

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION (L) NO. 366 OF 2016

Felguera Gruas India Pvt. Ltd.

having its registered office at 10-50-24/A, 3rd floor,

Sravva Manor, Vishakhapatnam,

Andhra Pradesh-530003

through Mr. Nandan Kumar, Senior Manager (Legal)

and Company Secretary

...Petitioner

vs.

1. Tuticorin Coal Terminal Pvt. Ltd.

having its registered office at #3, C Wing,

2nd floor

Amerchand Mansion, 16, Madame Cama Road,

Colaba, Mumbai-400 039

also at: 3rd Floor, Manickam Towers,

Palayam Kottai Road, Tuticorin-628 003

2. Barclays Bank PLC

having its Branch Office at 1st floor,

Eros Corporate Tower, Nehru Place,

New Delhi-110 019

3. Hong Kong & Shanghai Banking

Corporation Limited

having its branch office at 6-3-1107 & 1108,

Raj Bhavan

Road, Somajiguda, Hyderabad-500 082

..Respondents

ALONG WITH
ARBITRATION PETITION (L) NO.367 OF 2016
WITH
ARBITRATION PETITION (L) NO.368 OF 2016
WITH
ARBITRATION PETITION (L) NO.369 OF 2016
WITH
ARBITRATION PETITION (L) NO.370 OF 2016
WITH
ARBITRATION PETITION (L) NO.371 OF 2016

APPEARANCES

Mr. Darius Khambatta, Senior Advocate, along with Mr. Zal Andhyarujina instructed by M/s. Res Legal for the Petitioner.

Mr. S.U. Kamdar, Senior Advocate, along with Mr. Chirag Kamdar, Mr. Dharam Juman instructed by M/s. Argus Partners, for Respondent No.1.

CORAM: S. J. KATHAWALLA, J.
Judgment reserved on: 12th SEPTEMBER, 2017
Judgment pronounced on: 11th JANUARY, 2018

JUDGMENT

1. The above Arbitration Petitions are filed by the Petitioner Felguera Gruas India Pvt. Ltd. ("**FGIPL**") under Section 9 of the Arbitration and Conciliation Act, 1996 (***The Act***"), seeking interim injunction against the encashment of the Advance/Down Payment Bank Guarantees and Performance Bank Guarantees which are furnished by the FGIPL to the Respondent No.1 - Tuticorin Coal Terminal Pvt. Ltd. ("**TCTPL**")

as agreed under the six purchase orders being No. 02 dated 23rd August 2012; No.03 dated 23rd August 2012; No.1-B dated 28th November 2012; No.1-C dated 28th November 2012; No.01, dated 23rd August 2012; and No.1-A dated 28th November 2012, placed on FGIPL by TCTPL, pursuant to the Letters of Intent dated 10th July, 2012 and 1st November, 2012, entered into by FGIPL and TCTPL. The particulars of the subject Bank Guarantees are set out in the prayer clauses of the above Arbitration Petitions. Admittedly, the issues involved in all the above six Arbitration Petitions are similar.

2. FGIPL is a Company incorporated under the provisions of the Companies Act, 1956. According to the FGIPL, it is in the business of undertaking turn key projects across India. It offers end to end services in design, testing, commissioning, manufacturing, sourcing, supply and construction and has executed several major projects in Ports.

3. TCTPL is a Private Company incorporated under the provisions of the Companies Act, 1956. TCTPL ("*Concessionaire*") entered into a Concession Agreement dated 11th September, 2010 with the Board of Trustees for Tuticorin Port (V.O. Chidambaranar Port Trust) ("*Concessioning Authority*") for Development of North Cargo Berth-II (NCB-II) for handling bulk cargoes at Tuticorin Port on Design, Build, Finance, Operate and Transfer basis. The Concession Agreement has been entered for a period of 30 years. Upon completion of the project, ships shall come

alongside the berth for discharging the cargo. The berth is equipped with ship unloaders (already commissioned) for discharging the cargo from the ship. The TCTPL/Concessionaire, shall for a period of 30 years undertake the activity of discharging the cargo from the ship with the use of cranes, for which TCTPL shall be entitled to the cargo handling charges levied per metric ton from the users of the project facilities and services as per the tariff which shall be notified by TAMP from time to time.

