reason, behind the delay in achieving provisional acceptance, was attributable to the 1st respondent and CTC; some of the delays, in achieving provisional acceptance, were not only due to the delays in supply by CTC, but also because design coal was not provided by the 1st respondent itself; even till date, the 1st respondent has not been able to provide the specific type of coal required for conducting performance guarantee tests; the 1st respondent's inability, to procure the required type of coal, was the only reason for non-completion of the performance guarantee tests; the 1st respondent has been commercially operating Unit-1 from 15.11.2016, and Unit-2 from 18.02.2017, using coal (other than the design coal); they have been selling electricity commercially; and, on the other hand, the 1st respondent had implied, in the impugned letter, that the Units would not be treated as having been completed.

The appellant further stated that, according to the clauses of the On-Shore Service Contract, they were entitled for extension of time to finish the project, since the reasons for the delay were not attributable to them, and were beyond their control; the reasons for the delay had been communicated to the 1st respondent regularly through various e-mails, correspondence, MPR's, in the meetings, and in accordance with the terms and conditions of the contract; the appellant had repeatedly sought extension of time, as

the delay was either attributable to the 1st respondent or to CTC which would entitle the appellant for extension of time as per the contract; however, the same had been arbitrarily denied by the 1st respondent, despite admitting that the delay was because of belated supplies from CTC; the delays, on the part of CTC, may also be due to the default of the 1st respondent itself, which had to open a Letter of Credit for supplies to be made; the agreed contract price, of the On Shore Service Contract Agreement, was Rs.85,00,00,000/-; the appellant had furnished two bank guarantees of the State Bank of India in favour of the 1st respondent as performance bank guarantees for Rs.4,25,00,000/- each on 27.09.2014; both these bank guarantees were extended upto 31.03.2017; the appellant had finished all its obligations under the contract without any delay from its side; the 1st respondent had also made payment to the appellant for the work done, in the period beyond the schedule completion date, without extending the time formally which the appellant was otherwise entitled to; all payments were not received, by the appellant from the 1st respondent, for the work done by them; the 1st respondent is, admittedly, due to the appellant a sum of Rs.300 crores in all contracts (excluding its claim for price escalation); in continuation of their previous request, the appellant requested the 1st respondent on 02.01.2017 to grant interim extension of time beyond 10.11.2015 upto 27.11.2016 for Unit-1, and beyond 10.02.2016 upto 31.03.2017 for Unit-2, along with the additional costs incurred by the appellant as the delays had occurred due to the 1st respondent and CTC; when they started demanding payment of their dues, formal extension of time (caused due to

delay not attributable to them), and price escalation, the first respondent, as a counter-blast and an after thought, arbitrarily sought liquidated damages from the appellant vide letter dated 23.02.2017 for an aggregate sum of Rs.8.5 Crores under the On-Shore Service Contract Agreement for the alleged delay, of 471 days for Unit-1 and 379 days for Unit-2, in achieving provisional acceptance; the appellant and the 1st respondent had agreed, in the Co-ordination agreement, that the appellant would not be held liable for delay or liquidated damages caused due to the failure of CTC to supply material in accordance with the terms and conditions of the Supply FOB Agreement; the 1st respondent itself wrote a letter to CTC informing them that there was a delay of 555 days for completion of Unit-1 and 495 days for Unit-2, which had occurred because of them; a copy of the said letter was also marked to the appellant which showed that, according to the first respondent itself, the delay was due to CTC, and not the appellant; the 1st respondent had levied liquidated damages of USD 40,978.312 on CTC to be paid on or before 09.03.2017, failing which the same would be set off by the 1st respondent against payments required to be made to CTC; the 1st respondent was trying to unjustly enrich itself levying liquidated damages on the appellant, though the delay was on the part of the supplier; the first respondent was threatening to encash the bank guarantees furnished by the appellant; and this was clearly fraudulent, and contrary to the purpose for which the bank guarantees were submitted.

In their petition, the appellant had stated that, in view of the categorical admission of the 1st respondent in their letter dated

23.02.2017, that the delay was due to CTC, levy of liquidated damages on the appellant, for the delay caused by the 1st respondent itself and CTC, was contrary to the provisions of the On Shore Service Contract Agreement and the Co-ordination Agreement; the onus on the appellant to prove delay on the part of CTC, had also been discharged by the categorical admission of the 1st respondent; the appellant had, time and again, informed the first respondent that the delay in completion of the project was attributable solely to the supplier and the 1st respondent; no party can be a Judge in its own cause, and the 1st respondent was not permitted under law to unilaterally decide the issue of damages in its favour; if they had a claim for damages, they should approach the competent judicial authority for adjudication of the dispute; the 1st respondent is, admittedly, due around Rs.300 Crores to the appellant for the works done by them in all the contracts; they also have bank guarantees of around Rs.300 crores which include the aforesaid bank guarantees of Rs.149 crores; the 1st respondent has admitted having sent a notice to CTC levying liquidated damages for the delay caused by them; the 1st respondent is committing fraud, and is illegally levying liquidated damages of Rs.8.5 Crores under the On-Shore Services Contract Agreement on the appellant, and is threatening to set off the said amount against payments to be made to them; the 1st respondent is also fraudulently seeking to encash the bank guarantees given by the appellant; the Court can grant an injunction restraining invocation of bank guarantee, if a prima-facie case of either (i) fraud, or (ii) irretrievable injustice, or (iii) such invocation not being in terms of the bank guarantee, or (iv) if special equities are made out; and as the petitioner has,

prima-facie, showed that all these conditions exist, they are entitled to the relief sought for.

On fraud, the appellant pleaded that the 1st respondent had, itself, written a letter to CTC informing them that there was a delay in supplies; yet they were seeking to extract money from the appellant; these factors clearly establish that the bank guarantees have been obtained by the 1st respondent by fraud in order to encash the same arbitrarily, illegally and to gain wrongfully at the cost of the appellant. With regards special equities, the appellant stated that they would suffer irretrievable injustice if injunction, against the coercive measures including encashing the bank guarantees, was not granted; special equities were also in favour of the appellant as the 1st respondent was owned and operated by a Singapore based entity SembCorp Utilities Pte Ltd, and the 1st respondent had no other assets in India; even if the appellant were to succeed in the main dispute by way of arbitration, they would not be able to recover the money illegally obtained on encashment of the bank guarantees; the project itself was given as security to the banks for the loans extended by them to the 1st respondent; a successful result in the arbitral proceedings would be futile, causing irreparable loss and damage to the appellant, its promoters, shareholders, stake holders and lenders; and it would also have an adverse effect on their employees and their family members.

The appellant would further state that the On Shore Services Contract Agreement, and the Co-ordination Agreement, provide for adjudication of disputes by way of arbitration; since no amicable settlement had been reached between the parties, they intended to

invoke the arbitration clause against the 1st respondent; the illegal coercive steps by the 1st respondent as threatened, including fraudulent encashment of the bank guarantees, was imminent; if stay of all coercive steps, including encashment of the bank guarantees, was not granted, the appellant would suffer irretrievable loss and injury; it would also frustrate all further legal remedies available to the appellant; if, on the other hand, injunction is granted, no irreparable loss would be caused to the 1st respondent as the appellant's monies are, admittedly, lying with the 1st respondent, besides the bank guarantees of about Rs.400 Crores, which would adequately safeguard the interest of the 1st respondent if it succeeds in the arbitral proceedings; even on merits, the claim of the 1st respondent was baseless and concocted; and as special equities are in their favour, the appellants are entitled for an order of injunction.

In the counter-affidavit, filed on behalf of the 1st respondent, it is stated that the bank guarantee is a complete and a separate contract; Courts would not interfere with the enforcement of a bank guarantee where such enforcement is in terms of the bank guarantee itself which show that it is an on demand bank guarantee, and unconditional and irrevocable; the appellant has not even contended otherwise; except for a vague allegation of fraud, the appellant has not placed any material on record to substantiate its allegations; bald assertion of fraud, made solely with a view to obtain an order of injunction, would not suffice; and, in the absence of established fraud, the Court would not grant an injunction restraining encashment of the bank guarantees.

It is further stated that the petitioner had made false averments in order to obtain an order of injunction; in its e-mail dated 18.11.2016, the appellant has admitted that the slow pace of commissioning activities on Unit-II was likely to further delay the provisional acceptance test; admittedly, as on 18.11.2016, provisional acceptance of Unit-II had not been achieved; in their letter dated 02.01.2017, the appellant admitted that provisional acceptance test was likely to be achieved by 31.03.2017; tripartite discussions were held on 22.02.2017 between the appellant, CTC and the first respondent to decide on the action plan to proceed with regards the provisional acceptance test of Unit-1; these documents show that provisional acceptance of Units-I and II has not been achieved till then, and the appellant has lied on oath; till provisional acceptance test of Units-I and II are successfully conducted by the appellant, there is nothing due for payment by the 1st respondent in lieu of which the bank guarantees are sought to be enjoined; under the EPC contracts, the appellant was required to undertake the works in such a manner that the scheduled completion date of Units-I and II would be achieved within 42 months and 45 months, from the date of issuance of notice to proceed, respectively; under the Co-ordination Agreement, the provisional acceptance test for Unit-I and Unit-II was required to have been achieved, and duly completed, by 10.11.2015 (inclusive of a three month grace period from 10.08.2015) and 10.02.2016 (inclusive of a three month grace period from 10.11.2015), respectively; it was agreed, among the parties, that time would be of essence for delivery of the equipment, and completion of works, under the EPC contract; they

had requested the appellant to perform its obligations including expediting works to meet the completion schedule; because of the delay, in achieving provisional acceptance and final acceptance for Units-I and II, the 1st respondent incurred significant losses including in relation to payment of interest during construction to its lenders, cost overruns, overruns above the project cost, payment of penalty to Power Grid Corporation of India Limited due to delay in evacuation of power, etc; and such losses were of a value exceeding the pre-estimated liquidated damages provided under the EPC contract and other contracts.

After referring to Clauses 2.3 and 2.4 of the Co-ordination Agreement, it is stated, on behalf of the first respondent, that the contractual obligations of the appellant, under the co-ordination agreement, are much wider than merely facilitating co-ordination between the 1st respondent, CTC, and other sub-contractors or sub-suppliers; the first respondent issued notice dated 23.02.2017 seeking liquidated damages of Rs.134 crores under the civil and construction works contract; Rs.145.75 crores under the supply (ex-works) contract; 9.04 Million USD under the supply (C&F) contract; and Rs.8.5 crores under the on-shore services contract; as the appellant failed to comply with the request for payment, the 1st respondent became entitled to encash the bank guarantees in lieu of the liquidated damages for the delay; and, because of the delay caused by the appellant, the 1st respondent had already suffered irretrievable losses in terms of reputation and business.

It is further stated that the liquidated damages claimed from the parties, i.e. the appellant and CTC, became due on account of the delay caused in performing different obligations under different

agreements; both the claims were independent of each other, and could be invoked simultaneously without prejudice to one another; the appellant became liable to pay liquidated damages to the 1st respondent under the NCCL-EPC contracts, and the co-ordination agreement, for failure to complete the works under NCCL-EPC contracts, and for failure to achieve provisional acceptance for Units-I and II till date; the liquidated damages were claimed from CTC for the delay caused by them in delivering equipment under the supply FOB contract; this would not curtail the 1st respondent's right to claim liquidated damages from the appellant for its failure to achieve provisional acceptance for Unit-I by 10.11.2015, and for Unit-II by 10.02.2016, under the NCCL-EPC contracts; the claims were separate and mutually exclusive; the 1st respondent had the right to claim liquidated damages against both the parties concurrently; in terms of Clauses 3.1 and 3.2 of the co-ordination agreement, the appellant was barred from claiming exclusion from liability for any delay liquidated damages and/or for the delay, in completion of the provisional acceptance test for Units-I and II, attributable to them; and therefore the appellant's contention that the liquidated damages could not be levied on them for the delay caused by the 1st respondent, and its supplier-CTC, did not merit acceptance.

The 1st respondent denied that the reasons, behind the delay in achieving provisional acceptance, were due to the delay in supplies by CTC, and because the 1st respondent did not provide the designed coal. It is also denied that they were not able to provide the specified type of coal till date. It is stated that the appellant has neither furnished details of the design coal that was

to be used by the 1st respondent in terms of any agreed technical specification, nor have they explained how the actual coal, being used by the 1st respondent, did not match the design coal; the appellant had also failed to explain how the alleged non-usage of design coal had adversely affected the achievement of provisional acceptance; the appellant had failed to achieve final acceptance in terms of Article 6.4 of the 2nd amendment to the On-shore Services Contract Agreement; the Units could not, therefore, be treated as having been completed; the appellant had placed only one letter dated 02.01.2017 on record in support of their allegation that they had communicated the reasons for the delay regularly to the 1st respondent through e-mails; the appellant was barred from claiming exclusion from liability, for any delay or for delayed liquidated damages, because of the failure of CTC to supply material in accordance with the terms and conditions of the supply agreement, as the delay in completion of provisional acceptance test for Units-I and II was attributable to them; the claims against the appellant and CTC were independent of each other, and could be invoked simultaneously without causing prejudice to one another; and exercise of its right to claim damages from CTC, under the supply FOB contract, could not curtail the first respondent's right to claim liquidated damages from the appellant for its failure to achieve provisional acceptance for Units-I and II till date.

The 1st respondent also denied that the appellant had discharged the onus to prove delay, on the part of CTC, from the admission of the 1st respondent itself; or they were due Rs.300 crores to the appellant for the works done by them in all the

contracts; and they had bank guarantees for Rs.300 crores which included the bank guarantee of Rs.149 crores. It is stated that the appellant has not filed any documents in support of their plea that they had informed the 1st respondent of the reasons for the delay attributable to the suppliers and the 1st respondent, and had sought extension of time; mere allegation of fraud, in the injunction application, did not justify grant of injunction relating to encashment of the bank guarantees; the appellant had failed to produce any material or documents to substantiate the allegation of fraud; non-performance or delay by CTC, caused under the supply (FOB) Contract, could not be used as an excuse for the appellant's failure to perform its obligations under the NCCL- EPC contracts; similarly, the 1st respondent's right to claim liquidated damages from CTC, under the NCCL-EPC contracts, did not curtail their right to claim liquidated damages from the appellant for its failure to achieve provisional acceptance under the EPC contracts; and exercise of such a right, under the EPC contracts, cannot be termed a fraud.

The 1st respondent denied that there were any special equities in the appellant's favour, for grant of injunction, merely because the 1st respondent was owned and operated by a Singapore based entity i.e., M/s. Sembcorp Utilities Pte Ltd; or that the appellant would not be able to recover the money from the 1st respondent on encashment of the bank guarantees even if they were to succeed in the arbitral proceedings. The 1st respondent states that it is a Company incorporated in India under the Companies Act, 1956, and has significant assets in Nellore District of Andhra Pradesh.

In their reply, to the counter-affidavit filed by the first respondent, the appellant denied the allegation of abuse of process of court. They submitted that the validity of the bank guarantees had been extended; and all essential ingredients, to restrain invocation of bank guarantees, had been pleaded and established. Reference is made by them to the report of the Central Electricity Authority, Bangalore dated 06.03.2017 to contend that Unit 1 was synchronized on 26.05.2016 and started operating commercially on 17.11.2016, and Unit 2 was synchronized on 02.02.2017, commissioned on 15.02.2017 and started operating commercially on 21.02.2017; the first respondent had publicly announced completion of construction of the Thermal Power Project on these dates; both the Units have been operating commercially; the first respondent was generating revenue out of the supply of such energy; provisional acceptance test had been achieved for the Units, since the first respondent had been running both the Units at its optimum capacity; in the e-mail dated 18.11.2016, the appellant was informed that a part of the delay, in the slow pace of work, was because the first respondent did not deploy suitable man power at the site, and lack of priority given by the first respondent to Unit 2; it was also stated that there was inordinate delay in the delivery of the turbine by CTC which led to the slow pace of the work; notwithstanding the delay caused by the first respondent or CTC, the appellant was able to finish the work within minimum time, and had put both the Units to Commercial operations from 17.11.2016 and 21.02.2017 respectively; the understanding of the first respondent, on the scope of clause 2.3 and 2.4 of the co-ordination agreement to levy liquidated damages,

was incorrect; under Clause 3.1 and 3.2 of the co-ordination agreement, the appellant could not be made liable for the delay in due completion of the Provisional Acceptance Test, if such delay was solely due to the consortium; Clauses 3.1 and 3.2 opened with a non-obstante clause, and prevailed over any other contrary clauses; in any event, it was not the appellant's case that they violated Clauses 2.3 and 2.4; the appellant had performed its contractual obligations, and had put both the Units in commercial operations, notwithstanding the delay caused to the project by the first respondent and the consortium; the appellant was entitled for extension of time, because of the delay caused by CTC; the appellant's letter dated 02.12.2016, and the protocols dated 28.07.2016 and 02.08.2016, clearly established that it had fulfilled all its obligations under the contract; since the first respondent did not give provisional acceptance within ten days of the notice dated 02.12.2016, provisional acceptance must be deemed to have occurred; the appellant must be deemed to have achieved provisional acceptance for Unit 2 on 18.02.2017, as the first respondent put the facility to commercial operations from that day onwards; as per the EPC contracts and the co-ordination agreement, all the disputes are required to be resolved through mutual discussions and negotiation in an equitable manner; the appellant intended to go for arbitration for adjudication of the subject disputes; in reply to the first respondent's letter dated 23.02.2017 they had, by their letter dated 08.03.2017, disputed levy of liquidated damages, and had denied all the allegations made therein; and the first respondent could not set off liquidated

damages, or encash the securities, for damages which were arbitrarily levied or were disputed as not due.

In his order in C.O.P. No.63 of 2017 and batch dated 18.04.2017, (against which these appeals are preferred), the Learned Judge, Commercial Court-cum-XXIV Additional Chief Judge, City Civil Court, Hyderabad observed that there was no dispute with regards existence of an arbitration clause in the On-Shore Services Contract agreement and the Co-ordination agreement; the appellant had furnished the schedule bank guarantees in favour of the first respondent, and they were being extended from time to time; according to Clause 10.6 of the co-ordination agreement, it was agreed between the parties that the contracts were independent and separate contracts; and the co-ordination agreement was solely for the purpose of co-ordination and completion of the combined work in accordance with the master project schedule in a seamless manner.

The Learned Judge referred to Clause 2.3, 2.4, 3.1, 3.2 and 4.1 of the co-ordination agreement, and then observed that the appellant had not filed any documentary evidence to show that they had taken measures to ensure that the delay of CTC was not caused on account of their failure or breaches; and the appellant had failed to establish that there was egregious fraud on the part of the first respondent by producing cogent and convincing documentary evidence. After referring to **Ansal Engineering Projects Limited v. Tehri Hydro Development Corporation Ltd¹**, **Gujarat Maritime Board v. L&T Infrastructure**

¹ (1996) 5 SCC 450

Development Projects Ltd², and **Hindustan Steel Works Construction Ltd v. Tarapore & Co.³**, the Learned Judge held that, in the instant case, the appellant had contended that the first respondent was due around Rs.300 crores to them in all the contracts; reliance placed by them on **Gangotri Enterprises Ltd. v. Union of India⁴** was misplaced; reliance placed by them on **Union of India v. Raman Iron Foundry⁵** was also misplaced; in the instant case the dispute, among the parties, was an arbitral dispute, and had to be adjudicated by the arbitral tribunal; the appellant had not established a strong *prima facie* case; the balance of convenience was also not in its favour; and the appellant had also failed to establish that irreparable loss and injury would be caused to them if the relief of injunction sought for was not granted in their favour. The Learned Judge dismissed all the petitions filed by the appellant under Section 9 of the 1996 Act.

Elaborate oral submissions were made by Sri D.Prakash Reddy, Learned Senior Counsel appearing on behalf of the appellant and Sri C.V. Mohan Reddy, Learned Senior Counsel appearing on behalf of the first respondent. Written arguments have been filed by Sri Avinash Desai, Learned Counsel for the appellant, and Sri Thoom Srinivas, Learned Counsel for the first respondent.