4. In the year 2012, FGIPL offered its services to TCTPL for supplying as well as designing, erecting and commissioning of stacker-cum-reclaimers, stacker and conveyor system. Accordingly, FGIPL and TCTPL entered into a Letter of Intent dated 10th July, 2012, for supply, design, erection and commissioning of stacker-cum-reclaimers, pursuant to which TCTPL placed three Purchase Orders ('POs') all dated 23rd August, 2012, in respect of supply, design, erection and commissioning of stacker-cum-reclaimers and stacker for the NCB-II project at VOCPT, Tuticorin. Additionally, TCTPL entered into another Letter of Intent dated 1st November, 2012, with FGIPL, pursuant to which TCTPL placed three POs all dated 28th November, 2012, in respect of supply, design, erection, commissioning and handing over of conveyor system for the VOCPT Project at Tuticorin.

5. Therefore the entire contract between FGIPL and TCTPL comprised of the six POs mentioned hereinabove. Each PO had a clause for advance payment

against the submission of the original commercial invoice, advance/down payment, bank guarantee and performance bank guarantee. As stipulated, FGIPL issued the Down Payment Bank Guarantee and Performance Bank Guarantee in favour of TCTPL in respect of each PO. The Arbitration Agreement between the parties is contained in Article 41 of the General Terms and Conditions for procurement of goods in respect of stacker and stacker-cum-reclaimers.

6. As set out hereinabove, FGIPL has filed the above Arbitration Petitions under Section 9 of the Act seeking injunction against TCTPL from invoking any of the Advance/Down Payment Bank Guarantees or Performance Bank Guarantees provided by FGIPL in favour of TCTPL.

7. The first and the main contention of FGIPL is that the subject Bank Guarantees are conditional. Since the terms of each of the Bank Guarantees are identical, the relevant clauses of one such Advance/Down Payment Bank Guarantee are reproduced hereunder :

“1. If the Delivery Obligation is not performed by the Seller in accordance with the terms of the PURCHASE ORDER, the Guarantor shall, within 7 (seven) days from the receipt of a demand by the Purchaser, pay to the Purchaser any sum not exceeding Rs. 1,70,00,000/- (Rupees One Crore Seventy Lakhs Only).

2. The obligation of the Guarantor under this Guarantee shall be unconditional, absolute and irrevocable, irrespective of the genuineness, validity, regularity or enforceability of the PURCHASE ORDER or any other circumstances which might otherwise constitute a legal and/or equitable discharge of a surety or the Guarantor under the law relating to sureties. The Guarantor shall not be entitled to dispute

or inquire into whether the Purchaser has become entitled to claim the said amount under the PURCHASE ORDER or not or whether the Supplier has committed any breach of the PURCHASE ORDER and/or the General Terms and Conditions applicable thereto or not or whether the Purchaser is entitled to recover any damages from the Supplier for breach thereof or not.

3. The Purchaser need not initiate any proceeding or claim against the Seller before lodging any claim under this Guarantee.

...

*6. The liability of the Guarantor under this Guarantee shall be primary, direct, and immediate, and **not conditional, and/ or contingent upon pursuit by the Purchaser of any remedies** that it may against the Seller and/ or any other person in relation to the Purchase Order.*

7. The Guarantor hereby expressly waives:

...

D. Demand for observance, performance and/ or enforcement of any terms and / or provisions of this Guarantee and/ or the Purchase Orders.

...

15. A demand for payment under this Guarantee shall be deemed to have been sufficiently made if a claim in writing is sent by post or hand delivered to Guarantor at its office and is received by the Guarantor. (Emphasis supplied)

8. The Articles of the Performance Bank Guarantees are identically worded as in the case of Advance/Down Payment Bank Guarantees, save and accept Article 1, which reads thus :

"1. If the Delivery Obligation is not performed by the Seller in accordance with the terms of the purchase order, the Guarantor shall, within 7 (seven) days from the receipt of a demand by the Purchaser, pay to the Purchaser any sum not exceeding Rs.1,70,00,000/- (Rupees One Crore Seventy Lakhs Only)" (emphasis supplied).