I. OBJECT AND PURPOSE OF FURNISHING BANK GUARANTEE:

As the dispute, in the present batch of appeals, relates to the first respondent's right to invoke the bank guarantees, furnished

² (2016) 10 SCC 46 = MANUPATRA/SC/1105/2016

³ (1996) 5 SCC 34

⁴ (2016) 11 SCC 720

⁵ (1974) 2 SCC 231

as security for guaranteeing performance of the contract by the appellant, it is necessary, at the outset, to examine the purpose for which a bank guarantee is furnished. When, in the course of commercial dealings, an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would, otherwise, be defeated. (**U.P. State Sugar Corpn. v. Sumac International Ltd.**⁶). Between the bank and the beneficiary, the moment there is a written demand for invoking the bank guarantee, pursuant to a breach of the covenants, the bank is bound to make payment under the guarantee. (**Gujarat Maritime Board**²).

The commercial purpose, for which the system of confirmed irrevocable documentary credit has been developed in international trade, is to give to the seller an assured right to be paid before he parts with the control of the goods, and that does not permit of any dispute with the buyer, as to the performance of the contract being used as a ground for non-payment or reduction or deferment of payment. (**U.P. Cooperative Federation Ltd. v. Singh Consultants and Engineers (P) Ltd.**⁷; **UCM (Investment) v. Royal Bank of India**⁸). Performance guarantees are virtually promissory notes payable on demand. So long as an honest demand is made, the banks are bound to pay. They will rarely, if ever, be in a position to know whether the demand is honest or

⁶ (1997) 1 SCC 568

⁷ (1988) 1 SCC 174

⁸ [1982] 2 All E.R. 720

not. At any rate they will not be able to prove it to be dishonest. So they will have to pay. (**Singh Consultants and Engineers (P) Ltd.**⁷; **Edward Owen Engineering Ltd. v. Barclay's Bank International Ltd.**,⁹; **Centax (India) Ltd. v. Vinmar Impex Inc**¹⁰).

A bank, issuing a guarantee, is not concerned with the underlying contract between the parties to the contract. The duty of the bank, under a guarantee, is created by the document itself. Once the documents are in order, the bank giving the guarantee must honour the same and make payment. Ordinarily, Courts will not interfere, directly or indirectly, to withhold payment for, otherwise, trust in commerce, internal and international, would be irreparably damaged. (**State of Maharashtra v. National Construction Co.**¹¹; **United Commercial Bank v. Bank of India**¹²; **Centax (India) Ltd.**¹⁰; **ICICI Bank Ltd, Hyderabad v. IVRCL Ltd, Hyderabad**¹³; **Singh Consultants and Engineers (P) Ltd.**⁷). A bank, which gives a performance guarantee, is not concerned with the relations between the supplier and the customer: nor with the question whether the supplier has performed his contractual obligation or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantees, on demand if so stipulated, without proof or conditions. If the documentary credits are irrevocable and independent, the banks must pay when demand is made. (**Singh Consultants and Engineers (P) Ltd.**⁷; **Edward Owen Engineering Ltd.**⁹; **Centax (India) Ltd.**,¹⁰). Bearing the purposes, for which

⁹ [1978] 1 All E.R. 976

¹⁰ (1986) 4 SCC 136

¹¹ (1996) 1 SCC 735

¹² (1981) 2 SCC 766 = (1981) 3 SCR 300

¹³ 2015 (6) ALD 486 (DB)

bank guarantees are issued, in mind let us now examine the rival submissions, urged by Learned Senior Counsel on either side, under different heads.

II. CONTRACT OF BANK GUARANTEE IS AN INDEPENDENT CONTRACT:

Sri C.V. Mohan Reddy, Learned Senior Counsel appearing on behalf of the first respondent, would submit that the contract of guarantee is a complete and separate contract by itself; and the court/tribunal would only interfere if the invocation is against the terms of the guarantee itself. On the other hand Sri D.Prakash Reddy, Learned Senior Counsel appearing on behalf of the appellant, would submit that, in **Tarapore & Co.**³, the Supreme Court examined the disputes, with respect to the parent contract/underlying contract, to ascertain the existence of special equities.

A bank guarantee constitutes a separate, distinct and independent contract. This contract is between the Bank and the beneficiary. It is independent of the main contract between the person who has furnished the bank guarantee and the beneficiary.

(Hindustan Construction Co. Ltd. v. State of Bihar¹⁴; **Tarapore & Co.**³). A bank guarantee is the common mode of securing payment of money in commercial dealings as the beneficiary, under the guarantee, is entitled to realise the whole of the amount under that guarantee in terms thereof, irrespective of any pending dispute between the person on whose behalf the guarantee was given and the beneficiary. A bank guarantee constitutes an independent contract between the Bank and the principal.

¹⁴ (1999) 8 SCC 436

(Hindustan Construction Company Ltd¹⁴; Singh Consultants & Engineers (P) Ltd.⁷; Bolivinter Oil SA v. Chase Manhattan Bank¹⁵; Svenska Handelsbanken v. Indian Charge Chrome¹⁶; Larsen & Toubro Ltd. v. Maharashtra SEB¹⁷; Hindustan Steel Workers Construction Ltd. v. G.S. Atwal & Co. (Engineers) (P) Ltd.¹⁸; National Thermal Power Corpn. Ltd. v. Flowmore (P) Ltd¹⁹; National Construction Co.¹¹; Tarapore & Co.³; Sumac International Ltd⁶; ICICI Bank Ltd¹³).

A bank guarantee is, ordinarily, a contract quite distinct and independent of the underlying contract, the performance of which it seeks to secure. To that extent it can be said to give rise to a cause of action separate from that of the underlying contract.

(National Construction Co.,¹¹; United Commercial Bank¹²; Centax (India) Ltd.¹⁰; ICICI Bank Ltd¹³; Singh Consultants and Engineers (P) Ltd.⁷). A bank guarantee is not qualified by the underlying transaction, or the validity of the primary contract between the person at whose instance the bank guarantee was given and the beneficiary. **(Ansal Engineering Projects Ltd.¹).** The bank guarantee must be honoured in accordance with its terms. The bank, which gives the guarantee, is not concerned with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contractual obligation or not, nor with the question whether the supplier is in default or not. The bank must pay according to the tenor of its guarantee on demand without proof or

¹⁵ (1984) 1 ALLER 351 (CA)

¹⁶ (1994) 1 SCC 502

¹⁷ (1995) 6 SCC 68

¹⁸ (1995) 6 SCC 76

¹⁹ (1995) 4 SCC 515

condition. (**Sumac International Ltd.**,⁶; **United Commercial Bank**¹²; **Singh Consultants and Engineers (P) Ltd.**⁷).

Reliance placed on behalf of the appellant, on **Hindustan Construction Co. Ltd.**¹⁴, is misplaced. In the said case, the appellant was awarded a contract for construction of a dam to be completed within a period of 42 months, for which they were required to furnish a bank guarantee for 10% of the contract price as performance guarantee. On the bank guarantee being invoked by the respondent, the appellant filed a Suit in the Bombay High Court, and an interim order was initially passed restraining invocation of the bank guarantee which was confirmed later. The order passed by the Learned Single Judge was challenged before the Division Bench of the Bombay High Court which vacated the injunction with respect to mobilisation advance, but maintained the injunction in respect of the performance guarantee. The respondents preferred an appeal against that part of the order of the Division Bench wherein the injunction order, in respect of the performance guarantee, was upheld. The Supreme Court noted that, while the bank guarantee used the expression "*agree unconditionally and irrevocably*" to guarantee payment to the Executive Engineer on his first demand without any right of objection, it had thereafter qualified it by using the expression "*in the event that the obligations expressed in the said clause of the abovementioned contract had not been fulfilled by the contractor giving the right of claim to the employer for recovery of the whole or part of the Advance Mobilisation Loan from the contractor under the contract*"; this condition clearly referred to the original contract between the appellant and the respondent, and postulated that, if the obligations expressed in the contract were

not fulfilled by the appellant, it gave the respondent the right to claim recovery of the whole or part of the “advance mobilisation loan”, then the Bank would pay the amount due under the guarantee; by referring specifically to Clause 9, the Bank had qualified its liability to pay the amount covered by the guarantee, relating to “advance mobilisation loan” to the Executive Engineer, only if the obligations under the contract were not fulfilled by the appellant, or the appellant had misappropriated any portion of the “advance mobilisation loan”; the bank guarantee thus could be invoked only in the circumstances referred to in Clause 9 whereunder the amount would become payable only if the obligations were not fulfilled or there was misappropriation; that being so, the bank guarantee could not be said to be unconditional or unequivocal in terms; the defendant could not be said to have had an unfettered right to invoke that guarantee, and demand immediate payment thereof from the Bank; the performance guarantee was furnished in terms of clause 5 of the agreement; the bank guarantee, in respect of performance guarantee, was furnished to the Chief Engineer; the said bank guarantee could be invoked by none other than the Chief Engineer; and invocation of the bank guarantee by the Executive Engineer was not in terms of the bank guarantee. On examining the contents of the subject bank guarantees, the Supreme Court was satisfied that the Government of Bihar could not encash the bank guarantees as they were neither unconditional nor unequivocal.

It is necessary, therefore, for us to examine the relevant clauses in the agreements between the appellant and the first respondent which require bank guarantees to be furnished

towards guaranteed performance of the contract by the appellant, and the relevant clause in the contract of bank guarantee between the concerned bank and the first respondent, to ascertain whether or not these bank guarantees are unconditional and unequivocal.

The appellant and the first respondent entered into six agreements and, in addition, a bipartite agreement called the co-ordination agreement. The second amendment to the on-shore service contract dated 10.04.2011 provided, in Article 2.7, for the addition of a new Article 4.8 to be added to the on-shore service contract. Clause 4.8 stipulated that, to secure the appellants performance of its obligations, the appellant acknowledged and agreed that the first respondent shall have the right to hold the Contract Performance Guarantee, issued by a reputable commercial bank acceptable to the first respondent, as security for the performance of the appellant's obligations under the agreement. The Article further records the appellants acknowledgment that, in the event amounts are due under the agreement (including late completion liquidated damages, and ancillary power guarantee liquidated damages and any amount due and payable from the appellant to the first respondent or to be paid by the appellant on behalf of the first respondent, and such amounts are not paid when due), the first respondent shall have the unconditional and irrevocable right to demand and draw such amounts under the Contract Performance Guarantee equal to the amount owing by the appellant without prejudice to the first respondent's rights and/or which are the remedies accrued under the agreement.

Article 2 of the co-ordination agreement, entered into between the appellant and the first respondent, are the covenants of the appellant, and the rights of the first respondent. Clause 2.1 stipulates that the co-ordination agreement and the contracts are complementary and (except to the extent provided in the co-ordination agreement) are to be treated as independent and separate contracts; the appellant assumed full responsibility for, and guaranteed on a turnkey basis for, the performance of obligations and responsibilities under the contracts; they agreed to coordinate the works, services, equipment and other items to be performed under each of the contracts in an integrated manner for seamless and uninterrupted interface among all activities and obligations; both the parties agreed that the actions or omissions that constituted a default by the appellant, under one or more of the contracts, shall constitute a default under all of the contracts and entitle the first respondent to all the remedies provided for in the contracts, and to draw on any performance security under any and/or all of the contracts.

Clause 2.10 of the co-ordination agreement required the appellant to provide performance bonds in the form of on- demand bank guarantees or standby letters of credit as set out thereunder. It is useful, in this context, to refer to Contract Performance Bank Guarantee No.1303914 dated 24.09.2014 issued by the State Bank of India which records that, in consideration of the first respondent having awarded the appellant a contract (onshore service contract), and the appellant having agreed to provide a contract performance guarantee for faithful performance of the entire contract equivalent to Rs.8.5 crores to the first respondent, the State Bank of India

guaranteed and undertook to pay the first respondent on demand any, and all the, monies payable by the appellant upto the sum mentioned in the bank guarantee. The relevant portion of the said bank guarantee reads thus:

“We State Bank of India.....do hereby guarantee and undertake to pay the Owner, on demand any and all monies payable by the Contractor to the extent of as aforesaid at any time upto without any demur, reservation, contest, recourse or protest and/or without any reference to the Contractor. Any such demand made by the Owner on the Bank shall be conclusive and binding notwithstanding any difference between the Owner and the Contractor or any dispute pending before any Court, Tribunal, Arbitrator or any other authority. The Bank undertakes not to revoke this Guarantee during its currency without previous consent of the Owner and further agrees that the Guarantee herein contained shall be enforceable till ninety (90) days after expiry of its validity.”

The bank guarantee also records that the first respondent shall have the fullest liberty, without affecting in any way the liability of the bank under the guarantee, from time to time, to extend the time for performance of the contract by the appellant; the first respondent shall have the fullest liberty, without affecting the guarantee, to postpone, from time to time, the exercise of any power vested in them or of any right which they might have against the appellant, and to exercise the same at any time in any manner; the bank would not be released of their obligations under the bank guarantee by any exercise by the first respondent of its liberty with reference to all the matters mentioned therein, or by reason of any other act or forbearance or other act of omission or commission on the part of the first respondent or any other indulgence shown by the first respondent or by any other matter or thing which under

law would, but for the provision, have the effect of relieving the bank.

While this bank guarantee has no doubt been issued on behalf of the appellant, it is independent of the underlying contract between the appellant and the first respondent. The said bank guarantee is an independent agreement between the bank and the first respondent in terms of which the bank agreed to pay, on demand by the first respondent, the monies payable by the appellant to the extent of the sum indicated in the bank guarantee.

A bank guarantee is unconditional and unequivocal when the Bank, unconditionally and irrevocably, promises to pay, on demand, the amount of liability undertaken in the guarantee without any demur or dispute in terms of the bank guarantee. **(Ansal Engineering Projects Ltd.¹)**. Bank guarantees which are irrevocable in nature, in terms, provide that they are payable by the guarantor to the appellant on demand without demur. They further provide that the appellant shall be the sole judge of whether, and to what extent, the amount has become recoverable from the respondent or whether the respondent has committed any breach of the terms and conditions of the agreement. The guarantor shall immediately pay the guaranteed amount on demand. **(Sumac International Ltd.⁶)**. In an unconditional bank guarantee, the beneficiary is entitled to invoke it and seek encashment of the amount specified therein. It does not depend upon the result of the decision in the dispute between the parties, in the case of breach. The underlying object is that an irrevocable commitment in the form of a bank guarantee, solemnly given by the bank, must be honoured, and respect for free flow of commerce

and trade, and faith in the commercial banking transactions, is inculcated unhedged by pending disputes between the beneficiary and the contractor. (**Ansal Engineering Projects Ltd.¹**).

As is evident from the recitals hereinabove extracted, the bank guarantees, in the present case, are unconditional and, in terms thereof, the bank agreed to pay the first respondent, on demand, any or all monies payable by the appellant, to the extent referred to in the bank guarantees, without any demur, and even without reference to the appellant. The demand made by the first respondent on the bank, in terms of the contract of bank guarantees, was to be conclusive and binding notwithstanding any difference between the appellant and the first respondent or any dispute pending between them before any Court, Tribunal, arbitrator or any other authority.

III. EXCEPTIONS, TO THE RULE THAT AN INJUNCTION SHOULD NOT BE GRANTED AGAINST INVOCATION OF BANK GUARANTEES, ARE NOT LIMITED TO FRAUD, AND CANNOT BE PLACED IN A STRAIT JACKET:

Sri D. Prakesh Reddy, Learned Senior Counsel appearing on behalf of the appellant, would submit that, besides fraud, encashment of the bank guarantees can be injuncted in cases of irretrievable injury, extra-ordinary special equities, and invocation of bank guarantee not being in terms of the bank guarantee itself; a straight jacket formula cannot, universally, be applied to all cases; and every case has to be decided with reference to the facts involved therein. On the other hand Sri C.V.Mohan Reddy, Learned Senior Counsel appearing on behalf of the first respondent, would submit that the only two exceptions, where invocation of the bank guarantee can be restrained, is if there is clear fraud of which the

bank has notice, and the fraud is of the beneficiary who seeks to benefit; the second exception is when there are special equities in favour of injunction, such as when irreparable injury or irreparable injustice would occur.

The two main exceptions, for grant of an order of injunction to restrain enforcement of a bank guarantee, are (1) the fraud committed is in the notice of the bank, and is such as to vitiate the very foundation of the guarantee; and (2) injustice of the kind which would make it impossible for the guarantor to reimburse himself. (**Techtrans Construction India Pvt Ltd & Ksheeraabad Constructions Pvt. Ltd. v. Reliance Utility Engineers Ltd.**²⁰; **Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co.**,²¹; **Sunac International Ltd**⁶). As injunction against encashment of a bank guarantee is an exception and not the rule, cases of such exceptions must be evidenced by documents and pleadings on record, and should compulsorily fall within any of the following limited categories (i) if there is a fraud in connection with the bank guarantee which would vitiate the very foundation of such guarantee and the beneficiary seeks to take advantage of such fraud; (ii) the applicant, in the facts and circumstance of the case, clearly establishes a case of irretrievable injustice or irreparable damage; (iii) the applicant is able to establish exceptional or special equities of the kind which would prick the judicial conscience of the Court; and (iv) when the bank guarantee is not invoked strictly in its terms, and by the person empowered to invoke it under the terms of the guarantee. In other words, the letter of invocation is in

²⁰ 2015 (1) ALT 275 (DB)

²¹ (2007) 8 SCC 110

apparent violation of the specific terms of the bank guarantee. (**Punj Lloyd Insulations Ltd. v. State Bank of India**²²). While cases of irretrievable injury, fraud, extraordinary special equities and invocation of bank guarantee contrary to the terms of the bank guarantee itself, are exceptions to the rule, it is difficult to draw any straitjacket formula which would universally apply to all cases. (**Synthetic Foams Ltd. v. Simplex Concrete Piles (India) Pvt. Ltd.**²³ and **Hindustan Construction Co. Ltd. v. Satluj Jal Nigam Ltd.**²⁴; **State Trading Corporation of India Ltd. v. State Bank of India**²⁵). Let us now examine whether the appellant has conclusively established that, in the present batch of cases, the exceptions, to the Rule against injuncting invocation of the bank guarantees, are attracted. Before doing so, it is necessary to examine whether, and to what extent, the documents filed at a stage posterior to the filing of the O.Ps, under Section 9 of the 1996 Act on 06.03.2017, can be looked into, and then consider the rival contentions on whether or not the first respondent has committed breach of the contract justifying grant of temporary injunction on a *prima facie* case being made out.

IV. CAN DOCUMENTS, FILED SUBSEQUENT TO THE FILING OF THE O.P, BE RELIED UPON?

Sri C.V. Mohan Reddy, Learned Senior Counsel appearing on behalf of the first respondent, would submit that the additional documents, that the appellant is now relying upon to establish special equities, were filed before the Commercial Court only as an afterthought, that too because the first respondent had, in its reply

²² AIR 2006 DELHI 256 = MANU/DAE/8543/2006 (Delhi HC (DB)

²³ MANU/DE/0214/1987: AIR 1988 Delhi 2007

²⁴ AIR 2006 Delhi 169

²⁵ 200 (2013) DLT 289 = MANU/DE/1273/2013

to the Section 9 petition, contended that these allegations were unsupported by evidence; this Court should first consider whether these documents were filed following the procedure prescribed under the amended Order XI Rule 4 and 5 CPC, mentioned in the Schedule to the 2015 Act; these provisions require the appellant to seek prior leave of the Court for filing additional documents; the appellant has belatedly filed additional documents before this Court, including the provisional balance sheet of the first respondent as at March 31, 2017, and the first respondent's letter dated February 02, 2017 which were issued to the appellant as a regular exercise carried out as part of their audit; and the contents of the provisional balance sheet of the first respondent cannot be considered as they are still pending approval by the shareholders.

On the other hand Sri D. Prakash Reddy, Learned Senior Counsel appearing on behalf of the appellant, would submit that the appellant filed as many documents as they could at the time of filing the petition in support of their contention; they subsequently brought in various other relevant documents in answer to the defence set up by the first respondent in its counter; they are (a) Design Coal Communications: (b) Extension of Time (c) More than Rs.300 Crores payable and (d) Respondent is making losses; Order XI Rule 5 applies to Suits, and not to O.P.s which are in the nature of interim applications; Order XI Rule 1 (1) (c) permits additional documents to be filed, even though they are in the possession of the petitioner at the time of filing of the petition, in answer to any case set up by the respondent subsequent to the filing of the petition; and this Court is empowered to receive additional

documents, as evidence at the appellate stage, under Order 41 Rule 27 CPC for any other substantial cause.