9. Learned Senior Advocate appearing for the FGIPL in support of his submission that all the Bank Guarantees are conditional, mainly relied on Articles 1 and 2 of the

Advance/Down Payment Bank Guarantees and Performance Bank Guarantee, which are set out hereinabove and submitted as follows :

- (i) That a plain reading of Article 1 of the Advance Bank Guarantees shows that the invocation and obligation of the bank under the Bank Guarantee is dependent and conditional upon the delivery obligation not being performed by the seller/FGIPL in accordance with the terms of the purchase order.
- (ii) That from a plain reading of Article 1 of the Performance Bank Guarantees it is evident that the payment under the Performance Bank Guarantees by the Bank is conditional upon the seller's / FGIPL's failure to perform any of its obligations under the purchase order and/or any breach/violation of the terms of the purchase order by the seller/FGIPL.
- (iii) Article 2 of both the Advance as well as the Performance Bank Guarantees makes it clear that it concerns the obligation of the guarantor under the guarantee and provides that the same shall be "*unconditional, absolute and irrevocable*". This will be irrespective of (i) the genuineness, validity, regularity or enforceability of the Purchase Order and (ii) any other circumstance which might otherwise constitute a legal and/or equitable discharge of a surety or the guarantor. Further the guarantor shall not be entitled to dispute or enquire into whether the purchaser has become entitled to claim the said amount under the purchase order etc. with respect to such obligation.

(iv) That a conjoint reading of Articles 1 and 2 (and the other Articles of the Bank Guarantees) with a view to avoid any provision of the Bank Guarantees being rendered otiose, must necessarily proceed on an interpretation that Article 2 stands qualified by the conditionality provided for in Article 1 and that the latter part of Article 2 qualifies the two grounds mentioned in the earlier part of Article 2. Any other construction would necessarily render Article 1 otiose.

(v) that from a perusal of Article 1 of the Advance Bank Guarantee and the Performance Bank Guarantee, it is evident that the intention of the parties was to incorporate the terms and conditions of the relevant purchase orders into the Bank Guarantees. This is apparent from the language of the Advance Bank Guarantee in so far as it provides that, "*if the delivery obligation*" and from the Performance Bank Guarantee in so far as it provides that, "*if the seller fails to perform any of its obligation under the purchase order breaches or violate any of the terms of the purchase order*". Therefore, by the aforesaid provisions in the Bank Guarantees, the delivery obligation and the entire terms and conditions of the purchase order have respectively been incorporated into the Advance Bank Guarantees and Performance Bank Guarantees and it cannot be argued that there is merely a general reference to the purchase orders in the Bank Guarantees.

10. Mr. Khambatta submitted that in the event of this Court reaching a conclusion that the Articles of the present Bank Guarantees cannot be harmoniously construed

on well settled principles of construction of commercial documents, Article 1 will prevail upon the later Articles and the demand by Respondent No. 1 can be made only upon the fulfilment of conditions stated therein. This is because (i) Article 1 is the earlier clause, and it is well settled in cases of contract that if there is a conflict between clauses, the earlier clause prevails; (ii) Article 1 is the clause creating the liability of the Bank and is the primary clause in the Bank Guarantees. Once the liability of the Banks is created by Article 1 in a certain way and with certain parameters, that liability cannot be altered by subsequent clauses; (iii) the rule of *contra proferentem* is also applicable and since the document of Bank Guarantee is provided by TCTPL, the document must be construed against the maker. In support of the above submissions, Mr. Khambatta relied on the decisions of the Hon'ble Apex Court in the cases of *Saheb Zada Mohammed Kamgar Shah vs. Jagdish Chandra Deo Dhabal Deb and others*¹ and *Radha Sundar Dutta vs. Mohd. Jahadur Rahim and others*².

11. Mr.Khambatta further submitted :

(i) that the present case is for all intents and purposes similar to the case of *Hindustan Construction vs. State of Bihar and others*³ (HCCs case). He submitted that in both, the Advance Bank Guarantees as well as the Performance Bank Guarantees, the Bank has qualified its liability to pay the amount covered by the Guarantee by the conditions stated in Article 1. It is only if these conditions are met that the whole of

1 AIR 1960 SC 953

2 AIR 1959 SC 24

3 1999 (8) SCC 436

the amount under the Bank Guarantee would become payable on demand. That being so, the Bank Guarantee cannot be said to be unconditional or unequivocal;