Section 10 of the 2015 Act relates to the jurisdiction in respect of arbitration matters and, under Sub-Section (3) thereof, where the subject matter of arbitration is a commercial dispute of a specified value and, if such arbitration is other than an international commercial arbitration, all applications or appeals arising out of such arbitration under the provisions of the 1996 Act, that would, ordinarily, lie for settlement in a District Court, shall be filed in, and be heard and disposed of by, the Commercial Court exercising territorial jurisdiction over such arbitration where such Commercial Court has been constituted. Since the application made by the appellant herein, under Section 9 of the 1996 Act, is more than the specified value, they had invoked the jurisdiction of the Commercial Court under Section 10(3) of the 2015 Act.

Section 9(1)(ii) of the 1996 Act enables a party to apply to a Court for interim measures with respect to the matters specified in Clauses (a) to (e) thereunder, and confers the same power on the Court for making orders as it has for the purpose of, and in relation to, any proceedings before it. Consequently the Commercial Court, before which the application under Section 9 of the 1996 Act was made, would have the same power to make orders under Section 9(1)(ii) of the 1996 Act as it has in relation to any proceedings before it. Section 2(e)(1) of the 1996 Act defines “Court” to mean, in case of an arbitration other than an international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in

the exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration, if the same had been the subject matter of a suit. Consequently an application, under Section 9(1)(ii) of the 1996 Act, can be filed by a party only before the principal Civil Court of original jurisdiction in a district. Where a statute provides a remedy before an ordinary Civil Court, the rules of procedure that would apply are the ordinary rules of the Civil Procedure Code. Where the principal Court of original jurisdiction is the District Court, the procedural provisions of the CPC govern the proceedings before the said Court (**Ashapura Minechem Ltd. v. Pacific Basin IHX (UK) Ltd**²⁶). Since the power exercised by the Court, under Section 9 of the 1996 Act, is akin to the power which the District Court exercises in proceedings before it, there is no reason why the provisions of the Civil Procedure Code, which are applicable to proceedings before the District Court, should be held not to apply to petitions filed under Section 9 of the 1996 Act.

Chapter VI of the 2015 Act relates to the amendments of the provisions of the Code of Civil Procedure. Section 16(1) stipulates that the provisions of the CPC shall, in their application to any Suit in respect of a commercial dispute of a Specified Value, stand amended in the manner as specified in the Schedule. Section 16(2) stipulates that the Commercial Court shall follow the provisions of the CPC, as amended by 2015 Act, in the trial of a Suit in respect of a commercial dispute of a specified value. The word “Suit” in Sections 16(1) & (3) of the 2015 Act would bring,

²⁶ (Judgment of the Division bench of the Bombay High Court in Appeal (L) No.764 of 2012 dated 24.01.2013)

within its ambit, petitions filed under Section 9 of the 1996 Act because all applications under the 1996 Act (which would include a petition under Section 9 thereof) are, in view of Section 10(3) of the 2015 Act, required to be filed in, and to be heard and disposed of by, the Commercial Court exercising territorial jurisdiction over such arbitration.

Section 16(3) of the 2015 Act stipulates that, where any provision of any rule of the jurisdictional High Court or any amendment to the CPC by the State Government is in conflict with the provisions of the CPC as amended by the 2015 Act, the provisions of the CPC, as amended by the 2015 Act, shall prevail. The Schedule to the 2015 Act has substituted Order XI of the Code of Civil Procedure (which relates to disclosure, discovery and inspection of documents) in Suits before the Commercial Court. Order XI Rule 1(a) requires the plaintiff to file a list of all documents and photocopies of all documents in its power, possession, control or custody, pertaining to the Suit, along with the plaint, including (a) documents referred to and relied on by the plaintiff in the plaint; (b) relating to any matter in question in the proceedings, in the power, possession, control or custody of the plaintiff, as on the date of filing of the plaint, irrespective of whether the same is in support of or adverse to the plaintiff's case. Clause (c) of Order XI Rule 1 stipulates that nothing in Rule (1) shall apply to documents produced by the plaintiff, and relevant only (i) for examination of the defendant's witness, or (ii) in answer to any case set-up by the defendant subsequent to the filing of the plaint, or (iii) handed over to a witness merely to refresh his memory.

The submission, made on behalf of the appellant, that Order XI Rule 1 does not apply, since the appellant's case falls within the ambit of clause (c)(ii) of Order XI Rule 1 is only to be noted to be rejected. The appellant was required to plead and prove fraud of an egregious nature or special equities or irretrievable injury in order to obtain an order of injunction restraining the first respondent from invoking the bank guarantees. It was obligatory for them, therefore, to plead and prove their case. The documents filed by them along with their reply to the counter filed before the Commercial Court by the first respondent, the documents filed by them at the time of arguments, and the documents filed along with their appeal before this Court, to establish their claim of egregious fraud/special equities/irretrievable injury, is not in answer to the case set up by the first respondent subsequent to the filing of the petition, but are those which the appellant was obligated to file, along with their Section 9 petition, before the Commercial Court on 06.03.2017 itself.

Order XI Rule 3, as substituted by the 2015 Act, requires the plaintiff to contain a declaration on oath from the plaintiff that all the documents in their power, possession, control or custody, pertaining to the facts and circumstances of the proceedings initiated by him have been disclosed, and copies thereof annexed with the plaint; and that the plaintiff does not have any other documents in its power, possession, control or custody. Under the Explanation thereto, a declaration on oath under Rule (3) of Order XI is required to be contained in the statement of Truth as set out in the Appendix. No such declaration was furnished along with the Section 9 petition filed before the Commercial Court.

Order XI Rule 4 enables a plaintiff, in the case of urgent filings, to seek leave to rely on additional documents, as part of the declaration on oath; and, subject to grant of such leave by the Court, the plaintiff is required to file such additional documents in Court, within thirty days of filing the Suit, along with a declaration on oath that the plaintiff has produced all documents in its power, possession, control or custody, pertaining to the facts and circumstances of the proceedings initiated by the plaintiff; and that the plaintiff does not have any other documents in its power, possession, control or custody. Order XI Rule (5) stipulates that the plaintiff shall not be allowed to rely on documents, which were in the plaintiff's power, possession, control or custody, and not disclosed along with the plaint or within the extended period set out above, save and except by leave of the Court and such leave shall be granted only upon the plaintiff establishing reasonable cause for non-disclosure along with the plaint. Neither did the appellant, while filing the Section 9 petition, seek leave of the Court to file such additional documents within thirty days of filing the O.P nor was leave sought by them at any time thereafter. It is only if leave had been sought would the question of the Court being satisfied, that the appellant had established reasonable cause for non-disclosure along with the plaint, arise for consideration.

The appellant filed the O.P. before the Commercial Court on 06.03.2017. Along with the O.P, they filed a copy of the certificate of incorporation; a copy of the coordination agreement between them and the first respondent dated 23.03.2014; a copy of the on-shore service contract dated 10.04.2011; a copy of the Supply

(FOB contract) between the appellant, the first respondent and CTC dated 20.01.2012; a copy of the letter addressed by the first respondent separately to them, and to the CTC, on 23.03.2017 claiming liquidated damages; a copy of the letter addressed by the appellant to the first respondent on 02.01.2017 seeking extension of the contract period; and a copy of the bank guarantee dated 27.09.2014.

After the first respondent filed its counter-affidavit in the O.Ps before the Commercial Court, the appellant filed its reply thereto on 28.03.2017, to which it enclosed (i) copy of the letter dated 27.03.2017 extending the bank guarantee; (ii) a copy of the letter dated 25.07.2014 addressed by the first respondent to CTC seeking early delivery of the BTG equipment as it was delaying the overall project completion schedule; (iii) copy of a similar letter addressed by the appellant to the first respondent informing them that failure to declare provisional acceptance was because of factors beyond their control, and for release of the amount due on provisional acceptance test for Unit I; (iv) a copy of the letter dated 02.12.2016, addressed by the appellant to the first respondent, requesting them to issue provisional acceptance test certificate for Unit I, and to release the payments due; (v) a copy of the letter dated 06.12.2016 addressed by CTC to the first respondent regarding use of design coal; (vi) a copy of the letter dated 18.01.2017 addressed by the appellant to the first respondent wherein they stated that the boiler efficiency could not be measured as the coal used was different from the one stipulated in the specifications; (viii) a copy of the Regional Energy Account of Central Electricity Authority, Bangalore dated 03.02.2017; (viii) a

copy of the monthly progress report of the Southern Regional Power Committee of the Central Electricity Authority dated 06.03.2017; (ix) a copy of the Region-wise Generation Report dated 19.03.2017; and (x) copy of the E-mail dated 04.07.2016 regarding firing of Indonesia coal.

Subsequently, at the stage of arguments in the O.P. on 06.04.2017, the appellant filed the following documents without seeking leave of the Court to do so i.e (i) a copy of the letter dated 27.03.2017 addressed by the first respondent to the appellant that Coal was heterogeneous in nature, it could not exactly match the design coal, the first respondent held sufficient quantity of design coal, and was willing to make available design coal for the purpose of conducting performance guarantee tests as and when the appellant was ready to conduct such tests; (ii) a copy of the letter dated 01.04.2017 stating that the use of non-design coal by the first respondent had made CTC suffer great losses for which CTC could claim extension of time and additional costs; (iii) a copy of the Director's report of the first respondent wherein it is stated that, as at 31.07.2016, the first respondent had achieved overall EPC progress of 97.67%.

It is only at the stage of filing an appeal, against the order of the Court below, i.e on 08.06.2017, have the appellants filed (i) a copy of the provisional balance sheet of the first respondent as at 31.03.2017; (ii) a copy of the balance confirmation letter of the first respondent as on 31.03.2017 forwarding a copy of the extract of the ledger balance of the appellant in the books of accounts of the first respondent as on 31.03.2017; (iii) a copy of the arbitration notice issued by the appellant to the first respondent dated

27.05.2017; (iv) a copy of the first respondent's e-mail dated 02.06.2017 to discuss the possibility of an amicable settlement; and (v) a copy of the e-mail sent by the appellant to the first respondent on 05.06.2017.

While some of the aforesaid documents relate to a period posterior to the filing of the O.P. on 06.03.2017, the fact remains that even with regards documents anterior to the filing of the O.P, neither did the appellant seek leave of the Commercial Court, to file the documents, which they had filed, along with their reply to the counter-affidavit of the first respondent, on 28.03.2017 nor was leave sought for filing the documents at the stage of arguments on 06.04.2017. As no leave was sought, the question of leave being granted by the Commercial Court does not arise. Consequently, in terms of the aforesaid provisions, the appellant would not be entitled to place reliance on these documents, for which leave of the Commercial Court was neither sought nor granted. A party has to plead the case and produce/adduce sufficient evidence to substantiate his submissions made in the petition. (**Ritesh Tewari v. State of U.P.**,²⁷). When a point is ostensibly a point of law, which is required to be substantiated by facts, the party raising the point must plead and prove such facts by evidence which must appear from the petition. If the facts are not pleaded, or the evidence in support of such facts is not annexed, the Court will not entertain the point. (**Ritesh Tewari**²⁷; **Bharat Singh v. State of Haryana**²⁸). As documents, for which leave of the Commercial Court was not obtained, cannot be

²⁷ (2010) 10 SCC 677

²⁸ (1988) 4 SCC 534

considered, it is only if the documents filed on 06.03.2016, along with the petition, substantiate the pleadings in the petition, can such pleas be examined.

In any event most of the documents, on which reliance is placed on behalf of the appellants, were filed in support of their claim that it is the first respondent's failure to abide by its obligations under the underlying agreements which resulted in their inability to perform their obligations of conducting a provisional acceptance test. We shall now briefly note the rival contentions, urged by Learned Senior Counsel appearing on behalf of the appellant and the first respondent, on merits to buttress our conclusion that these rival claims necessitate detailed examination in the arbitral proceedings, before it can be conclusively determined as to which of the parties to the agreement had caused breach of its terms.

V. WHEN CAN A *PRIMA-FACIE* CASE, FOR GRANT OF INJUNCTION RESTRAINING THE INVOCATION OF BANK GUARANTEE, BE SAID TO HAVE BEEN MADE OUT?

While the appellant had sought a temporary injunction in the O.Ps, to restrain the first respondent from encashing the bank guarantee pending its disposal, the O.Ps themselves were dismissed by the Commercial Court. The discretion of the Court is exercised to grant a temporary injunction only when the following requirements are made out by the plaintiff: (i) existence of a *prima facie* case as pleaded, necessitating protection of the plaintiff's rights by issue of a temporary injunction; (ii) when the need for protection of the plaintiff's rights is compared with or weighed against the need for protection of the defendant's rights or likely infringement of the defendant's rights, the balance of convenience

tilting in favour of the plaintiff; and (iii) clear possibility of irreparable injury being caused to the plaintiff if the temporary injunction is not granted. In addition, temporary injunction being an equitable relief, the discretion to grant such relief will be exercised only when the petitioner's conduct is free from blame and he approaches the court with clean hands. (**Seema Arshad Zaheer v. Municipal Corpn. of Greater Mumbai**²⁹).

While the aforesaid factors must be borne in mind in examining an application seeking temporary injunction, an application to injunct encashment of a bank guarantee stands on a different footing. Courts must not lose sight of the fact that the commitment of banks must be honoured free from interference (**Tarapore & Co.**³), and the Court would, ordinarily, not interfere with enforcement of the bank guarantee except only in cases where fraud or special equity or irretrievable injustice is, prime facie, made out in the case as a triable issue by strong evidence so as to prevent irretrievable injustice to the parties. The trading operation should not be jettisoned, and faith of the people in the efficacy of banking transactions should not be eroded or brought to disbelief. (**Ansal Engineering Projects Ltd.**¹). When, in the course of commercial dealings, an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank, giving such a guarantee, is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. Courts should, therefore, be slow in granting an

²⁹ (2006) 5 SCC 282

injunction to restrain realization of such a bank guarantee. **(Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineering Works (P) Ltd.,³⁰; Svenska Handelsbanken¹⁶; Larsen & Toubro Ltd.¹⁷; G.S. Atwal & Co. (Engineers) (P) Ltd.¹⁸ and Sumac International Ltd.⁶).**

An unconditional bank guarantee can be invoked in terms thereof by the person in whose favour the bank guarantee is given, and Courts would, ordinarily, be reluctant to grant an injunction against invocation of a bank guarantee. **(Tarapore & Co.³; Singh Consultants & Engineers (P) Ltd.⁷; Bolivinter Oil SA¹⁵; Svenska Handelsbanken¹⁶; Larsen & Toubro Ltd.¹⁷; G.S. Atwal & Co. (Engineers) (P) Ltd.¹⁸; Flowmore (P) Ltd.¹⁹; National Construction Co.¹¹; Tarapore & Co.³; ICICI Bank Ltd¹³).** While the sound banking system may require more caution in the issuance of irrevocable documentary credits, it would be for the banks to safeguard themselves by other means, and generally not for the Court to come to their rescue with injunctions. **(Singh Consultants and Engineers (P) Ltd.⁷).**

The Courts usually refrain from granting injunction to restrain the performance of contractual obligations arising out of a letter of credit or a bank guarantee between one bank and another. If such temporary injunctions were to be granted in a transaction between a banker and a banker, restraining a bank from recalling the amount due when payment is made under reserve to another bank, or in terms of the letter of guarantee or credit executed by it, the whole banking system in the country would fail. In view of the banker's obligation under an irrevocable

³⁰ (1997) 6 SCC 450

letter of credit to pay, his buyer- customer cannot instruct him not to pay. (**Singh Consultants and Engineers (P) Ltd.**⁷; **United Commercial Bank**¹²). The Court should not lightly interfere with the operation of irrevocable documentary credit, except where there is a serious dispute to be tried, and there is a *prima facie* act of fraud. (**Edward Owen Engineering Ltd.**⁹; **Singh Consultants and Engineers (P) Ltd.**⁷).

Injunctions against the negotiating banks, for making payment to the beneficiary, must be given cautiously as constant judicial interference, in the normal practices of the market, can have disastrous consequences since it affects the trustworthiness of the Indian banks and markets. (**Millenium Wires (P) Ltd. v. State Trading Corporation of India Ltd**³¹; **ICICI Bank Ltd.**¹³). Only in exceptional cases would the Courts interfere with the machinery of irrevocable obligations assumed by banks. In the case of a confirmed performance guarantee, just as in the case of a confirmed letter of credit, the bank is only concerned with ensuring that the terms of its mandate and confirmation has been complied with. It is in no way concerned with any contractual disputes which might have arisen between the buyer and the seller. (**Tarapore & Co.**³; **R D,. Harbottle (Mercantile) Ltd. v. National Westminster Bank Ltd.**³²).

The following principles should be noted, in the matter of injunction to restrain encashment of a bank guarantee, (i) while dealing with an application for injunction in the course of commercial dealings, and when an unconditional bank guarantee

³¹ 2015 (4) SCALE 62

³² 1977 2 All ER 862

is given or accepted, the beneficiary is entitled to realise such a bank guarantee in terms thereof irrespective of any pending disputes relating to the terms of the contract; (ii) the bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer; (iii) the Courts should be slow in granting an order of injunction to restrain the realisation of a bank guarantee; (iv) since a bank guarantee is an independent and a separate contract, and is absolute in nature, existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of bank guarantees; (v) fraud should be of an egregious nature which would vitiate the very foundation of such a bank guarantee or letter of credit, and the beneficiary has sought to take advantage of the situation; and (vi) allowing encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. (**Gujarat Maritime Board²; Techtrans Construction India Pvt Ltd & Ksheeraabad Constructions Pvt. Ltd.²⁰**). The Court should look into the terms of the bank guarantee, and the letter of invocation, in deciding the fate of a prayed injunctive relief. (**Continental Construction Ltd. v. Satluj Jal Vidyut Nigam Ltd³³**).

As the appellant has sought an injunction to restrain the first respondent from invoking the bank guarantee in the Section 9 petition, and in the appeal now filed before us, the scope and ambit of the contract of bank guarantee primarily necessitates examination, and not the underlying contract, for the rival claims, based on disputes arising from the underlying contract, are

³³ 2006 (1) ARBLR 321 (DELHI) = MANU/DE/8175/2006 (Delhi HC)

matters for examination and resolution in arbitral proceedings. Nonetheless, the contentions urged by the Learned Senior Counsel on either side are being noted to show that the appellant does not have a fool proof case of even the underlying contract being vitiated by fraud justifying an injunction being granted to restrain the first respondent from invoking the bank guarantees.

(a) THE FIRST RESPONDENT HAS COMMENCED COMMERCIAL OPERATIONS:

Sri D. Prakash Reddy, Learned Senior Counsel appearing on behalf of the appellant, would submit that the appellant has completed all erection works, and has fulfilled all its obligations ordained by the EPC Contracts, except conducting performance guarantee tests; the first respondent had stated that, as on 31.07.2016, the appellant had achieved overall EPC progress of 97.67%; according to the monthly progress report, of the Southern Regional Power Committee for the month of January 2017, commercial operations started on 17.11.2016 for Unit 1 and on 21.02.2017 for Unit II; the purpose of the performance guarantee tests, pre-commissioning tests etc. are to ensure that the Plant is put to commercial use; and, as commercial operations have started, provisional acceptance is deemed to have been achieved.

On the other hand Sri C.V. Mohan Reddy, Learned Senior Counsel appearing on behalf of the first respondent, would submit that till date the appellant has not achieved Provisional Acceptance of Units 1 and 2, in terms of the EPC Contracts; they have not even issued the 20 days' prior written notice to the first respondent, as required under Article 6.2 of the Onshore Services Contract, conveying its intention to commence Provisional Acceptance

Testing; the appellant has not complied with the amended Articles 6.3.1.1 and 6.3.1.2 of the Onshore Services Contract which provide for the tests required to be conducted for successful completion of Provisional Acceptance; they have not complied with the terms of the amended Article 6.3.2 of the Onshore Services Contract which requires them to deliver, to the first respondent, a notice of provisional acceptance; for the appellant's failure to achieve provisional acceptance, the first respondent is entitled to claim delay liquidated damages from the appellant, and to invoke the bank guarantees in lieu thereof; the Performance Guarantee Test is a stage subsequent to the Provisional Acceptance Test, which has not been undertaken till date; the issue of Performance Guarantee Test is not relevant, for the purposes of the Provisional Acceptance Test and its related milestone payment; the appellant has also failed to achieve Final Acceptance in terms of Article 6.4 of the Second Amendment to the On-Shore Services Contract Agreement; commencement of commercial operation of the power plant does not establish that provisional acceptance has been achieved, till the prescribed conditions are fulfilled, and a provisional acceptance test certificate is issued by the first respondent; and the tripartite discussion held on February 22, 2017, and the letter dated January 02, 2017 show that the progress could not have been 97.67% complete as on July 31, 2016.