(ii) that it is relevant to note that in fact TCTPL is conscious of the fact that both the Bank Guarantees were conditional upon the terms and conditions of the purchase order. Accordingly, TCTPL in its respective Invocation Letters dated 10th March, 2016, invoking the Advance Bank Guarantee and the Performance Bank Guarantee have expressly stated that, “*the delivery obligation is not performed by the seller*” and that *the seller has failed to perform its obligation under the purchase order*”;

(iii) That the subject Bank Guarantees does not make the beneficiary (i.e. TCTPL) the sole Judge of whether the conditions are satisfied. In this regard, Mr. Khambatta relied on the decision of this Court in *Western Coal Fields & another vs. Rajesh and another*⁴ ;

(iv) that Article 1 of the Bank Guarantee would require two conditions to be satisfied (i) that the Letter Of Invocation sets out the non-performance of the Delivery Obligation (Advance Guarantee) or the failure to perform/breach/violation of the Purchase Order (Performance Guarantee) (ii) that the statement in (i) above is true and borne out by the facts. Mr. Khambatta relied on the decision of this Court in *Crest Communications Ltd. vs. State Bank of India*⁵ and submitted that the said decision indicates that both requirements have to be satisfied;

⁴ (2011) 6 All MR 722

⁵ (2000) 1 All MR 598 (Bombay)

(v) that TCTPL, therefore, deserves to be restrained from invoking the Bank Guarantees which are conditional and which conditions are not satisfied.

12. Mr. Kamdar, the Learned Senior Advocate appearing for TCTPL, in response, made the following submissions :

(i) That a plain reading of the terms of the Bank Guarantees makes it clear that each of the said Bank Guarantees are unconditional, absolute and irrevocable;

(ii) Article 1 of the Bank Guarantee does not contemplate any condition for invocation. It only makes a reference to the purchase order. Article 2 makes it clear that the Bank Guarantees are unconditional, absolute and irrevocable. Furthermore, the wordings in Article 2 of the Bank Guarantee that, "*the Guarantor shall not be entitled to dispute or enquire into whether the purchaser has become entitled to claim the said amount under the Purchase Order or not or whether the supplier has committed any breach of the Purchase Order and/or the General Terms and Conditions applicable thereto or not or whether the purchaser is entitled to recover any damages from the supplier for breach thereof or not*", makes it clear that whether the performance is done by FGIPL or not, cannot be disputed, questioned or enquired into by the bank and even if any claim is made by the purchaser/TCTPL, or whether there is any breach or not by the purchaser/TCTPL, are matters that cannot be looked into by the bank, which is the counter-party to the Bank Guarantees.

(iii) that it is trite law that the Bank Guarantees are independent contracts between

TCTPL and the Issuing Banks. Therefore, the question of enquiry by the counter party Banks as to whether there is any breach or failure of the FGIPL under the underlying purchase orders does not arise, particularly in the light of the fact that the Bank Guarantees are absolute, unconditional and irrevocable, as also the fact that the decision of TCTPL in that regard cannot be disputed or enquired into by the Bank, or the decision whether FGIPL has committed a breach under the purchase order cannot be questioned. In fact, the language of the second part of Article 2 of the subject Bank Guarantee makes any decision of TCTPL as regards a breach of performance of the purchase order by the FGIPL conclusive, final, binding and unquestionable, in so far as the Bank is concerned;

(iv) that the contention advanced on behalf of FGIPL that this Court should interpret the Bank Guarantees in a manner that Article 2, being subsequent to Article 1 and irreconcilable therewith, therefore must give way to Article 1, is without merit. Firstly, Articles 1 and 2 of the Bank Guarantees are not irreconcilable and can stand together. Article 1 must be read harmoniously with the second part of Article 2, and if that is done, it clearly shows that the Bank Guarantees are unconditional, absolute and irrevocable. Upon such harmonious reading, even the first part of Article 2 would stand and no part of any clause of the Bank Guarantees would be required to be discarded. Articles 1 and 2 are capable of being harmoniously interpreted and so long as harmonious interpretation is possible, it is well settled that such principle of interpretation, including the one suggested by TCTPL should be adopted and any

other principle of interpretation should be resorted to only if it is not possible to harmoniously interpret the various articles of a contract.