In the Director's Report, presented to the shareholders as part of the 8th Annual Report together with audited financial statements for the year ending 31.03.2016, the Directors of the first respondent stated that, as on July 31st 2016, the first respondent had achieved over all EPC progress of 97.67%; all BTG

and BOP material supply had been completed, and supply of balance mandatory spares were on going. The fact, however, remains that, subsequently, the appellant, in its letter dated 2.01.2017, informed the first respondent that over a year had elapsed since they had lodged their first request for extension in the contract period without any constructive response from the first respondent, despite which they had continued to render services under the contract; and a number of delay events had occurred in the project which were beyond their control, and for reasons not attributable to them, but they had claimed only a few of them as justification for extension of time. This letter dated 02.01.2017 acknowledges that the appellant was likely to achieve provisional acceptance test for Unit -2 by 31.03.2017 by implementing various expediting measures at a considerably higher cost.

The tripartite discussions held on 22.02.2017 between the appellant, the first respondent and the CTC records the action plan to achieve provisional acceptance test, and the target completion dates for various items to be completed by the appellant and the CTC by the end of February, 2017 for all most all the items such as reliability test run; minimum performance guarantee test on auxiliary power not more than 105%; minimum performance guarantee on test heat rate not more than 1.3%; emission limits; finalization of the BTG manual; and bottom ash conveying not possible through HCSD. While all the aforesaid defects were to be completed by the appellant by 26.02.2017, the commissioning of the fire alarm detection system was to be completed by the appellant by 15.03.2017. It does appear, from the letter dated

02.01.2017 addressed by the appellant to the first respondent and the tripartite discussions held on 22.02.2017, that the first respondent's claim, in the Directors Report, of having achieved a progress of 97.67% by 31.07.2016, was highly exaggerated.

The on-shore services contract dated 10.04.2011 defines "*performance guarantee*" to have the meaning set forth in Article 8.1; "*performance guarantee liquidated damages*" to have the meaning set forth in Article 8.1, and to be payable as liquidated damages and not as a penalty; "*performance guarantee test*" to mean the performance guarantee test conducted in accordance with the provisions of Article 6.4.1 for the purpose of determining the facility's achievement of the performance guarantee; "*provisional acceptance*" to mean, with respect to the facility, the achievement of substantial performance in accordance with the provisions of Article 6.4; "*provisional acceptance certificate*" to have the meaning set forth in Article 6.4; and "*provisional acceptance test*" to mean the provisional acceptance test conducted in accordance with the provisions of Article 6.3.1.

Article 6.3.1.1 stipulates that the provisional acceptance tests for the Units shall consist of the tests and achievements of the performance levels mentioned thereunder, which are (a) the operation of the Unit as a whole for fifteen continuous days and during each such fifteen-day test period, the Unit shall be operated for not less than 72 hours continuously at 100% STG MCR; (b) the unit demonstrates an electrical output equal to or greater than 97.5% of the electrical output guarantee, and a gross heat rate equal to or lower than 103% of the heat rate guarantee and, for the purpose of demonstrating the achievement of the gross heat rate

and electrical output levels required for provisional acceptance for the facility, the provisional acceptance test shall consist of the operation of the units as a whole for not less than four hours at a load condition of 100% STG MCR and 80% STG MCR; (c) the units meets the ramp rates, reactive power capability, full load rejection capability; maximum capacity at value wide open conditions as per technical specifications; and (d) the units meet the guaranteed emission limits. It further stipulates that, once the Unit has successfully completed commissioning and start-up, and is capable of safe operation in accordance with applicable laws, applicable permits, prudent utility practices, the technical limitations and requirements of the operating manual, the appellant shall be entitled to perform a provisional acceptance test for the unit control tuning, and the operation used during the provisional acceptance test shall be identical to the control tuning and operation that would be used during normal operation.

Article 6.3.1.2 provides that the provisional acceptance of the Units shall be achieved upon the successful completion of the factors mentioned in Clauses (a) to (f) thereunder. Clause 6.3.2 required the appellant, if it believed that it had achieved provisional acceptance for the facility, to deliver to the first respondent a notice of provisional acceptance which is required to contain a report, in the form previously agreed by the appellant and the first respondent, of the results of the acceptance test, and the works completed, with sufficient detail to enable the first respondent to determine whether provisional acceptance for the facility had been achieved.

Article 6.4 relates to the performance guarantee test and Article 6.4.1 stipulates that final acceptance of the units shall be achieved if the conditions mentioned thereunder are met. Sub-clause (a) required the appellant to have concluded a single test for the units in accordance with the testing protocol and standards as set out in the technical specifications (the performance guarantee test) in which the facility demonstrates a level of achievement of (i) 100% (or higher) of the electrical power electrical output guarantee and (ii) 100% (or lower) of the heat rate guarantee, for the facility, and the facility demonstrates 100% (or lower) of the auxiliary power guarantee as set forth in Appendix V. Final acceptance also requires the conditions, in clauses (b) to (f) mentioned thereunder, to be met.

Article 6.4.2 required the appellant to deliver to the first respondent a notice of provisional acceptance. It is evident, therefore, that the performance guarantee test, which is among the tests to determine whether the unit has achieved final acceptance, is to be undertaken subsequent to the provisional acceptance test to be conducted by the appellant in terms of Article 6.3.1.2. The aforesaid clauses disclose that the provisional acceptance test for Units I and II consist of several tests, achievements and performance levels. The first respondent claimed liquidated damages by their notice dated 23.02.2017, a day after 22.02.2017 when the tripartite discussions were held between the appellant, the first respondent and CTC. From the minutes of the tripartite discussions held on 22.02.2017 it does appear that several items of works had not been completed by the appellant by then. Whether or not these works, which the appellant was required to

complete, and had agreed to do so, by the last week of February and by mid March, 2017, are significant are again matters for consideration in the arbitral proceedings, and not in a Section 9 petition wherein the relief, of injunction against encashment of bank guarantee, was sought. While the first respondent does appear to have commenced commercial operations, it does also seem that the appellant did not conduct the provisional acceptance test for Units 1 and 2 till the filing of the O.P on 06.03.2017, or at any time thereafter. Whether inability of the appellant to conduct the provisional acceptance test is due to the failure of the first respondent to fulfill their obligations under the Contract, is for the arbitral tribunal to consider, and are not matters for examination either in Section 9 petition, or in an appeal arising from an order passed therein.

(b) EFFECT OF THE DELAY ATTRIBUTABLE TO THE CHINESE CONSORTIUM, AND FAILURE TO CLAIM DAMAGES IN THE MONTHLY BILLS DURING EXECUTION OF THE WORKS:

Sri D. Prakash Reddy, Learned Senior Counsel appearing on behalf of the appellant, would submit that liquidated damages can be levied only if the delay attributable to CTC was lesser than that attributed to the appellant; the first respondent has, itself, claimed that the delay was on the part of the CTC to supply the BTG equipment material, which covers the whole period of delay of 555 days for Unit 1 and 495 days for Unit 2; the delay, attributed to the appellant in achieving Provisional Acceptance, is allegedly 471 days for Unit 1 and 379 days for Unit 2, which is lesser than the period of delay alleged against the CTC; this amounts to claiming damages for the same delay twice i.e. both from the CTC and the appellant; there cannot be any delay on the part of the appellant in

erection when, admittedly, supply of the BTG Equipment was delayed; the appellant cannot be held responsible for the alleged delays in the supply of BTG Equipment by the CTC; from the letter of the CTC dated 01.04.2017, it is evident that the BTG equipment could not be supplied on time only because the first respondent did not open a letter of credit within the agreed time schedule; the first respondent is making these false claims only to avoid making payment of the admitted amounts due; in view of Section 58 of the Indian Evidence Act, 1872, the appellant need not prove an admitted fact, established by the documents of the first respondent itself; and the delay notified by the appellant, vide its letter dated 02.01.2017, was upto 24.05.2016 only, whereas the delay calculated for 471 days was till 23.02.2017.

On the other hand Sri C.V. Mohan Reddy, Learned Senior Counsel appearing on behalf of the first respondent, would submit that the EPC Contracts confer a right on the first respondent to claim delay liquidated damages from the appellant, in case provisional acceptance test is not completed for Unit 1 by November 10, 2015, and for Unit 2 by February 10, 2016; Article 7.2 of the second amendment, to the Onshore Services Contract, extends the right to claim Late Completion Liquidated Damages in case the appellant fails to achieve provisional acceptance of Units 1 and 2 within time; invocation of the bank guarantees, in lieu of delay liquidated damages, is a right which has been granted to the first respondent under the EPC Contracts, and the Co-ordination Agreement; the liquidated damages, claimed from the parties i.e. the Petitioner and CTC, have become due on account of the delay caused in performing different obligations under different

agreements; the two claims are independent of each other, and can be invoked simultaneously without prejudice to one another; the appellant became liable to pay liquidated damages to the first respondent for failure to complete the works under the EPC Contracts, and for failure to achieve Provisional Acceptance; Clause 10.6 of the Co-ordination Agreement stipulates that the EPC Contracts are independent and separate contracts; irrespective of the belated supply of the BTG equipment by CTC, the appellant was bound to complete other works under the EPC Contracts which were not dependant on the supply of BTG equipment; the said works were not completed by the appellant on time; they caused delay in supply and erection of foundations, delay in construction of civil and steel structures, and delay in delivery of equipment; they failed to augment all necessary resources including skilled manpower, plant and tools, as a result of which the Project got delayed, and the first respondent had to incur significant losses; as time was of essence, the first respondent had requested the appellant-petitioner to perform its obligations including the obligation to expedite the works to meet the completion schedule; due to various delays, inactions, omissions and breach of contractual obligations by the appellant, the first respondent has suffered substantial losses and damages, including in respect of Works to be completed by the appellant on behalf of the first respondent, settlement of land and labour related issues, significant increases in financing costs, and various penalties to third parties; because of the failure of the appellant to execute the works within time, the first respondent had to carry out certain works, and procure certain material and equipment,

the cost of which is recoverable from the appellant; the first respondent is also entitled to recover costs incurred towards de-scoping of works, labour cess, pending roads/drains/painting works and purchase of spare parts etc; and such costs/losses, added up together, far exceeds the pre-estimated liquidated damages provided under the EPC Contracts or the amount of Rs. 304.5 Crores which the appellant claims is allegedly payable by the first respondent to them.

By their letter dated 23.02.2017, the first respondent informed the CTC that they were under an obligation to ensure delivery of BTG equipment within 27 months and 29 months for Units-1 and 2 respectively; it was agreed, among the parties, that time would be of essence for delivery of the BTG equipment; there had been a delay in completion of delivery of the equipment by 555 days for Unit-1, and 495 days for Unit-2, as against the firm and committed delivery schedule; and, as a result, there had been a delay in provisional taking over and final taking over for Units 1 and 2, which had caused additional direct losses to the appellant over and above the pre-estimated liquidated damages provided under the supply (FOB) Contract. For reason of the CTC's failure to meet the delivery schedule, the first respondent demanded that CTC pay liquidated damages for the amounts specified in the letter. They also stated that they had the right to offset the liquidated damages against payments to the CTC, in case the liquidated damages were not paid on or before 09.03.2017. It is relevant to note that this letter was addressed by the first respondent to the CTC on 23.02.2017, a day after the tripartite meeting held between the appellant, the first respondent and the

CTC on 22.02.2017 wherein the appellant and the CTC had acknowledged that several requirements were yet to be completed; and they would be completed on the dates, mentioned in the minutes, which are from 23.02.2017 till 15.03.2017.

By their letter dated 23.02.2017, the first respondent informed the appellant that they had, time and again, requested the latter to expedite completion of the works under the EPC contracts, but they had not, till date, claimed liquidated damages from the appellant because of cash flow issues of the appellant, and in the interest of achieving project completion at the earliest; the appellant was yet to complete the works under the EPC contracts, and there had been inordinate delay in achieving provisional acceptance, as set forth in detail in Annexure-I; and the first respondent was invoking its right to claim the following liquidated damages in accordance with the terms of each contract i.e., (a) Rs.134 crores under the Civil and Construction Works Contract; (b) Rs.145.75 crores under the Supply (Ex-Works) Contract; (c) Rs.9.04 Million US Dollars under the Supply (C&F) Contract; and (d) Rs.8.5 crores under the ON-Shore Services Contract.

The appellant was requested to pay the aforesaid amounts under the relevant EPC contracts on or before 10.03.2017 against each of the EPC contracts and were informed that, in the event they failed to make payments on or before the said date, the appellant would have the right to set off the liquidated damages against any payment due to the appellant, and this letter was being issued without prejudice to the rights, approved rights or other rights of the first respondent under the EPC contracts. The

letter of the appellant dated 02.01.2017 shows that they themselves have attributed the delay in completion of the project to several factors, and have not confined it merely to the delay on the part of the CTC to supply the BTG equipment. The first respondent claims that the appellant had caused delay in supply and erection of foundations, delay in construction of civil and steel structures, and delay in delivery of equipment; they failed to augment all necessary resources, skilled manpower, plant and tools; because of the failure of the appellant to execute works within time, the first respondent had to carry out certain works, and procure certain material and equipment, the cost of which was recoverable from the appellant; and they were also entitled to recover the costs incurred, towards de-scoping of works, labour cess, pending roads/drains/painting works and purchase of spare parts etc, from the appellant. These rival claims, by the appellant and the first respondent, that the other was responsible for the delay in completion of Provisional Acceptance test are also required to be considered by the arbitral tribunal, and are not matters for elaborate examination in an appeal arising out of an order passed in a Section 9 petition.

(c) CLAUSES 3.1 AND 3.2 OF CO-ORDINATION AGREEMENT AND CLAUSE 7 OF THE ONSHORE AGREEMENT:

Sri D. Prakash Reddy, Learned Senior counsel appearing on behalf of the appellant, would submit that clauses 3.1 and 3.2 of the co-ordination agreement, which starts with a non-obstante clause, prohibit the appellant – contractor being made liable for delay liquidated damages, if the delay is attributable to CTC; in terms of clause 7.2.2 of the On-shore services Agreement, only the undisputed amount can be set off for Late Completion Liquidated

Damages; neither the impugned notice dated 23.02.2017, nor any of its previous communications, contain any allegation that the appellant is not entitled for the benefits of the exclusionary clause; the appellant is, therefore, not legally required to plead that they do not fall under any one of the said exceptions; and, at any rate, the appellant has pleaded that, according to the co-ordination agreement, it is entitled for exclusion of the delay caused by the CTC in supply of the BTG Equipment.

On the other hand Sri C.V. Mohan Reddy, Learned Senior Counsel appearing on behalf of the first respondent, would submit that Clauses 2.3 and 2.4 of the co-ordination agreement make it clear that the contractual obligations of the appellant, under the co-ordination agreement, were much wider than mere facilitating co-ordination between the first respondent and the CTC; in terms of the proviso to Clauses 3.1 and 3.2 of the Co-ordination Agreement, the appellant is barred from claiming exclusion from liability for any delay liquidated damages and/or for delay in completion of Provisional Acceptance Test for Units 1 and 2, if such delay is attributable to them; in the present case the appellant has delayed completion of works; the appellant is, therefore, not entitled to claim exemption from liability simply by placing reliance on the introductory part of Clauses 3.1 and 3.2; the appellant has not pleaded, in the Section 9 petition, that it is not liable to pay delay Liquidated Damages because Clause 3.1 (A) to (D) is not applicable; and the first respondent neither had the opportunity to rebut such a claim of the appellant nor could it have been expected to disclose its entire defense in its letter dated February 23, 2017, and to have stated that, despite the delay on

the part of CTC, the appellant is liable to pay Liquidated Damages on account of application of Clauses 3.1 (A) to (D) and 3.3 of the Co-ordination Agreement.

Clause 3 of the co-ordination agreement relates to breach or failure of the CTC and, under Clause 3.1, notwithstanding anything contrary in the co-ordination agreement, the first respondent agreed that the appellant shall not be liable for delay, or for any delay liquidated damages, due to failure of the CTC to achieve the boiler, turbine and generator (BTG) delivery dates on FOB basis of 27 months from 5th March, 2012 for Unit-I and 29 months from 5th March, 2012 for Unit-II (BTG FOB Delivery), provided always that this exclusion would not apply if and where: (A) delay was attributable to the appellant's lack of proper and timely coordination on shipping or transit or transportation of material from FOB port of loading to unloading at the project site; or (B) delay was due to interfacing or lack of interfacing between the CTC and the appellant; or (C) the delay was attributable to the appellant's breach or default of any of the contracts; or (D) the appellant did not make every reasonable effort to mitigate such delay.

Clause 3.2 provided that, notwithstanding anything to the contrary in the co-ordination agreement, the first respondent agreed that the appellant shall not be liable for delay in achieving and due completion of provisional acceptance tests for Unit-1 by 10th November, 2015 and for Unit-2 by 10th February, 2016, and if such delay and such non-achievement were solely due to the CTC, provided always that this exclusion would not apply if and where: (A) the appellant did not properly handle and/or store

and/or install the BTG equipment, material or components supplied by the CTC; or (B) delay was due to interfacing or lack of interfacing between the CTC and the appellant; or (C) the delay or such non-achievement of provisional acceptance tests for Unit -1 by 10th November, 2015 and Unit 2 by 10th February, 2016 was attributable to the appellant's breach or default of any of the contracts; or (D) the appellant did not make every reasonable effort to mitigate the effect of such delay or non-achievement.

Clause 3.3 stipulated that, where any delay by the CTC in meeting the BTG FOB delivery dates set out in Clause 3.1 did not fall under any of the exclusions set out in sub-clauses 3.1(A), (B), (C) and (D), or where any delay by the CTC, in meeting the performance test dates set out in Clause 3.2, did not fall under any of the exclusions set out in clause 3.2(A), (B), (C) or (D), the appellant should be granted a day-for-day extension on the overall completion schedule without any entitlement to any damages for prolongation costs in respect of any part of the work under the contracts in respect of such extension of time. Clause 3.3 places the onus of proving, that the delay was solely on account of CTC, on the appellant at all times.

Clause 4.1 stipulated that, notwithstanding any provision to the contrary in the contracts, the appellant agreed that any trigger for late completion liquidated damages, in any of the contracts, would automatically trigger all late completion liquidated damages payments under all the contracts unless such delays were attributable to the CTC under Clauses 3.1 or 3.2; the amount of late completion liquidated damages per day of delay shall not exceed Rs.1.56 Crores for Unit 1 and Rs.1.04 Crores for Unit 2,

and the total late completion liquidated damages under the contracts shall not exceed 10% of the aggregate of the contract prices. In terms of Clause 4.1 the appellant agreed that it shall not be entitled for any extension of time beyond 10.11.2015 for Unit -1 and 10.02.2016 for Unit -2 or for any additional costs under the contracts or under the co-ordination agreement by reason of any failure or delay in deliveries based on sequential delivery schedule arrangements between the CTC and the first respondent; Clause 4.4 of the Co-ordination Agreement permits the first respondent to draw on any performance security under any of the EPC Contracts, in case of any outstanding liability or claim of the first respondent against the appellant.

Article 7, of the on-shore service contract dated 10.04.2011, relates to late completion liquidated damages and extension of time. Article 7.1, thereunder, stipulates that time is the essence of the contract with respect to each unit, the project and the contract; each unit shall achieve provisional taking over and final taking over by a date certain in accordance with clauses (a) to (d) thereunder. Article 7.2 stipulates that, if the provisional acceptance does not occur by the scheduled completion date for each unit, the appellant shall pay to the first respondent, subject to the limitation set forth in Article 9.1 as liquidated damages and not as a penalty, the amount of 0.5% of the contract price of each unit per week after the 30th calendar day by which the provisional acceptance for each unit is later than the scheduled completion date. This is subject to the timely sequential deliveries guaranteed under the Owner's Supply (C & F) Contract having been met and the delay in provisional acceptance not attributable to short

supplies or failure during erection and commissioning of supplies under the Owner's Supply (C & F) Contract.