(v) that a similar issue of interpretation of the terms of a bank guarantee arose before the Hon'ble Supreme Court in the case of *Mahatma Gandhi Sahakra Sakkare Karkhane vs. National Heavy Engg. Corp. Ltd. and another*⁶ in respect of similar clauses of a bank guarantee. The relevant clauses of the bank guarantee in that case provided that the bank had undertaken to pay to the purchaser a sum of Rs. 92.40 lakhs upon the failure of the supplier to conduct the trial test of the sugar plant by 24th July, 2003 and also upon the failure of the sellers to commission the project (plant and machinery) before December, 2003. The said clause thus contemplated that the bank guarantee is payable upon the failure of the trial test and/or failure of commissioning of the project by the dates specified in the bank guarantee itself. Clause 2 of the bank guarantee in the said case provided that the bank guarantee was payable on demand and without demur. It further provided that the purchaser was not required to adopt any legal remedy that may be available to it and that the purchaser was to be the sole judge as to whether the bank guarantee had become invocable. In the present case too, Article 2 contemplates that the demand made by TCTPL shall not be disputed or enquired into by the Bank, the Bank also will not be entitled to enquire into whether the said claim amount under the purchase order has not become payable or that whether FGIPL has committed any breach of the purchase order. It is therefore

6 (2007) 6 SCC 470

submitted on behalf of TCTPL that the language of Article 2 of the subject Bank Guarantee makes TCTPL the sole judge in determining whether there is breach of the purchase order and accordingly whether any amount should be claimed under the Bank Guarantee from the Guarantor i.e. the Bank. The Hon'ble Supreme Court in its judgment after interpreting the clauses of the bank guarantee therein rejected the submission that the said bank guarantee was conditional and held that clauses 1 and 2 of the said bank guarantee are capable of harmonious interpretation and no part of the bank guarantee was to be discarded.

(vi) that the decision in the case of HCC has been interpreted by the Hon'ble Supreme Court in various subsequent judgments, as set out by this Court in the case of *ITD Cementation Limited vs. Reliance Infrastructure Limited*⁷ and whilst so discussing the judgment of the Hon'ble Supreme Court in the case of HCC (supra), this Court had also taken note of the judgment of the Hon'ble Supreme Court in *Vinitec Electronics Pvt. Ltd. vs. HCL Infosystems Ltd.*⁸ where also the decision of the Hon'ble Supreme Court in the HCC (supra) was interpreted and distinguished.

(vii) that the Hon'ble Supreme Court has in Mahatma Gandhi's case (supra) also dealt with an argument on the basis of the HCC case and distinguished the same in paragraph 28 of its judgment;

(viii) that the contention of FGIPL that the language of the Bank Guarantees makes them conditional, ought not to be and should not be accepted because doing so would

⁷ (2014) 2 Bom CR 1

⁸ (2008) 1 SCC 544

make the whole of Article 2 nugatory and redundant. Such course is not permissible particularly when harmonious construction of both the Articles is available and the Court, as a matter of rule, must apply and accept harmonious construction and it is only when all possibilities of harmonious construction fail, that the Court is entitled to go to the alternate method of interpretation, which is sought to be argued by the learned Counsel for FGIPL.

(ix) that the distinction sought to be made by FGIPL by contending that the present guarantee does not expressly provide that TCTPL is to be the sole judge as to whether the Bank Guarantees can be invoked or not, is patently erroneous and incorrect, since the present guarantee expressly contemplates that any demand made by TCTPL cannot be disputed or questioned by the Bank and the same is conclusive, final and binding;

(x) that the principles laid down in the decisions of the Hon'ble Supreme Court in *Saheb Zada Mohd. Kamgar Shah* (supra) and *Radha Sundar Dutta* (supra) has no application to the present Petitions as it is TCTPL's submission that harmonious construction of Articles 1 and 2 of the Bank Guarantees is possible and permissible.