Article 7.2.2 stipulates that the appellant shall pay the late completion liquidated damages, required to be paid under Article 7.2, monthly in arrears, against the first respondent's debit note, by wire transfer on the tenth day of each month, with the last such payment to occur on provisional acceptance with respect to the facility; if the appellant is obligated to pay any late completion liquidated damages to the first respondent under Article 7.2, and such undisputed amount is not paid within the time period referred to above, the first respondent shall have the right to offset any such amount against any amounts then or thereafter due from the first respondent to the appellant, or to exercise its rights against any security provided by the appellant, in such order as the first respondent may elect in its reasonable discretion.

The construction of the aforesaid clauses, to determine whether or not the appellant is liable for liquidated damages, for the delay in achieving provisional acceptance test by the prescribed dates, is again a matter for the arbitral tribunal to consider. Suffice it to note that Clause 4.1 of the co-ordination agreement confers, on the first respondent, the right to claim late completion liquidated damages for each day's delay subject to the limit of 10% of the aggregate of the contract price; and Article 7.2.2 of the on-shore service contract confers power on the first respondent to offset any amount due from them to the appellant, or to exercise their right against any security provided by the appellant, on failure of the appellant to pay late completion liquidated damages.

(d) IS NON-SUPPLY OF DESIGN COAL, THE REASON FOR THE APPELLANT'S FAILURE TO ACHIEVE PROVISIONAL ACCEPTANCE TEST?

Sri D. Prakash Reddy, Learned Senior Counsel appearing on behalf of the appellant, would submit that Article 5.7 of the On-shore Services Contract stipulates that it is the duty of the first respondent to arrange for the specified fuel to be delivered to the site to enable the Contractor to perform the start-up and testing of the facility; the fuel to be supplied by the first respondent was termed as "Design Coal", which contains various technical specifications as mentioned in Appendix-X of the On-shore services contract; various parameters, stipulated under the EPC Contracts, entered into between the first respondent and the appellant for the performance guarantee tests, could not be achieved by the use of non-design coal; the performance guarantee tests could not be conducted since the respondent did not supply design coal, which is an essential ingredient for conducting the tests; the first respondent did not have the design coal, and only had supplies of Indonesian coal; the first respondent itself sought a clarification, with respect to the suitability of Indonesian Coal from the CTC which supplied the BTG equipment, *vide* its email dated 10.08.2015; the CTC, *vide* its email dated 24.08.2015, conveyed the opinion of the manufacturer of the boiler equipment i.e. Harbin Boiler Company Ltd. ("HBC"), and made it clear that it would lead to disastrous effects if they used anything other than design coal as specified in the contract; however, the first respondent continued to fire the non-design coal after synchronizing Unit-1 on 26.05.2016; CTC sent an email dated 23.06.2016 to the first respondent, marking a copy to the appellant, stating that performance of the boiler would be affected because of the actions

of the first respondent in firing non-design coal; the first respondent has used non-design coal in gross violation of the agreed terms and conditions, because of which the boiler equipment has already been damaged, and is not fit for performance guarantee tests; it is the responsibility of the supplier to test the performance of the boiler and related equipment, and the appellant is required to act merely as a facilitator for the conduct of the tests; in their letter dated 27.03.2017 the first respondent stated that coal was heterogeneous in nature, it could not exactly match the design coal, they had obtained, and were now holding sufficient quantity of the design coal and were willing to make available such design coal for the purposes of conducting the performance guarantee tests; and this was said after running the units commercially using non-design coal.

On the other hand Sri C.V. Mohan Reddy, Learned Senior Counsel appearing on behalf of the first respondent, would submit that the appellant has neither pleaded in the Section 9 petition, nor have they proved on the basis of any supporting document, that the contractual conditions have been complied with by them till date; the appellant has not even issued a notice of provisional acceptance, supported with a preliminary report, to claim completion of Provisional Acceptance; at the stage of arguments it was contended, for the first time (without any pleading to that effect), that the preliminary report (which is to accompany the Notice of Provisional Acceptance) could not be prepared because of non-supply of design coal by the first respondent to conduct the tests necessary to prepare the said report; such an argument has been made by the appellant without pointing out any document or

material on record to establish that the appellant had requested the first respondent to supply design coal to enable them to conduct the tests necessary to prepare the preliminary report; they have neither mentioned in the petition details of the design coal that was to be used by the first respondent in terms of any agreed technical specification, nor have they explained how the actual coal, being used by the first respondent, did not match the design coal; the appellant has also failed to explain how alleged non-usage of design coal has adversely affected achievement of provisional acceptance; the allegation, regarding design coal, was made in the Section 9 petition without filing any documents in its support; and some e-mail exchanges, regarding design coal, were belatedly filed by the appellant with their rejoinder only as an afterthought, and without prior permission of the Court.

Clause 6.1 of the coordination agreement stipulates that any dispute, controversy, claim or difference or any kind between the appellant and the first respondent, whether found in contract, tort or otherwise, arising out of or relating to any of the, or all the, contracts and/or the coordination agreement, shall be referred to, at the written request of a party, to be resolved at a meeting of the Chief Executives of each party through mutual consultation and negotiation, such meeting to take place within fourteen days of the date of such notice being served on the other party. Clause 6.2 stipulates that, if the parties fail to resolve such dispute, controversy, claim or difference by such mutual consultation and negotiation within the next thirty days, then any party may submit the dispute, controversy, claim or difference for resolution by arbitration at the request of either the appellant or the first

respondent upon written notice to that effect to the other. Clause 6.3 stipulates that such arbitration shall be finally and exclusively settled in accordance with the Arbitration and Conciliation Act, 1996; and the place of arbitration shall be in Hyderabad in India. Clause 6.4 stipulates that the arbitration panel shall consist of three arbitrators; one to be appointed by the appellant and the other by the first respondent; and the two arbitrators, appointed by the parties, shall in turn jointly appoint the third arbitrator.

The disputes, claims/differences arising out of any of the contracts or the coordination agreement are required, on failure of such dispute being resolved by mutual consultation and negotiation, to be resolved by an arbitral Tribunal consisting of three arbitrators. Disputes, such as whether the appellant is liable to pay liquidated damages; whether they are deemed to have achieved provisional acceptance consequent upon the first respondent having commenced commercial operations; whether the appellant's delay in completing the project, and in achieving provisional acceptance, is because of the failure of the first respondent to supply design coal; whether the delay in supply of BTG equipment by the CTC would absolve the appellant of payment of liquidated damages etc., all arise out of the contracts/coordination agreement, and are required to be resolved by way of arbitration before the arbitral tribunal. As both the appellant and the first respondent have already appointed an arbitrator each, the arbitral tribunal will, on appointment of the third arbitrator by both the arbitrators, proceed to resolve the disputes, arising under these contracts, between the appellant and the first respondent.

It would be wholly inappropriate for us, therefore, to examine the rival claims of the appellant on the one hand, and the first respondent on the other, firstly because these are all matters for the arbitral tribunal to resolve; and, secondly, because the present appeal arises out of an order passed by the Commercial Court exercising jurisdiction under Section 9 of the 1996 Act. The jurisdiction of the Commercial Court was invoked by the appellant herein seeking interim measures under Clause (ii) of Section 9(1) of the 1996 Act which enables the party, before or during arbitral proceedings, to request the Court to grant an interim measure of protection which, in the present case, is to restrain the first respondent from invoking the bank guarantees furnished by the bank at the behest of the appellant. We must, therefore, confine our enquiry only to the question whether or not the bank guarantee, furnished by the bank to the first respondent at the behest of the appellant, is vitiated by fraud or special equities; and not to undertake an elaborate examination of whether or not there was a breach of the contracts by the appellant or the first respondent or even the CTC, and whether they had failed to perform their respective obligations under these contracts.

VI. CAN THE FIRST RESPONDENT BE A JUDGE IN ITS OWN CAUSE AND UNILATERALLY HOLD THE APPELLANT RESPONSIBLE FOR THE DELAY, AND ENCASH THE BANK GUARANTEE TOWARDS THEIR CLAIM FOR DELAY LIQUIDATED DAMAGES?

Sri D. Prakash Reddy, Learned Senior Counsel appearing on behalf of the appellant, would submit that the amounts, claimed by the first respondent as liquidated damages, have been disputed by the appellant vide its letter dated 08.03.2017; the first respondent cannot be allowed to be a judge in its own cause, it

cannot unilaterally invoke the performance guarantees, and set off the monies payable to the appellant, towards its false and disputed claim of liquidated damages; a claim for liquidated damages by a party is only a claim, and does not entitle the party to unilaterally adjust what it claims as liquidated damages from the amounts payable to the contractor; and in **Gangotri Enterprises Limited**⁴ the Supreme Court, following **Raman Iron Foundry**⁵, has held that, in the event the sum claimed by the beneficiary from the guarantor is in the nature of damages, which is not yet adjudicated upon in arbitration proceedings and which is not the sum admitted by the guarantor, injunction may be granted against encashment of the bank guarantee, subject to a *prima-facie* case being made out on merits that the guarantor has a strong ground to succeed in the arbitration or any competent forum of law.

On the other hand Sri C.V. Mohan Reddy, Learned Senior Counsel appearing on behalf of the first respondent, would submit that, under the EPC Contracts and the Co-ordination Agreement, the appellant is required to pay liquidated damages to the first respondent for delay in the agreed delivery schedule, and/or if the project does not achieve provisional acceptance by the specified dates; as the appellant failed to comply with their request for payment of liquidated damages, the first respondent has contractually and lawfully become entitled to encash the bank guarantees in lieu of liquidated damages for the delay; the argument that, as the amount of Late Completion Liquidated Damages has not been determined and is disputed, it needs to be adjudicated by the Court, is erroneous and misplaced; in **Gangotri Enterprises Ltd.**⁴, the respondent had sought to invoke the

performance bank guarantees given by the appellant under a contract (which had been completed) for sums claimed in relation to another contract entered into with the appellant for which no performance guarantee was given; the respondent therein was restrained from encashing the performance bank guarantees given in an unrelated contract; and as, that is not the case herein, the present appeal should be decided on the basis of the guiding principles laid down by the Supreme Court in **Gujarat Maritime Board**² which was rendered subsequent to **Gangotri Enterprises Ltd.**⁴.

In **Raman Iron Foundry**⁵, the scope of Clause 18 of the general conditions of the contract, entered into by the Central Purchase Organization of India for purchase of stores from third parties, arose for consideration. The tender for supply of certain quantity of foam compound was accepted by the appellant, and Clause 18 of the agreement, which provided for recovery of sums due, read thus:

“18. RECOVERY OF SUMS DUE: Whenever any claim for the payment of a sum of money arises out of or under the contract against the contractor, the purchaser shall be entitled to recover such sum by appropriating in whole or in part, the security, if any, deposited by the contractor, and for the purpose aforesaid, shall be entitled to sell and/or realise securities forming the whole or part of any such security deposit. In the event of the security being insufficient, the balance and if no security has been taken from the contractor, the entire sum recoverable shall be recovered by appropriating any sum then due or which at any time thereafter may become due to the contractor under the contract or any other contract with the purchaser or the Government or any person contracting through the Secretary, if such sum even be not sufficient to cover the full amount recoverable, the contractor shall on demand pay to the purchaser the balance remaining due.”

While the respondent contended that the appellant had committed the breach, the appellant contended that it was the respondent which had committed breach of contract, and was

liable to pay damages to the appellant. On being called upon to make payment, the respondent failed to do so. The respondent filed an application under the Arbitration Act before the Delhi High Court. They also sought an injunction restraining the appellant from recovering the amount, claimed by them as damages, from the pending bills of the respondent. The claim of the respondent against the appellant, and the counter-claim of the appellant against the respondent, was the subject matter of reference to arbitration. During the pendency of the arbitration some amounts became payable by the appellant in respect of the contracts entered into between the parties. Apprehending that the appellant would appropriate these amounts claimed by it, even though their claim for damages was disputed by the respondent, an application was made by the respondent requesting the Delhi High Court to restrain the appellant from recovering its claim for damages from the amounts due and payable to the respondent in respect of the pending bills. The Delhi High Court took the view that Clause 18 did not authorise the appellant to appropriate the amounts of any pending bills of the respondent towards satisfaction of its claim for damages against the respondent, unless such claim for damages was either admitted by the respondent or adjudicated upon in an arbitration or in a suit before the civil court. Aggrieved thereby, the appellant carried the matter in appeal to the Supreme Court which held that the claim for liquidated damages did not give rise to a debt until the liability was adjudicated, and the damages were assessed by a decree or order of a Court or other adjudicatory authority; when there was a breach of contract, the party which committed the breach did not, eo instanti, incur any pecuniary

obligation, nor did the party complaining of the breach become entitled to a debt due from the other party; the only right which the party aggrieved by the breach of the contract had, was the right to sue for damages; this was not an actionable claim; and the appellant was not entitled to recover the amount, of its claim for damages, by appropriating other sums due to the contractor under Clause 18. Encashment of a bank guarantee, which is a contract independent of the underlying agreement between the parties, was not in issue in **Raman Iron Foundry**⁵.

In **Gangotri Enterprises Ltd**⁴, the respondent issued a letter of acceptance to the appellant and the contract agreement, which was signed pursuant thereto, required the work to be completed within the specified time. Subsequently the appellant was entrusted a second work by the respondent-North Central Railway for construction of a New Station Building for which the appellant submitted a bank/performance guarantee from its bankers. Since the work relating to the earlier contract was not completed, the respondent terminated the contract, invited fresh tenders, and allotted the remaining part of the work to another company. With respect to the second work, the appellant was given a completion certificate on completion of the works. The appellant requested the respondent-North Central Railway to return its bank guarantee, pursuant to which the respondent issued a circular directing all its departments to withhold payment to the appellant under the subsequent contract stating that the earlier contract was cancelled, and such cancellation had resulted in a loss of more than five and half crores. The respondent also sought encashment of the bank guarantee. The appellant invoked the arbitration

clause, and then moved an application under Section 9 of the 1996 Act seeking injunction against encashment of the bank guarantee, contending that the respondent had no right to encash the bank guarantee furnished by the appellant in relation to a dispute arising out of another contract. The respondent, however, contended that Clause 62(1) of the general conditions of contract enabled it to recover any dues from the appellant even if such claim was not for the “*sum due*” and “*sum payable*”; and it was a claim for damages, though disputed by the appellant, and remained to be adjudicated in a Court.

The Supreme Court relied on its earlier judgment in **Raman Iron Foundry**⁵, and held that Clause 62 of the contract in issue was identical to Clause 18 of the contract in **Raman Iron Foundry**⁵ which stipulated that the amounts to be forfeited or recovered may be deducted from any moneys then due or which, at any time thereafter, may become due to the Contractor by the Railways under this work or any other contract or otherwise; the arbitration proceedings, in relation to the earlier contract, was still pending; the sum claimed by the respondent from the appellant did not relate to the contract for which the bank guarantee had been furnished, but it related to another contract for which no bank guarantee had been furnished; the sum claimed by the respondent was in the nature of damages which was not yet adjudicated in the arbitration proceedings; the sum claimed was neither a sum due in the present, nor a sum payable by the respondent; it was not an admitted sum; and as the Bank Guarantee was in the nature of a performance guarantee furnished for executing the work under the subsequent contract, and the

work having been completed to its satisfaction, the respondent had no right to encash the Bank Guarantee. The Supreme Court further held that the case on hand was similar to the facts in **Raman Iron Foundry**⁵, and hence the law laid down in that case was applicable to the case before it; and both the Learned Counsel did not bring to their notice the law laid down in **Raman Iron Foundry**⁵.

In **Tarapore & Co.**³, the appellant awarded a contract to the respondent for construction of civil works in the Visakhapatnam Steel Plant. The contract was to be completed within a specified duration. The respondent-contractor sought extension of time, but could not complete the work even during the extended period. Disputes arose between them. The respondent appointed an arbitrator and the disputes were pending before the arbitrator. Thereafter, by mutual agreement, the contract work was reduced, but this reduced work was also not completed within the extended time. At the request of the respondent, the contract period was extended further, despite which the work was not completed, resulting in the appellant rescinding the contract. On the very same day, on which the contract was rescinded, the appellant sought to invoke the bank guarantee and called upon the bank to pay the amounts thereunder. The petition for injunction, filed by the respondent under the Arbitration Act, was dismissed. Thereafter, the respondent filed two revisions before this High Court (A.P. High Court).

Relying on the decision of the Supreme Court in **Raman Iron Foundry**⁵, this High Court held that any term in the agreement, that one of the parties shall be the sole Judge to quantify the

same, had to be held as invalid; the liability to pay damages would arise only after it was established that there was a breach of the contract; it was for the Court or the arbitrator to decide as to who had committed the breach; and till the liability was ascertained, it could not be said that there was a “*debt due or debt owing*”. On these grounds, this High Court rejected the contention, urged on behalf of the appellant, that it was the sole Judge to decide as to whether the contractor had committed a breach of the contract, and what was the extent of damage caused to it.

This High Court further held that, in the absence of any determination by the Court or the arbitrator, no amount could be said to be payable by the respondent to the appellant by way of damages; it was, therefore, just and proper to restrain the appellant from enforcing the bank guarantees; no irretrievable injustice would be caused to the appellant as it could recover damages, from the bank and the contractor, in case it succeeded in the case; and the interest of the appellant could be safeguarded by directing the contractor to keep on extending the bank guarantees till the matter was settled by the arbitrator. The appellant was restrained from enforcing the bank guarantee. Aggrieved thereby, the appellant carried the matter in appeal and the Supreme Court, in **Tarapore & Co³**, observed:

“.....The High Court also committed a grave error in restraining the appellant from invoking bank guarantees on the ground that in India only reasonable amount can be awarded by way of damages even when the parties to the contract have provided for liquidated damages and that a term in a bank guarantees making the beneficiary the sole judge on the question of breach of contract and the extent of loss or damages would be invalid and that no amount can be said to be due till and adjudication in that behalf is made either by a court or an arbitrator, as the case may be. In taking that view the High Court has overlooked the correct position that a bank guarantee is an independent and distinct contract between the

bank and the beneficiary and is not qualified by the underlying transaction and the primary contract between the person at whose instance the bank guarantee is given and the beneficiary. What the High Court has observed would be applicable only to the parties to the underlying transaction or the primary contract but can have no relevance to the bank guarantee given by the bank, as the transaction between the bank and the beneficiary is independent and of a different nature. In case of an unconditional bank guarantee the nature of obligation of the bank is absolute and not dependent upon any dispute or proceeding between the party at whose instance the bank guarantee is given and the beneficiary. The High Court thus failed to appreciate the real object and nature of a bank guarantee. The distinction which the High Court has drawn between a guarantee for due performance of a works contract and guarantee given towards security deposit for that contract is also unwarranted. The said distinction appears to be the result of the same fallacy committed by the High Court of not appreciating the distinction between the primary contract between the parties and a bank guarantee and also the real object of a bank guarantee and the nature of bank's obligation thereunder. **Whether the bank guarantee is towards security deposit or mobilisation advance or working funds or for due performance of the contract if the same is unconditional and if there is a stipulation in the bank guarantee that the bank should pay on demand without demur and that the beneficiary shall be the sole judge not only on the question of breach of contract but also with respect to the amount of loss or damages, the obligation of the bank would remain the same and that obligation has to be discharged in the manner provided in the bank guarantee.** In **General Electric Technical Services Company Inc. vs. Punj Sons (p) Ltd.** (1991 (4) SCC 230) while dealing with a case of bank guarantee given for securing mobilisation advance it has been held that the right of a contractor to recover certain amounts under running bills would have no relevance to the liability of the bank under the guarantee given by it. In that case also the stipulations in the bank guarantee were that the bank had to pay on demand without demur, and the beneficiary was to be the sole judge as regards the loss or damage caused to it. This Court held that notwithstanding the dispute between the contractor and the party giving the contract, the bank was under an obligation to discharge its liability as per the terms of the bank guarantee. **Larsen and Toubro Limited vs. Maharashtra State Electricity Board** (6) SCC 68 and **Hindustan Steel Workers Construction Ltd. Vs. G.S. Atwal & Co (Engineers) Pvt. Ltd.** 1995 (6) SCC 76 were also cases of work contracts wherein bank guarantees were given either towards advances or release of security deposits or for due performance of the contract. In both those cases this Court held that the bank guarantees being irrevocable and unconditional and as the beneficiary was made the sole judge on the question of breach of performance of the contract and the extent of loss or damages an injunction restraining the beneficiary from invoking the bank guarantees could not have been granted. The above referred three subsequent decisions of this Court also go to show that

the view taken by the High Court is clearly wrong.....” (emphasis supplied).