(xi) that the decision of this Court in the case of *Western Coalfields Ltd. vs. Rajesh and another*⁹ runs contrary to the various judgments of this Court as well as the Hon'ble Supreme Court which make it clear that unconditional bank guarantees cannot be treated as a contingent contract by referring to or relying upon the terms of

9 (2011) 6 All MR 722

the underlying contract. In any event, the said judgment is considered and dealt with by a Division Bench of this Court in the case of *S. Satyanarayana & Co. vs. West Quay Multiport Pvt. Ltd.*¹⁰ in paragraph 15, and by a learned Single Judge of this Court in the case of *ANCL & Co. India Ltd. vs. Corporation Bank Ltd.*¹¹, paragraphs 53 and 56;

(xii) that therefore the contention of FGIPL that Article 1 overrides Article 2 of the Bank Guarantee in the present case cannot be accepted;

(xiii) that the contention of the learned Counsel for FGIPL, as enumerated in paragraphs 19 and 20 of the written submissions filed by FGIPL, that the satisfaction must be arrived at, as to whether there is a breach or not, is plainly contrary to the second part of Article 2 of the Bank Guarantee and also directly contrary to paragraph 26 of the judgment of the Hon'ble Supreme Court in the case of *BSES Ltd. vs. Fenner India Ltd.*¹²;

(xiv) that the question whether FGIPL has performed the obligation under the purchase order or not, is an issue which has to be decided only at the stage of trial, or in the present case by the Arbitral Tribunal when the disputes are decided on its own merits, because it pertains to the dispute with regard to the underlying contract and not the Bank Guarantee. In support of this submission, the learned Senior Advocate for TCTPL relied on the decision of this Court in the case of *ANCL & Co.* (supra).

¹⁰ 2015 SCC Online Bom 3352

¹¹ 2013 SCC Online Bom 78

¹² (2006) 2 SCC 728

13. On the issue of Bank Guarantee being conditional, Mr. Khambatta, in rejoinder, made the following submissions on behalf of FGIPL :

(i) that the judgment of this Court in the case of *ITD Cementation Ltd.* (supra) is distinguishable from the present case, inter alia, on account of (i) the mobilisation advance guarantee in ITDC case did not provide for any incorporation of the contractual terms into the bank guarantee; (ii) the Bank Guarantees presently in question do not contain clauses in pari materia to clauses 5, 6 and 9 of the mobilisation advance guarantee in the ITDC case, (iii) the Performance Bank Guarantee presently in question also materially differs from the Performance Bank Guarantee in the ITDC case. Firstly the contractual provisions were not incorporated into the Bank Guarantee and secondly, clauses in the present Bank Guarantee are materially different from Clauses 6, 7, 8 and 11 of the Performance Bank Guarantee in the ITDC case, (iv) that it is based on these distinguishing features that this Court concluded at paragraph 16 in the ITDC case that, “*The language of the Bank Guarantees therefore leaves no room for doubt that the Bank Guarantees furnished by the Plaintiff to the Defendant No. 1 are unconditional and irrevocable,* (v) that clearly the judgment in the ITDC case revolved around the aforesaid peculiar features of the bank guarantees involved there, which are distinguishable from the Bank Guarantees in the present case;

(ii) Relying on clauses 16, 17 and 18 in the case of *Mahatma Gandhi Sahakra Sakkare Karkhane* (supra) it was submitted on behalf of FGIPL that the judgment of

the Supreme Court in that case is entirely distinguishable for the following reasons:

- (iii) The terms and conditions of the contract in that case were not incorporated into the bank guarantee as they are in the present case;
- (iv) A plain reading of the clauses provided that the sole discretion as to whether the amount of the Bank Guarantee had become recoverable was conferred upon the purchasers. There is no such provision in the Bank Guarantees in the present case;
- (v) The Hon'ble Supreme Court expressly found in para 19 that on a true construction of the Bank Guarantee, the guarantor had essentially agreed that the purchasers alone shall be the sole judge in the matter as to whether the amount of the Bank Guarantee has become recoverable from the sellers or whether the seller had committed any breach of the terms and conditions of the agreement. In the case of the present Bank Guarantee, there is no such provision and that the present Bank Guarantees can be invoked only in the circumstances referred under their Article 1.
- (vi) That the decision of the Division Bench of this Court in *S. Satyanarayana & Co.* (supra) and of the learned Single Judge in *ANCL & Co. India Ltd.* (supra), neither overrules nor in any manner conveys that the decision of the Learned Single Judge of this Court in *Western Coal Fields & another* (supra) is incorrect. Though the Learned Senior Advocate for TCTPL has submitted that the said judgment runs contrary to the various judgments of this Court, as well as the Hon'ble Supreme Court, no such judgment is relied upon in support of this contention.
- (vii) That it is therefore reiterated that the subject Bank Guarantees are conditional

and TCTPL cannot be allowed to invoke the same except in the circumstances referred to under Article 1.