In **G.S. Atwal & Co. (Engineers) Pvt. Ltd.**¹⁸, the appellant and the respondent had entered into several contracts whereby the respondent was required to construct 11 schools in Libya for which they had furnished two bank guarantees to the appellant. Disputes arose between the appellant and the respondent regarding performance of the contract, resulting in a reference to arbitration. While the reference was pending, the respondent requested the Court to grant injunction restraining the appellant from encashing the bank guarantees. An order of injunction was granted by the Learned Single Judge of the Calcutta High Court taking the view that the second bank guarantee was a performance guarantee and, before invoking the same, the appellant was required to assess the quantum of loss and damages, and should mention the ascertained figure in the letter of invocation; and, if this was not so done, the guarantee could not be invoked. Aggrieved thereby, the matter was carried in appeal. It is in this context that the Supreme Court observed that in the dispute, pending adjudication in arbitration between the appellant and the respondent, the Bank was not a party; in case of confirmed Bank Guarantees/Irrevocable Letters of Credit, the Court would not interfere with the same unless there was fraud or irretrievable injury was involved; the bank guarantees required the bank to pay the amount without demur, and without requiring the appellant to invoke any legal remedy; it was further specifically provided that the appellant would be the sole judge of, and as to, whether the respondent, a party to the contract, had committed any breach; the decision of the appellant, as to the outstanding amount due,

was final and binding; the bank guarantees, furnished by the Bank to the appellant, were unconditional; the appellant was the sole judge regarding the question as to whether any breach of contract had occurred and, if so, the amount of loss to be recovered by the appellant from the respondent; the entire dispute was pending before the Arbitrator; whether and if so what was the amount due to the appellant was to be adjudicated in the arbitration proceeding; and the reasoning of the Learned Single Judge of the Calcutta High Court that, before invoking the performance guarantee, the appellant should assess the quantum of loss and damages, and mention the ascertained figure, was not a ground to restrain invocation of the bank guarantee.

In **Ansal Engineering Projects Limited**¹, the appellant sought an injunction, under the Arbitration Act, 1940 to restrain the respondent from invoking the bank guarantee. The contract was for construction of residential quarters. While a period was stipulated for its completion, the construction was not completed by then. The contract was terminated by the first respondent. As the respondent sought to encash the bank guarantee, after termination of the contract, the petitioner approached the Delhi High Court contending that the amount due and payable by the petitioner was required to be determined in the Suit; and till then, the bank guarantee could not be invoked and payment could not be made. The Delhi High Court rejected the contentions and dismissed the petition. Aggrieved thereby, the petitioner carried the matter in appeal to the Supreme Court. It is in this context that a three Judge Bench of the Supreme Court observed:

“.....It is settled law that bank guarantee is an independent and distinct contract between the bank and the

beneficiary and is not qualified by the underlying transaction and the validity of the primary contract between the person at whose instance the bank guarantee was given and the beneficiary. Unless fraud or special equity exists, is pleaded and prime facie established by strong evidence as a triable issue, the beneficiary cannot be restrained from encashing the bank guarantee even if dispute between the beneficiary and the person at whose instance the bank guarantee was given by the Bank, had arisen in performance of the contract or execution of the Works undertaken in furtherance thereof. The Bank unconditionally and irrevocably promised to pay, on demand, the amount of liability undertaken in the guarantee without any demur or dispute in terms of the bank guarantee. The object behind is to inculcate respect for free flow of commerce and trade and faith in the commercial banking transactions unhedged by pending disputes between the beneficiary and the contractor.

It is equally settled law that in terms of the bank guarantee the beneficiary is entitled to invoke the bank guarantee, and seek encashment of the amount specified in the bank guarantee. It does not depend upon the result of the decision in the dispute between the parties, in case of the breach. The underlying object is that an irrevocable commitment either in the form of bank guarantee or letters of credit solemnly given by the bank must be honoured.....

.....It is next contended by Shri G. Nageshwara Rao, learned counsel for the petitioner that unless the amount due and payable is determined by a competent court or tribunal by mere invocation of bank guarantee or letter of credit pleading that the amount is due and payable by the petitioner, which was disputed, cannot be held to be due and payable in- a case. The Court has yet to go into the question and until a finding after trial, or decision is given by a court or tribunal that amount is due and payable by the petitioner, it cannot be held to be due and payable. Therefore, the High Court committed manifest error of law in refusing to grant injunction as the petitioner has made out a prima facie Strong case. We find no force in the contention. All the clauses of the contract of the bank guarantee are to be read together. Bank guarantee/letters of credit is an independent contract between the bank and the beneficiary. It does not depend on the result of the dispute between the person on whose behalf the bank guarantee was given by the bank and the beneficiary. Though the question was not elaborately discussed, it was in sum answered by this Court in Hindustan Steel Workers Construction Ltd. v. G.S. Atwal & Co. (Engineers) Pvt. Ltd.. [1995] 6 SCC 76 at 79. This Court had held in part 6 that the entire dispute was pending before the arbitrator. Whether, and if so, what is the amount due to the appellant was to be adjudicated in the arbitration proceedings. The order of the learned Single Judge proceeds on the basis that the amounts claimed were not and cannot be said to be due and the bank has violated the understanding between the respondent and the Bank in giving unconditional guarantee to the appellant.....

.....Similarly, the reasoning of the learned Single Judge that, before invoking the performance guarantee, the appellant should assess the quantum of loss and damages and mention the ascertained figure cannot be put forward to restrain the appellant from invoking the unconditional guarantee. This reasoning would clearly indicate that the final adjudication is not a pre-condition to invoke the bank guarantee and that is not a ground to issue injunction restraining the beneficiary to enforce the bank guarantee.....” (emphasis supplied)

In **Sumac International Ltd.**,⁶ the appellant had entered into an agreement with the respondent to design and prepare an engineering layout, and to manufacture, procure and supply to the appellant the machinery and equipment for a complete sugar plant. The respondent was required to set-up the plant, and make it ready for commercial production, by the stipulated date. The agreement stipulated that time was the essence of the contract. In terms of the agreement, the respondent furnished bank guarantees to the appellant all of which were payable on demand. The respondent did not complete the project even within the extended period. The appellant cancelled the agreement, and claimed refund of the advance paid by it. It, thereafter, invoked the bank guarantees in respect of advance payment and the delivery guarantee. The respondent filed a petition under the Arbitration Act for appointment of an arbitrator, and two applications for interim relief seeking stay of encashment of the bank guarantees. On the application being dismissed by the Civil Court, they approached the Allahabad High Court, and an injunction was granted restraining the appellant from enforcing the bank guarantee. Aggrieved thereby the appellant carried the matter in appeal and the Supreme Court followed its earlier judgment in **Singh Consultants and Engineers (P) Ltd.**⁷, wherein it was held

that the bank which gives the guarantee is not concerned with the relations between the supplier and the customer, nor with the question whether the supplier had performed his contractual obligation or not, nor with the question whether the supplier is in default or not; and the bank must pay according to the tenor of its guarantee on demand without proof or condition. Thereafter the Supreme Court, in **Sumac International Ltd**⁶, observed:

“..... Our attention was invited to a number of decisions on this issue -- among them, to *Larsen & Turbro Ltd. v. Maharashtra State Electricity Board & Ors.* (1995 [6] SCC 58), *Hindustan Steel Workers Construction Ltd. v. G.S. Atwal & Co. (Engineers) Pvt. Ltd.* (1995 [6] SCC 76) and to *National Thermal Power Corporation Ltd. v. Flowmore Pvt. Ltd. & Anr.* (1995 [4] SCC 515). The latest decision is in the case of *State of Maharashtra & Anr. v. M/s National Construction Company, Bombay & Anr.* (JT 1996 [1] SC 156) where this Court has summed up the position by stating, **"The rule is well established that a bank issuing a guarantee is not concerned with the underlying contract between the parties to the contract. The duty of the bank under a performance guarantee is created by the document itself. Once the documents are in order the bank giving the guarantee must honour the same and make payment ordinarily unless there is an allegation of fraud or the like. The courts will not interfere directly or indirectly to withhold payment, otherwise trust in commerce internal and international would be irreparably damaged. But that does not mean that the parties to the underlying contract cannot settle the disputes with respect to allegations of breach by resorting to litigation or arbitration as stipulated in the contract. The remedy arising ex-contract is not barred and the cause of action for the same is independent of enforcement of the guarantee."** The other recent decision is in *Hindustan Steelworks Construction Ltd. v. Tarapore & Co. & Anr.* (JT 1996 [6] SC 295).

Clearly, therefore, the existence of any dispute between the parties to the contract is not a ground for issuing an injunction to restrain the enforcement of bank guarantees. There must be a fraud in connection with the bank guarantee. In the present case we fail to see any such fraud. The High Court seems to have come to the conclusion that the termination of the contract by the appellant and his claim that the time was of the essence of the contract, are not based on the terms of the contract and, therefore, there is a fraud in the invocation of the bank guarantee. This is an erroneous view. **The disputes between the parties relating to the termination of the contract cannot make invocation of the bank guarantees fraudulent...."** (emphasis supplied).

In **Gujarat Maritime Board**², the appellant invited bids for the development of a port and, pursuant thereto, a letter of intent was issued to the first respondent. The conditions of the LOI required, among others, for lead promoters to submit a detailed project report and to obtain several clearances. Towards performance guarantee, a bank guarantee of Rs.5 crores (Rupees five crores only) was required to be submitted to ensure submission of the Detailed Project Report within twelve months, and obtaining environment and other clearances within 18 months, failing which the appellant was entitled to cancel the letter of intent, and the bank guarantees were to stand forfeited. When the appellant sought to invoke the bank guarantee, the first respondent invoked the jurisdiction of the Gujarat High Court which allowed the Writ Petition holding that, as there was a shift in the initial project envisaged in the letter of intent, the contention that forfeiture must follow notwithstanding any difficulty in execution of the contract could not be accepted; and the parameters, for avoiding payment of bank guarantee by the bank, could not be applied as, if the decision of the appellant to cancel the contract and to award the penalty of forfeiture was found to be erroneous and was set aside, the question of allowing the appellant to encash the bank guarantee would not arise. Aggrieved thereby the appellant carried the matter in appeal, and it is in this context that the Supreme Court observed that the bank guarantee is an independent contract between the guarantor-bank and the guarantee-appellant; the guarantee was unconditional; no doubt, the performance guarantee was against the breach by the lead promoter viz. the first respondent, but between the bank and the

appellant, the specific condition incorporated in the bank guarantee was that the decision of the appellant, as to the breach, was binding on the bank; and the justifiability of the decision was a different matter between the appellant and the first respondent. After referring briefly to its earlier judgment, in **Himadri Chemicals Industries Ltd.**²¹, the Supreme Court observed:-

“.....The guarantee given by the Bank to the appellant contains only the condition that in case of breach by the lead promoter viz. the first respondent of the conditions of LoI, the appellant is free to invoke the bank guarantee and the Bank should honour it “... without any demur, merely on a demand from GMB (appellant) stating that the said lead promoter failed to perform the covenants...”. It has also been undertaken by the Bank that such written demand from the appellant on the Bank shall be “... conclusive, absolute and unequivocal as regards the amount due and payable by the Bank under this guarantee”. Between the appellant and the first respondent, in the event of failure to perform the obligations under the LoI dated 6-2-2008, the appellant was entitled to cancel the LoI and invoke the bank guarantee. **On being satisfied that the first respondent has failed to perform its obligations as covenanted, the appellant cancelled the LoI and resultantly invoked the bank guarantee. Whether the cancellation is legal and proper, and whether on such cancellation, the bank guarantee could have been invoked on the extreme situation of the first respondent justifying its inability to perform its obligations under the LoI, etc. are not within the purview of an inquiry under Article 226 of the Constitution of India. Between the Bank and the appellant, the moment there is a written demand for invoking the bank guarantee pursuant to breach of the covenants between the appellant and the first respondent, as satisfied by the appellant, the Bank is bound to honour the payment under the guarantee.”** (emphasis supplied)

As noted hereinabove, in **Tarapore & Co.**³, the A.P. High Court had, relying on the judgment of the Supreme Court in **Raman Iron Foundry**⁵, observed that any term in the agreement, that one of the parties should be the sole Judge to quantify damages, was invalid; and the liability to pay damages would arise only if there was a breach of the contract which was for the arbitrator to decide. This judgment of the A.P. High Court,

wherein reliance was placed on **Raman Iron Foundry**⁵, was later set aside by the Supreme Court, in **Tarapore & Co.**³, holding that the bank guarantee was an independent and distinct contract, and was not qualified by the underlying transaction or the validity of the primary contract between the person at whose instance the bank guarantee was given and the beneficiary; what the High Court had observed would apply only to the parties to the underlying transaction or to the primary contract, but could have no relevance to the bank guarantee given by the bank, as the transactions between the bank and the beneficiary were independent, and of a different nature; and in the case of an unconditional bank guarantee, the nature of obligation of the bank was absolute, and was not dependent upon any dispute or proceeding between the party, at whose instance the bank guarantee was given, and the beneficiary.

A similar view has been taken in the subsequent judgment of the Supreme Court in **G.S. Atwal & Co. (Engineers) Pvt. Ltd.**¹⁸; **Ansal Engineering Projects Ltd.**¹; **Sumac International Ltd.**⁶; and **Gujarat Maritime Board**². Reliance placed, on behalf of the appellant, on **Raman Iron Foundry**⁵ and **Gangotri Enterprises Ltd.**⁴, to contend that, till the claim of the first respondent for delay liquidated damages is adjudicated by the arbitral tribunal, there was no debt due justifying invocation of bank guarantee is only to be noted to be rejected.

Even otherwise in **Gangotri Enterprises Ltd.**⁴ the bank guarantee furnished by the appellant was with respect to a contract which had been completed, but was sought to be encashed for failure of the same contractor to perform their

obligations under another contract for which no bank guarantee was furnished. Unlike in **Gangotri Enterprises Ltd.**⁴, in the present case the bank guarantee sought to be encashed by the first respondent is on the basis of their claim that the appellant had failed to perform its obligation under the agreement for the performance of which these bank guarantees were furnished. Further the law laid down by the two Judge Bench of the Supreme Court in **Gangotri Enterprises Ltd.**⁴ runs contrary to the law declared by a three Judge Bench of the Supreme Court in **Ansal Engineering Projects Ltd**¹. When conflicting judgments of the Supreme Court are brought to its notice, the High Court is bound to follow the three Judge Bench judgment of the Supreme Court as against the judgment delivered by a two Judge Bench.

As has been noted in the judgment in **Gangotri Enterprises Ltd.**⁴ itself, the law laid down in **Raman Iron Foundry**⁵ was not brought to the notice of the Court by the Learned Counsel appearing for the parties. It is also evident that the fact that, in **Tarapore & Co**³, the Supreme Court had over-ruled the judgment of this High Court (which had followed the judgment of the Supreme Court in **Raman Iron Foundry**⁵), and had held that the contract of bank guarantee was independent of the underlying contract; and the beneficiary, while invoking the bank guarantee, could be the sole judge of the question of breach of contract was not brought to the notice of the Supreme Court in **Gangotri Enterprises Ltd.**⁴. Reliance placed on behalf of the appellant, on **Gangotri Enterprises Ltd.**⁴, is therefore misplaced.

The contentions that, a term in a bank guarantee making the beneficiary the sole judge on the question of breach of contract

and the extent of loss or damages would be invalid, and no amount can be said to be due till an adjudication in that behalf is made either by a court or a arbitrator, would be applicable only to the parties to the underlying transaction or the primary contract, but can have no relevance to the bank guarantee given by the bank, as the transaction between the bank and the beneficiary is independent and of a different nature. In the case of an unconditional bank guarantee, the nature of obligation of the bank is absolute and not dependent upon any dispute or proceeding between the party at whose instance the bank guarantee is given and the beneficiary. (**Tarapore & Co.³; G.S. Atwal & Co. (Engineers) Pvt. Ltd.¹⁸; Ansal Engineering Projects Ltd.¹**).

Where the bank guarantee is irrevocable and unconditional, and the beneficiary is made the sole judge on the question of breach of performance of the contract and the extent of loss or damages, an injunction restraining the beneficiary from invoking the bank guarantees cannot be granted. (**Tarapore & Co.³; Larsen and Toubro Limited¹⁷; G.S. Atwal & Co (Engineers) Pvt. Ltd.¹⁸**). Notwithstanding the dispute between the contractor and the party giving the contract, the bank is under an obligation to discharge its liability as per the terms of the bank guarantee. (**Tarapore & Co.³; General Electric Technical Services Company Inc. v. Punj Sons (p) Ltd.³⁴**). Whether the bank guarantee is unconditional or if there is a stipulation in the bank guarantee that the bank should pay on demand without demur or that the beneficiary shall be the sole judge not only on the question of breach of contract but also with respect to the amount of loss or damages, the obligation of the

³⁴ (1991 (4) SCC 230

bank would remain the same. This obligation must be discharged in the manner provided in the bank guarantee. (**Tarapore & Co.**³).

The Bank guarantee/letter of credit does not depend on the result of the dispute between the person on whose behalf the bank guarantee was given by the bank and the beneficiary. The final adjudication is not a pre-condition to invoke the bank guarantee, and that is not a ground to issue injunction. (**Tarapore & Co.**³; **G.S. Atwal & Co. (Engineers) Pvt. Ltd.**¹⁸; **Ansal Engineering Projects Ltd.**¹).

The duty of the bank, under the guarantee, is created by the document itself. Once the documents are in order, the bank giving the guarantee must ordinarily honour the same and make payment. Courts will not interfere directly or indirectly to withhold payment, otherwise trust in commerce (internal and international) would be irreparably damaged. But that does not mean that the parties to the underlying contract cannot settle the disputes with respect to allegations of breach by resorting to litigation or arbitration as stipulated in the contract. The remedy arising ex contractu is not barred, and the cause of action for the same is independent of enforcement of the guarantee. (**Sumac International Ltd.**⁶; **National Construction Co.**¹¹; **Tarapore & Co.**³; **United Commercial Bank**¹²; **Centax (India) Ltd.**¹⁰; **ICICI Bank Ltd**¹³; **Singh Consultants and Engineers (P) Ltd.**⁷).

VII. FRAUD:

Sri D. Prakash Reddy, Learned Senior Counsel appearing on behalf of the appellant, would submit that, if their claim was genuine, the first respondent would have imposed liquidated damages in the monthly bills of the appellant as required under

the contracts; two days after commencement of commercial operations of Unit-II, the first respondent made a false claim for liquidated damages for the alleged delay in execution of the works by the appellant; this conduct is fraudulent, and a false claim is made only to avoid making payment of the amounts legitimately due to the appellant, and to encash the performance guarantees illegally; and the first respondent has simultaneously claimed liquidated damages from the appellant and CTC, though the entire delay is attributable to CTC alone.

On the other hand Sri C.V. Mohan Reddy, Learned Senior Counsel appearing on behalf of the first respondent, would submit that the delay liquidated damages are claimed under two contracts which are neither inter-linked/connected nor dependent on each other; the quantum of damages has been calculated on the basis of different contract prices, and different number of days of delay in completing separate works; and the appellant has not established fraud, much less a fraud in relation to the contract of bank guarantee which is independent of the underlying contract; it is not even the case of the appellant that the first respondent had obtained bank guarantees from the banks on the basis of fraudulent representations, and the banks had knowledge of such fraud when it issued the bank guarantees; simultaneous letters claiming Liquidated Damages from CTC and the appellant does not constitute 'fraud'; and it may, possibly, be considered a disputed question regarding liability for Liquidated Damages which can only be the subject matter of arbitration.

The fraud must be in connection with the bank guarantee itself. (**Sumac International Ltd**⁶). If the bank detects, with a

minimal investigation, the fraudulent action of the beneficiary, payment can be refused. (**Edward Owen Engineering Ltd.**⁹; **Singh Consultants and Engineers (P) Ltd.**⁷). As a Bank Guarantee constitutes an agreement between the Banker and the Principal, albeit, at the instance of the promisor, it is primarily for the bank to plead a case of fraud when a contract of guarantee is sought to be invoked, and not for a promisor to set up a case of breach of contract. (**Techtrans Construction India Pvt Ltd & Ksheeraabad Constructions Pvt. Ltd.**²⁰; **Reliance Salt Ltd. v. Cosmos Enterprises**³⁵; **Sumac International Limited**⁶; **ICICI Bank Ltd**¹³).

In **Dwarikesh Sugar Industries Ltd.**³⁰, the Supreme Court held:-

“.....Coming to the allegation of fraud, it is an admitted fact that in the plaint itself, there was no such allegation. It was initially only in the first application for the grant of injunction that in a paragraph it has been mentioned that the appellant herein had invoked the bank guarantee arbitrarily. This application contains no facts or particulars in support of the allegation of fraud. A similar bald averment alleging fraud is also contained in the second application for injunction relating to Bank Guarantee No. 40/47. This is not a case where Defendant 1 had at any time alleged fraud prior to the filing of injunction application. The main contract, pursuant to which the bank guarantees were issued, was not sought to be avoided by alleging fraud, nor was it at any point of time alleged that the bank guarantee was issued because any fraud had been played by the appellant. We have no manner of doubt that the bald assertion of fraud had been made solely with a view to obtain an order of injunction. In the absence of established fraud and not a mere allegation of fraud and that also having been made only in the injunction application, the court could not, in the present case, have granted an injunction relating to the encashment of the bank guarantees.....” (emphasis supplied)

Pleadings are only allegations or averment of facts. Mere pleading do not make a strong case of prima facie fraud. The material and evidence has to show it. (**Svenska Handelsbanken**¹⁶). A mere allegation in the pleadings that the contractee, fraudulently, invoked the bank guarantee would not amount to establishing clear fraud or fraud of an egregious nature.

³⁵ (2006) 13 SCC 599

(**Techtrans Construction India Pvt Ltd & Ksheeraabad Constructions Pvt. Ltd.**²⁰; **Himadri Chemicals Industries Limited**²¹). Fraud, like any other charge of a criminal offence whether made in civil or criminal proceedings, must be established beyond reasonable doubt. A finding as to fraud cannot be based on suspicion and conjecture. (**Svenska Handelsbanken**¹⁶; **A.L.N. Narayanan Chettyar v. Official Assignee, High Court Rangoon**³⁶).

Unless fraud is pleaded and, prime facie, established by strong evidence as a triable issue, the beneficiary cannot be restrained from encashing the bank guarantee even if the dispute between the beneficiary and the person, at whose instance the bank guarantee was given by the Bank, had arisen in the performance of the contract or execution of the works undertaken in furtherance thereof. (**Ansal Engineering Projects Ltd.**¹).

The established exception to the contractual obligations of the confirming bank to the seller, is that where the seller, for the purpose of drawing on the credit, fraudulently presents, to the confirming bank, documents that contain (expressly or by implication) material representations of fact that to his knowledge are untrue. This exception of fraud on the part of the beneficiary, seeking to avail himself of the credit, is a clear application of the maxim *ex trupi cause non oritur actio* or 'fraud unravels all', the Courts will not allow their process to be used by a dishonest person to carry out a fraud. (**Singh Consultants and Engineers (P) Ltd.**⁷; **UCM (Investment)**⁸).

³⁶ AIR 1941 P.C. 93

The disputes between the parties, relating to the termination of the contract, cannot make invocation of the bank guarantees fraudulent, nor is it a ground for issuing an injunction to restrain the enforcement of the bank guarantees. (**Sumac International Ltd.**⁶). Clear fraud, of which the bank has notice, is an exception to the rule that the bank guarantee must be honoured in accordance with its terms. (**Sumac International Ltd.**⁶; **Singh Consultants and Engineers (P) Ltd.**⁷).

A fraud, in connection with a bank guarantee, should be such as to vitiate its very foundation. If there is such a fraud, of which the beneficiary seeks to take advantage, he can be restrained from doing so. (**Dwarikesh Sugar Industries Ltd.**³⁰; **Svenska Handelsbanken**¹⁶; **Larsen & Toubro Ltd.**¹⁷; **G.S. Atwal & Co. (Engineers) (P) Ltd.**¹⁸ and **Sumac International Ltd.**⁶). The bank's obligations do not extend to protect the person responsible for the fraud. But, the banker must be sure of his ground before declining to pay. The nature of the fraud that the Courts talk about is fraud of an "egregious nature as to vitiate the entire underlying transaction". (**Edward Owen Engineering Ltd.**⁹; **Singh Consultants and Engineers (P) Ltd.**⁷). The fraud perpetrated would be of an egregious nature when it is of a gross nature which shakes the conscience of the Court, and the said fraud is known to the parties, including the party representing as well as the bank. (**Bhandari Engineers and Builders Pvt. Ltd. v. Vijaya Bank**³⁷). The Court would be slow in granting an order of injunction, restraining realisation of a bank guarantee, except when it is clearly shown that a fraud of a grievous nature has been

³⁷ 168 (2010) DLT 47 = MANU/DE/0120/2010

committed and to the notice of the Bank. (**Millenium Wires (P) Ltd.**³¹; **ICICI Bank Ltd**¹³).

Commission of fraud must be confined to acts committed by a party to a contract with the intention to deceive another party or to induce him to enter into a contract. Fraud, which vitiates the contract, must have a nexus with the acts of the parties prior to entering into the contract. Subsequent breach of contract on the part of a party would not vitiate the contract itself. (**Reliance Salt Ltd.**³⁵; **ICICI Bank Ltd**¹³). Fraud, which vitiates the contract, must have a nexus to the acts of the parties prior to entering into the contract. No such allegation is made by the appellant in the petition filed by them under Section 9 of the 1996 Act. They have not even stated that the bank-guarantees were obtained by fraud. Fraud alleged against the contractee is under the contract between the contractor and the contractee. (**ICICI Bank Ltd**¹³).

An injunction may be granted where it is proved that the bank knew that any demand for payment already made, or which may thereafter be made, will clearly be fraudulent. The evidence must be clear, both as to the fact of fraud and as to the bank's knowledge. It would, normally, not be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction, and an application by the bank to have it discharged. (**Dwarikesh Sugar Industries Ltd.**³⁰; **Bolivinter Oil SA**¹⁵; **Singh Consultants and Engineers (P) Ltd**⁷; **Millenium Wires (P) Ltd.**³¹; **ICICI Bank Ltd**¹³; **Techtrans Construction India Pvt Ltd & Ksheeraabad Constructions Pvt. Ltd.**²⁰; **Sumac International Ltd.**⁶).

It is not the bank which is pleading fraud, but the appellant at whose behest the bank had furnished the bank-guarantees to the first respondent. The appellant has not even stated, in the petition filed by them before the Commercial Court, that the fraud, allegedly committed by the first respondent, was to the knowledge of the banks. Vague allegations of fraud cannot form the basis for grant of an injunction restraining invocation of the bank-guarantee. The duty cast on the banks is created by the bank guarantee itself, and they are not concerned with the underlying contract between the appellant and the first respondent. **(ICICI Bank Ltd¹³).**

As noted hereinabove, fraud must not only be pleaded but must also be established. The fraud must be in connection with the bank guarantee itself. It must also be established that the bank knew that any demand for payment already made, or which may thereafter be made, will be clearly fraudulent. The duty cast on the bank to make payment on demand is in terms of the bank guarantee itself, and is not related to the underlying contract between the person at whose behest the bank guarantee was furnished and the beneficiary. Further the fraud must be of an egregious nature which shocks the conscience of the Court. Such fraud must be known to the parties and to the bank.

The appellant does not allege fraud on the part of the first respondent in obtaining the bank guarantee. Their entire case is founded on the allegation that the first respondent made a false claim for liquidated damages in execution of the works by the appellants two days after the commencement of commercial operations of Unit II, and such a false claim was made only to

avoid making payment of the amounts due to the appellant, and to illegally encash the bank guarantee. The appellant alleges fraud because the first respondent's claim for liquidated damages is contrary to the terms of the underlying contract. The amounts which the appellant claims as due to them is also based on their claim of having performed their obligations under the primary contracts. It is not even pleaded by the appellant, much less proved, that the first respondent had fraudulently obtained the bank guarantee. It is evident, therefore, that the first exception to rule against grant of injunction for invocation of bank guarantee, i.e., the bank guarantee has been obtained by fraud, is not attracted.

VIII. SPECIAL EQUITIES:

Sri D. Prakash Reddy, Learned Senior Counsel appearing on behalf of the appellant, would submit that the expression '*extraordinary special equities*', or '*irretrievable injustice / injury*', have such meaning as may be justified with reference to the facts and circumstances of each case; the expression "*special equities*" extends to cases which would prick the judicial conscience of the Court; issues and disputes, arising out of the parent/underlying contract, can be looked into in order to ascertain whether or not special equities exist in favour of the party seeking injunction; the total amount which would be wrongfully gained by the first respondent, by its wrongful exercise of unilaterally adjusting monies towards liquidated damages, would be around Rs.700.00 Crores; this would cause severe and irreparable loss to the appellant, its liquidity and its entire business as such a huge amount would be wiped out from its available cash flows; this

could also result in the account of the appellant becoming a non-performing asset, besides crippling their business; on the other hand, if stay on unilateral adjustment of such amounts and invocation of performance guarantees is granted, the first respondent would be well protected as the bank guarantees would be kept alive; the appellant also undertakes to keep the bank guarantees alive throughout the period of arbitration, and is also willing to furnish a bank guarantee for the interest amount calculated at the rate offered by banks, ordinarily, on savings; the appellant has already invoked the arbitration clause; it has issued arbitration notice on 27.05.2017, and has appointed Justice Cyriac Joseph (former Judge of the Supreme Court) as its nominee arbitrator; the first respondent has also replied to the arbitration notice, and has appointed Justice T.S. Thakur (Former Chief Justice of India) as their nominee arbitrator vide their letter dated 25.06.2017; the interests of the parties would be well protected, and the ends of justice met, if encashment of the bank guarantee is injuncted pending the decision of the Arbitral Tribunal; and the appellant would not be able to recover damages from the first respondent as all the assets of the first respondent have been mortgaged to its secured creditors, it has been suffering abnormally escalating losses, etc.

Learned Senior Counsel would also submit that the appellant would not be able to recover the said monies from the first respondent even if they succeed before the arbitral tribunal; the Director's Report, of the first respondent for the year 2015-2016, establishes that the first respondent made a loss of Rs.15.48 crores for the year ending 31.03.2015, and by the year ending

31.03.2016 the losses jumped to more than Rs.42.76 crores; the audited Balance Sheet of the first respondent for the year 2016-2017, as e-mailed by the officer of the first respondent upon the request of their shareholder, establishes that the first respondent has suffered losses of around Rs. 328.46 Crores during the Financial Year 2016-17; the accumulated losses of the first respondent, for the three years 2014-15 to 2016-17, exceed Rs.386.49 Crores; it is clear that they have been supplying electricity incurring huge losses, and the losses would continue to mount year on year; the details of the Mortgaged Assets in the Director's Report, and the Audited balance sheet, establish that all its movable and immovable assets have been mortgaged to banks/secured creditors against loans exceeding Rs.6000 crores; even the performance bank guarantees, furnished by the appellant, have been assigned by the first respondent to the banks; they do not have any other independent assets, the main promoter of the first respondent i.e., Sembcorp Pte Ltd is a Singapore based company, and holds 88% shares in it; the first respondent is distinct and independent of its parent company; and the secured debt of banks would take priority over any other debt, including the amounts that would be payable to the appellant by the first respondent, in the event of their succeeding in the arbitration proceedings.

Learned Senior Counsel would further submit that the Balance Sheet of the first respondent for the year 2016-17 reflects retention moneys of Rs.304 crores, and Rs.27 crores towards unpaid bills payable by the first respondent to the appellant; the letters dated 02.02.2017 and 31.03.2017 sent by the first

respondent itself shows that the amount payable to the appellant, including the retention money and running account bills, are Rs.367.47 Crores; the maximum liquidated damages that can be claimed is already retained by the first respondent from the amounts payable to the appellant; if the first respondent is allowed to encash the bank guarantees illegally, they would be in possession of more than Rs.700 crores (Rs. 367.47 crores + Rs. 343.1 crores) belonging to the appellant; the future of thermal electricity generating companies is bleak as supply is far in excess of demand; in view of the drastic fall in the price of power being sold by generating companies, particularly renewable energy, most of the thermal power companies are not able to recover even the cost of fuel, let alone the interest cost payable to the lenders, and the employee costs; rating agencies, including CRISIL, estimate that around 46,000 mw of power generation projects (36,000 mw coal-based and 10,000 mw gas –based) are in distress, and loans to these projects, of around Rs.2.1 lakh crores, is at complete risk; none of the cases, cited by the first respondent, have dealt in detail with the aspect of special equities/irretrievable injury or damages in close reference to the facts of the present case; and the appellant herein is substantially relying on the exceptions relating to special equities and irretrievable damage that would be caused to the appellant in the event illegal encashment of the bank guarantees are permitted.

On the other hand Sri C.V. Mohan Reddy, Learned Senior Counsel appearing on behalf of the first respondent, would submit that no case of irretrievable/irreparable injury was pleaded, or established. by the appellant to seek an injunction against

encashment of the Bank Guarantees; the nature of irretrievable injury, required to be established in the case of bank guarantees, must be of the nature referred to in **Itek Corporation v. First National Bank of Boston**³⁸; in the present case, admittedly, the facility is into commercial operation and is generating revenue; the appellant has an adequate remedy available in law, in the form of arbitration, to recover its dues, if any, from the first respondent; the first respondent's parent company i.e Sembcorp Utilities Pville. Limited has extended its Corporate Guarantee (to the tune of Rs. 7604 Crores) as part of the overall security package to the lenders, which covers the term loan and the working capital facilities enjoyed by the first respondent; in addition, Sembcorp Utilities Pville. Limited has infused Rs. 4,240 Crores into the first respondent to repay part of the term loan facilities, and to support the cash flows; this demonstrates the parent company's commitment towards the projects, and forms the back-bone of the first respondent's financial resources; due to the delay caused by the appellant, the first respondent has already suffered irretrievable losses in terms of reputation and business, monetary losses, including payment of interest during construction to its lenders, cost overruns over and above the project cost, increase in pre-operative expenses, payment of penalty to Power Grid Corporation of India Limited, the Telangana DISCOM due to delay in evacuation of power, and Krishnapatnam Port Company Limited under a Port Services Agreement; due to various delays, inactions, omissions and breach of its contractual obligations by the appellant, the first respondent has incurred losses which are

³⁸ 566 F. Supp.1210 (1983).

recoverable from the appellant, including costs incurred towards de-scoping of works from the contract price, labour cess, pending roads/drains/painting works and purchase of spare parts etc; such costs/losses are of a value which exceeds the pre-estimated liquidated damages; in the event injunction is granted by this Court, it is the first respondent which would suffer further irretrievable injury, and not the appellant; most of the averments/submissions made by the appellant, claiming 'special equities' in its favour, are also disputed questions of fact, and ought to be dealt with in the arbitration; the appellant has not filed any supporting document, along with the Section 9 petition, to establish special equities; it was only when the first respondent pointed this out in its counter to the Section 9 petition that, as an afterthought, the appellant has filed additional documents along with its reply thereto; the first respondent has always been, and continues to be committed to, making regular payments to the appellant, subject to their achieving the respective payment milestones; all dues have been paid till date; in terms of the payment terms, agreed under Appendix B of the EPC Contracts, nothing is due till successful achievement of the provisional acceptance of Units 1 and 2, as evidenced by the issuance of the provisional acceptance certificate by the first respondent; the appellant has deliberately not mentioned that payment, under the EPC Contracts, were progressive in nature and dependant on completion of the respective milestones; payment, which was to become due upon successful completion of the milestone of provisional acceptance, has not become due as on date since provisional acceptance has not been achieved by the appellant;

since the conditions stipulated in Article 6.3 has not been satisfied, and provisional acceptance has not been achieved as on date, the said amount is not payable to the appellant; the amounts, mentioned in the first respondent's letter dated February 02, 2017, are not retention amounts, but milestone payments which are to be paid only upon successful completion of the milestone of provisional acceptance test, and not otherwise; and the same ought not to be treated as an admission of outstanding liability by the first respondent to the appellant.

In **Gammon-OJSC Mosmetrostroy JV v. Chennai Metro Rail Limited**³⁹, the Madras High Court held:-

“.....It is claimed that 60% of the work was already completed by Joint Venture and therefore, the remaining work to be completed is only 37%. Even to complete the said work, the lead party namely GAMMON sought permission from CMRL to exercise the step in right as contemplated under Clause 19.11. The said request was not considered by CMRL for various reasons. Admittedly, the CMRL has extended the time for completion of the contract and the extended time has not admittedly expired on the date of issuing the termination order. The GAMMON has not simply sought for permission to bring in a third party by exercising the step in right without making any bonafide attempt. On the other hand, it is a matter of fact that GAMMON sought to bring in an Italian company for completing the remaining work. This was also not considered by CMRL. Such attempt of GAMMON certainly, show the bonafide on their part in completing the project. It is also claimed that the CMRL has not settled some bills in respect of the works already completed to the tune of Rs. 100 crores. However, this claim is denied by CMRL by stating that the applicant cannot expect CMRL to pump in a sum of Rs. 100 crores when the JV has admittedly failed and its JV partner had abandoned the project. **Needless to say that this claim by the applicant and denial by the respondent is a matter to be gone into by the Arbitral Tribunal. These are all the facts prima facie indicate that termination of the contract followed by the attempt to invoke the bank Guarantee would certainly cause irretrievable injury to the applicant.** In spite of all those facts, if injunction is refused, in my considered view, it would cause to the applicant not only an irretrievable injury but also irretrievable injustice. In fact, the very termination of contract, not stayed by this Court, has already caused irretrievable injury. Whether termination is valid or not is to be decided by the Arbitral Tribunal. However, as the termination, not stayed by this Court has caused irretrievable injury to the applicant, pending disposal of the arbitral proceedings, further injury can be averted by granting the injunction against invoking Bank Guarantees. It should also be noted that not granting of stay of termination by this Court in this proceedings is not based on merits of the rival contentions of the parties, but on the reason that termination has already come into force and staying the same would revive the party to their original position. Further, it is a matter of fact that already the CMRL has invoked two bank guarantees which are the subject matter in other two applications in Application Nos. 730 & 733 of 2015. As the Bank Guarantees have been invoked in those

³⁹ MANU/TN/2876/2015 (Mad) = 2015(6) ARBLR 340

matters, those applications were dismissed by this Court on 07.08.2015.....

.....Admittedly, the Bank Guarantees given by the applicant are alive and the CMRL can at any time, invoke the same. Therefore, the interest of the CMRL is well protected by the Bank Guarantees furnished by the applicant. If those Bank guarantees are continued to be alive during the arbitral proceedings and even thereafter, during the pendency of the proceedings under Section 34 of the said Act, the interest of the CMRL is in no way be affected or prejudiced. On the other hand, if the Bank guarantees are invoked in the mean time, certainly, the applicant would be put to great financial strain as the concerned Banks which had given Bank Guarantee would ultimately, bounce upon the applicant to pay the money. In my considered view, this would certainly make the applicant to suffer even before the Arbitral Tribunal decides the main dispute between the parties.....” (emphasis supplied)

In **P.D. Alkaram Pvt. Ltd. v. Canara Bank**⁴⁰, the Delhi High

Court held:-

“.....The plaintiff has also placed on record sufficient material, in the form of various invoices issued by M/s. Hindalco Industries Ltd.; bill-wise details of aluminium procured, corresponding to drawings filed per Annexure P-1 (Colly.), which, prima facie, shows that it had procured fabrication material worth more than Rs.20 lacs, advanced by the defendant. In the light of this material, over-emphasis of learned counsel for the defendant on the above extracted last part of the plaintiff's letter dated 29 May 1996, to the effect that it would start mobilising itself for the job only when the site is ready, renders it of no substance. It may not be out of place to mention that during the course of hearing it was suggested to learned counsel for the defendant that the purchased material stated to be lying at the premises of the plaintiff may be got inspected by the defendant and if deemed fit it could be released to the defendant for being used in the building under construction. It seems that the inspection was carried out because it was stated at the bar by learned counsel for the defendant that the material was not complete and it was on that plea that the defendant did not show any interest in the material. **In this view of the matter, plaintiff's pleas of defendant's failures and fraudulent misrepresentation apart, to be dealt with on merits later in due course, when the plaintiff prima facie, seems to have utilised the entire mobilization advance for procuring the material for use on the defendant's building, as per the approved specifications, I feel that the plaintiff has successfully brought out special circumstances which are sufficient to make the present case an exceptional one justifying interference by restraining defendant no.2 from enforcing the bank guarantee in question. As a matter of fact having gained knowledge that the plaintiff has procured substantial material, even invocation of the bank guarantee after oral termination of the contract appears to be fraudulent. Bearing in mind all these factors, I find that special equities are in favor of the plaintiff and if the defendant is allowed to encash the bank guarantee in question, it would amount to irretrievable injustice to the plaintiff.** I am, Therefore, satisfied that it is a fit case where defendant No.1 needs being interdicted from encashing the bank guarantee in question.....” (emphasis supplied).

In **Hindustan Construction Co. Ltd.**¹⁴, the Supreme Court

held:-

“.....We have scrutinised the facts pleaded by the parties in respect of both the bank guarantees as also the documents filed before us

⁴⁰ 1998 (1) ARBLR 566 (Delhi) = MANU/DE/0504/1998

and we are, *prima facie*, of the opinion that the lapse was on the part of the defendants who were not possessed of sufficient funds for completion of the work. The allegation of the defendants that HCCL itself had abandoned the work does not, *prima facie*, appear to be correct and it is for this reason that we are of the positive view that the “special equities” are wholly in favour of HCCL.....” (emphasis supplied)

In **Universal Publishers Pvt. Ltd. v. Australian Executor**

Trustees Limited⁴¹, the Supreme Court of New South Wales held:-

“.....According to AET’s audited accounts for the year ended 30 June 2013, it had net assets of \$33,029. AET however is a trustee. It is said that it holds the land at Macquarie Park as custodian for Hyperion Properties Syndicates Limited which in turn is a responsible entity of a managed investment scheme. *Prima facie*, AET would be entitled to be indemnified out of the assets of the trust, that is the managed investment scheme, in respect of liabilities it properly incurred in discharge of its functions as trustee. There is nothing to suggest that it would not be entitled to such an indemnity if it were liable to pay damages or to make restitution to Universal if it received payment under the bank guarantee but it was ultimately found that Universal had not been in breach of the lease.

If that were the conclusion at the final hearing, it does not appear that AET’s right of indemnity out of the trust assets to meet its liability to pay damages or to make restitution would be sufficient to provide it with the funds to pay damages or makes restitution. **If the bank guarantee were called on and AET spent the money as it evidently proposes to do on site remediation, but it was held at a final hearing that Universal was not in breach of the lease, then it appears likely that AET would not be able to meet an award of damages for restitution.**

I conclude that damages are unlikely to be an adequate remedy if it were ultimately held that AET was not entitled to call on the bank guarantee. This is the governing consideration also when deciding where the balance of convenience lies.....” (emphasis supplied).

In **Gammon**³⁹, the Madras High Court was of the view that completion of 60% of the work by Gammon, termination of the contract by the respondent before expiry of the extended time for completion of the contract, and the bonafide attempt of Gammon to bring in an Italian Company to complete the remaining work, were all factors which, *prima facie*, indicated that the termination of the contract, followed by the attempt to invoke the bank guarantee, would cause irretrievable injury to Gammon.

In **P.D. Alkaram Pvt. Ltd**⁴⁰, the Delhi High Court opined that the documents placed on record, *prima facie*, showed that the

⁴¹ (2013) NSWSC 2021

plaintiff had procured fabrication material from the amounts advanced by the defendant; the plaintiff had, *prima facie*, utilized the entire mobilization advance for procuring material for being used on the defendant's building as per the approved specification; and these factors constituted special equities in favour of the plaintiff.

In **Hindustan Construction Company Ltd**¹⁴, the Supreme Court was, *prima facie*, of the opinion that the defendants did not possess sufficient funds for completion of the work; their allegation that the appellant had abandoned the work did not, *prima facie*, appear to be correct; and they were of the view that special equities were wholly in favour of the appellant. As noted hereinabove, the Supreme Court, in **Hindustan Construction Company Ltd**¹⁴, was satisfied that the subject bank guarantees were neither unconditional nor unequivocal. As the Supreme Court was satisfied that invocation of bank guarantee was subject to fulfillment of certain conditions in the underlying contract, it took note of the dispute between the parties, under the said contract, to examine whether there were special equities in favour of the appellant.

In **Universal Publishers Pvt. Ltd**⁴¹, the Supreme Court of New South Wales observed that the respondent would not be able to meet an award of damages for restitution; and damages were unlikely to be an adequate remedy if it were ultimately held that the respondent was not entitled to call on the bank guarantee. As shall be detailed hereinafter, the Supreme Court, in **Sumac International Ltd**⁶, has held that irretrievable injury must be of the kind which was the subject matter of the decision in **Itek**

Corporation³⁸. Before doing so, it would be useful to understand what constitutes “special equities” and “irretrievable injustice/injury”, as it is only if they are in favour of the appellant, would this Court be justified in restraining the first respondent from invoking the bank guarantees.

The expression 'extraordinary special equities', or 'irretrievable injustice/injury', are not defined expressions. A case of special equities, in all circumstances, may not be a case of irretrievable injustice/injury. (**Continental Construction Ltd.**³³). However, special circumstances, such as there is a serious dispute on the question as to who has committed breach of the contract, or the contractor has a counter claim against the contractee, or the dispute between the parties has been referred to the arbitrators, or that no amount can be said to be due and payable by the contractor to the contractee till the arbitrator declares their award, are not sufficient to make the case exceptional justifying interference by restraining the contractee from enforcing the bank guarantees. (**Tarapore & Co.**³).

An irrevocable commitment, either in the form of confirmed bank guarantee or irrevocable letter of credit, cannot be interfered with expect when a case of apprehension of irretrievable injustice has been made out. (**Tarapore & Co.**³; **Singh Consultants & Engineers (Pvt.) Ltd**⁷). Cases of grant of injunction, restraining enforcement of the bank guarantee, arise when allowing encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties. Since, in most cases, payment of money under such a bank guarantee would adversely affect the bank, and its customer at whose instance the

guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee, and the adverse effect of such an injunction on commercial dealings in the country. (**Dwarikesh Sugar Industries Ltd.**³⁰; **Svenska Handelsbanken**¹⁶; **Larsen & Toubro Ltd.**¹⁷; **G.S. Atwal & Co. (Engineers) (P) Ltd.**¹⁸ and **Sumac International Ltd.**⁶).

A mere apprehension, that the other party will not be able to pay, is not enough. (**Sumac International Ltd.**⁶; **Singh Consultants and Engineers (P) Ltd.**⁷). For irretrievable injury to result, the circumstance must be such which would make it impossible for the guarantor to reimburse himself, if he ultimately succeeds, or when irretrievable harm or injustice, to one of the parties concerned, has resulted. This should be decisively established, and it must be proved to the satisfaction of the Court that there would be no possibility, whatsoever, of recovery of the amount from the beneficiary, by way of restitution. (**Dwarikesh Sugar Industries Ltd.**³⁰; **Millenium Wires (P) Ltd.**³¹; **ICICI Bank Ltd**¹³).

The question, which necessitates examination, is whether the appellant has made out a case of irreparable injury, by proof of special equities for the Court to grant injunction to restrain the first respondent from encashing the bank guarantee. As noted hereinabove, mere apprehension that the first respondent would not be able to repay the amounts, which it would receive on encashment of the bank guarantees, is not enough to restrain them from invoking the bank guarantees. The appellant claims that they would also suffer huge loss if the first respondent were to

unilaterally adjust the amount claimed as liquidated damages, with the amounts they would receive on encashment of the bank guarantees. This would, also, not constitute special equities justifying grant of an order of injunction restraining the first respondent from encashing the bank guarantees.

The allegation that the first respondent has suffered a loss of Rs.328.46 Crores, during the financial year 2016-17, is based on the figures reflected in their provisional balance sheet, which had not been approved by their shareholders. While this accumulated loss of the first respondent, for the three years 2014-15 to 2016-17, is highlighted as exceeding Rs.386.49 Crores, and emphasis is placed by the appellant on the fact that the movable and immovable assets of the first respondent have been mortgaged to the banks/secured creditors against loans exceeding Rs.6,000 Crores, it is contended, on behalf of the first respondent, that its parent company-SembCorp Utilities Pte Ltd has extended a corporate guarantee of Rs.7,604 Crores as part of the overall security package to the lenders, which covers the term loan and the working capital facilities enjoyed by the first respondent; and, in addition, they had infused Rs.4,240 Crores into the first respondent to repay a part of the term loan facilities, and to support the cash flows of the first respondent.

As noted hereinabove, Irretrievable injury must be of the kind which was the subject-matter of the decision in **Itek Corporation**³⁸. In that case an exporter in the USA entered into an agreement with the Imperial Government of Iran, and sought an order terminating its liability on stand by letters of credit issued by an American Bank in favour of an Iranian Bank as part of the

contract. The relief was sought on account of the situation created after the Iranian revolution when the American Government cancelled the export licences in relation to Iran, and the Iranian Government had forcibly taken 52 American citizens as hostages. The US Government had blocked all Iranian assets under the jurisdiction of the United States, and had cancelled the export contract. The Court upheld the contention of the exporter that any claim for damages against the purchaser, if decreed by the American Courts, would not be executable in Iran under these circumstances; and realisation of the bank guarantee/letters of credit would cause irreparable harm to the plaintiff. (**Sumac International Ltd.**⁶; **Singh Consultants and Engineers (P) Ltd.**⁷).

The exceptional circumstances which make it impossible for the guarantor to reimburse himself, if he ultimately succeeds, should be decisively established, and a mere apprehension, that the other party will not be able to pay, is not enough. In **Itek**, there was certainty on this issue and there was good reason in that case for the Court to be, *prima facie*, satisfied that the guarantors i.e. the bank and its customer would be found entitled to receive the amount paid under the guarantee. In the cases on hand the petitions, filed under Section 9 of the 1996 Act, do not conclusively establish that the appellant is likely to suffer irretrievable injury, or that it is impossible for them to reimburse themselves, from the first respondent, even if they were to succeed later before the arbitral Tribunal.

In **Sumac International Ltd**⁶, it was contended, on behalf of the respondent, that irretrievable injustice would be caused to them if the bank guarantees were allowed to be realised, because

the appellant was a sick industrial company in respect of which a reference was pending before the BIFR under the Sick Industrial Companies (Special Provisions) Act, 1985 ("SICA" for short); and even if it succeeded before the Arbitrator, it would not be able to realise its claim from the appellant. The Supreme Court held that the mere fact that a reference under SICA was pending before the BIFR was not sufficient to bring the case within the ambit of the "irretrievable injustice" exception; under Section 16(4) of SICA, where the BIFR deems it fit to make an inquiry or to cause an inquiry to be made in this connection, it may appoint one or more persons to be special directors for safeguarding the financial and other interests of the company or in the public interest; under Section 17 after making an inquiry, if the BIFR is satisfied that a company has become a sick industrial company, it may then decide, by an order in writing, whether it is practicable for the company to make its net worth exceed the accumulated losses within a reasonable time; if this is practicable, then the BIFR shall give such company the opportunity to make its net worth exceed the accumulated losses; under sub-section (3) of Section 17, if the BIFR decided that this was not practicable within a reasonable time, it may adopt measures specified in Section 18, and provide for a scheme for appropriate measures in relation to that company; there can, therefore, be no presumption that the company will, in no circumstance, be able to discharge its obligations; there was no material to show that the appellant could not make its net worth positive; this was not a situation of the kind envisaged in the case of **Itek Corporation**³⁸ where there was no possibility whatsoever of

recovery of any amount from the purchaser; and, in the present case, there was a good possibility of such recovery.

Even if we were to proceed on the premise that the first respondent has, in fact, suffered losses in excess of Rs.326.5 Crores, and its assets are mortgaged to the bank as security for the loans extended to them in excess of Rs.6,000 Crores, we cannot also ignore the first respondent's claim that their holding company (which owns more than 88% shares of the first respondent) has furnished corporate guarantees for a sum in excess of Rs.7,500 Crores and has, in addition, infused Rs.4,340 Crores into the first respondent, among others, to support its cash flows. As in the case of **Sumac International**⁶, no material has been placed by the appellant to show that the first respondent would not, under any circumstances, be in a position to repay the amount, received by them on encashment of the bank guarantees, in case the appellant were to succeed in the arbitration proceedings later. Unlike in **Itek Corporation**³⁸, where there was no possibility whatsoever of recovering any amounts from the other party, the extent of support extended to the first respondent by its parent company shows that the appellant's apprehension, to the contrary, is unfounded. The appellant's far fetched and outlandish prophecy of a complete collapse, of the Indian thermal energy industry, would also not constitute "special equities" justifying an order of injunction being granted restraining the first respondent from invoking the bank guarantees.

While claiming that the amounts due to it from the appellant is far higher than the amounts which they have sought to recover towards liquidated damages together with the retention money, the

first respondent also contends that the amounts, which the appellant claims to be retention money and as payable to them in excess of Rs.300 Crores, constitute amounts representing milestone payment, which would fall due only on the appellant achieving provisional acceptance; and, till they do so, they are not entitled for the said sum. These are again matters which are required to be examined by the arbitral tribunal, and not by this Court in an appeal preferred against an order passed by the Commercial Court in a petition filed under Section 9 of the 1996 Act. Suffice it to hold that the appellant has not made out a case of special equities justifying an order of injunction being granted to restrain the first respondent from invoking the bank guarantees.

IX. FALSE PLEA IN THE SECTION 9 PETITION FILED BY THE APPELLANT : ITS CONSEQUENCE:

The appellant has alleged, in paragraph 8 of their Section 9 petition, that provisional acceptance has been achieved for Unit 1 on May 25, 2016 and Unit 2 on February 02, 2017; on provisional acceptance being achieved, Rs.300 Crores was due from the first respondent for the works done by them; and, in the event the bank guarantee is allowed to be encashed, they would have no means of recovering the amounts due, as the first respondent has no assets in India. Sri C.V. Mohan Reddy, Learned Senior Counsel appearing on behalf of the first respondent, would submit that such averments are false to the appellant's own knowledge; as the appellant has come before this court with unclean hands, and has lied on oath in the petition, they are not entitled to injunctive relief; the Section 9 petition has been filed on the basis of a false affidavit; and litigants must observe total clarity and candour in

their pleadings. He would rely on **Seema Arshad Zaheer**²⁹; and **Amar Singh v. Union of India**⁴²).

In its e-mail dated November 18, 2016, the appellant has admitted that the slow pace of commissioning activities on Unit-2 is likely to further delay the PAT (Provisional Acceptance Test). As on November 18, 2016, provisional acceptance of Unit - II was, admittedly, not achieved. In their letter dated January 02, 2017, the appellant admits that they are likely to achieve PAT by 31st March, 2017. A tripartite discussion was held on February 22, 2017 between the appellant, the first respondent and the CTC to decide on the action plan to achieve provisional acceptance of Unit-I. It does appear, from these documents, that provisional acceptance of Units 1 and 2 were not achieved till the jurisdiction of the Commercial Court was invoked by the appellant on 06.03.2017. It does appear that their plea, in the petition filed by them under Section 9 of the 1996 Act, that provisional acceptance was achieved for Unit - I on 25.05.2016, and for Unit II on 02.02.2017, are false.

It is the duty of a party seeking injunction to bring to 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. (**Amar Singh**⁴²; **Dalglisch v. Jarvie**⁴³). Litigants, who come to Court with “unclean hands”, are not entitled to be heard on the merits of their case. (**Amar Singh**⁴²). A litigant, who attempts to pollute the stream of justice, or who touches the pure

⁴² (2011) 7 SCC 69

⁴³ 42 ER 89 = (1950) 2 Mac & G 231

fountain of justice with tainted hands, is not entitled to any relief, interim or final. (**Amar Singh**⁴²; **Dalip Singh v. State of U.P.**⁴⁴).

Litigants must observe total clarity and candour in their pleadings, 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”. (**Amar Singh**⁴²; **Hari Narain v. Badri Das**⁴⁵; **Welcome Hotel v. State of A.P.**⁴⁶; **G. Narayanaswamy Reddy v. Govt. of Karnataka**⁴⁷; **S.P. Chengalvaraya Naidu v. Jagannath**⁴⁸; **A.V. Papayya Sastry v. Govt. of A.P.**⁴⁹; **Prestige Lights Ltd. v. SBI**⁵⁰; **Sunil Poddar v. Union Bank of India**⁵¹; **K.D. Sharma v. SAIL**⁵²; **G. Jayashree v. Bhagwandas S. Patel**⁵³ and **Dalip Singh**⁴⁴).

A plaintiff, applying ex-parte, comes 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, as he has broken faith with the Court, the injunction must go. (**Amar Singh**⁴²; **Castelli v. Cook**⁵⁴). If there is an important misstatement, Courts should never hesitate to discharge the order at once, so as to impress upon all Suitors, the importance of

⁴⁴ (2010 2 SCC 114

⁴⁵ AIR 1963 SC 1558

⁴⁶ (1983) 4 SCC 575

⁴⁷ (1991) 3 SCC 261

⁴⁸ (1994) 1 SCC 1

⁴⁹ (2007) 4 SCC 221

⁵⁰ (2007) 8 SCC 449

⁵¹ (2008) 2 SCC 326

⁵² (2008) 12 SCC 481

⁵³ (2009) 3 SCC 141

⁵⁴ 68 ER 36 = (1849) 7 Hare 89

dealing in good faith with the Court when ex-parte applications are made. (**Amar Singh**⁴²; **Republic of Peru v. Dreyfus Bros. & Co.**⁵⁵).

It is the rule of the Court, and one which 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 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. (**Amar Singh**⁴²; **R. v. Kensington Income Tax Commr., ex p Princess de Polignac**⁵⁶).

Suppression of facts by the party against the beneficiary, and *prima facie* evidence to show that there is truth in these allegations, would not entitle the party to seek injunction restraining invocation of the bank guarantee. (**Synthetic Foams Ltd.**²³ and **Satluj Jal Nigam Ltd.**²⁴; **State Trading Corporation of India Ltd.**²⁵). While the ex facie false plea, of having already achieved provisional acceptance, in the Section 9 petition filed by the appellant, would have, by itself, necessitated denying them any relief, and in non-suiting them on this short ground, we have examined their claim on merits, including that the invocation of the bank guarantee is fraudulent and special equities are in their favour, as the increase in the number of cases seeking injunction,

⁵⁵ 38 Ch D 348 = 55 LT 802

⁵⁶ (1917) 1 KB 486 (CA)

restraining invocation of bank guarantees, under the 2015 Act, made us feel the need to reiterate the law declared by the Supreme Court on these aspects.

X. CONCLUSION:

Viewed from any angle, we see no reason to restrain the first respondent from invoking the bank guarantees furnished by the appellant, as these bank guarantees are unconditional and unequivocal, and the appellant has neither made out a case of fraud vitiating the contract of bank guarantee nor of special equities justifying an order of injunction being granted restraining invocation of the bank guarantees.

All the Civil Miscellaneous Appeals fail and are, accordingly, dismissed. Miscellaneous Petitions pending, if any, shall also stand dismissed. There shall be no order as to costs.

(RAMESH RANGANATHAN, ACJ)

(T.RAJANI, J)

Date: 24-10-2017.

Note: L.R. copy to be marked.

B/o
CS/MRKR

After judgment was pronounced in Court today, Sri D. Prakash Reddy, learned Senior Counsel appearing on behalf of the appellant, while submitting that the validity of the subject bank guarantees have been extended till 26.11.2017, would request that the first-respondent be restrained from encashing the bank guarantees for a period of three weeks to enable the appellant to approach the Supreme Court.

Sri Thoom Srinivas, learned counsel for the first-respondent, opposes grant of such a relief, contending that, in case the appellant were to succeed before the Arbitral Tribunal, they can always recover the amount from the first respondent. As the appellant has had the benefit of an interim order, during the pendency of these appeals, we consider it appropriate to direct that the subject bank guarantees shall not be encashed for a period of two weeks from today.

(RAMESH RANGANATHAN, ACJ)

(T.RAJANI, J)

24th October, 2017

Note: Issue C.C in two days.

B/o
CS/MRKR/JSU