14. I have considered the oral as well as the written submissions on behalf of FGIPL and TCTPL. I have also considered the case laws relied upon by them.

15. As set out earlier, it is submitted on behalf of FGIPL that the Bank Guarantees are conditional, whereas on behalf of TCTPL it is contended that the Bank Guarantees are absolute, unconditional and irrevocable.

16. As set out earlier, except Article 1 of the Advance Bank Guarantees and Article 1 of the Performance Bank Guarantees, the terms of each of the Bank Guarantees are identical. Article 1 of the Advance Bank Guarantee provides that, *"if the delivery obligation is not performed by the seller in accordance with the terms of the purchase order, the guarantor shall within seven days from the receipt of a demand by the purchaser pay to the purchaser any sum not exceeding Rs.1,70,00,000/-"* and Article 1 of the Performance Guarantee provides that, *"if the seller either fails to perform any of its obligations under the purchase order or breaches/violates any of the terms of the purchase order, the Guarantor shall, within 7 working days from the date of receipt of a written demand from the Purchaser pay to the Purchaser any sum not exceeding Rs. 85,00,000/-"*. However, a mere reading of Article 1 of the said Bank Guarantees in isolation is not enough to hold as submitted by Mr. Khambatta on behalf of FGIPL, that the subject Bank Guarantees are conditional ; that the intention of the parties was to incorporate the

entire terms and conditions of the purchase orders in the Advance/Down Payment and Performance Bank Guarantees ; that the Advance Bank Guarantees could be invoked and the bank is obliged to pay upon such invocation, only upon being satisfied that the delivery obligation was not performed by the seller/FGIPL in accordance with the terms of the purchase order ; and the Performance Bank Guarantee could be invoked and the bank is obliged to pay upon such invocation, only upon being satisfied that the seller/FGIPL failed to perform any of its obligations under the purchase order and/or any breach/violation of the terms of the purchase order by the seller/FGIPL.

17. A conjoint reading inter-alia of Articles 1, 2, 3, 6, 7D and 15 is relevant for arriving at a decision as to whether the Bank Guarantees are conditional or unconditional.

Article 2 of the Bank Guarantee provides :

- (i) That the obligation of the Guarantor Bank under the Guarantee shall be unconditional, absolute and irrevocable, irrespective of the genuineness, validity, regularity or enforceability of the purchase order or any other circumstances which might otherwise constitute a legal and/or equitable discharge of a surety, or the Guarantor under the law relating to sureties ;
- (ii) That the Guarantor Bank shall not be entitled to dispute or inquire into: Whether the Purchaser / TCTPL has become entitled to claim the said amount under the purchase order or not, **or**;

Whether the supplier / FGIPL has committed any breach of the purchase order and/or the general terms and conditions applicable thereto or not , **or**;

Whether the Purchaser / TCTPL is entitled to recover any damages from the Supplier / FGIPL for breach thereof or not.

Article 3 of the Bank Guarantee provides that the purchaser / TCTPL need not initiate any proceeding or claim against the seller / FGIPL before lodging any claim under the Guarantee.

Article 6 provides that the liability of the Guarantor/Bank under the Guarantee shall be primary, direct and immediate, and not conditional and/or contingent upon pursuit by the purchaser / TCTPL of any remedies that it may have against the seller / FGIPL and/or any other person in relation to the purchase order.

Clause (D) of Article 7 expressly waives demand for observance, performance and/or enforcement of any terms and/or provisions of the guarantee and/or purchase order.

Article 15 of the Bank Guarantee makes it clear that a demand for payment under the guarantee shall be deemed to have been sufficiently made if a claim in writing is sent by post or hand delivered to the Guarantor/Bank at its office and is received by the guarantor.

It is therefore clear that Article 1 of the Advance Bank Guarantee as well as the Performance Bank Guarantee have only made a general reference to the purchase order and generally set out that if the delivery obligation is not performed by the seller/FGIPL in accordance with the terms of the purchase order, or if the seller fails to perform any of its obligation/s under the purchase order, or breaches or violates any of the terms of the purchase order, the guarantor bank shall within seven days from receipt of the demand from the purchaser make payment to TCTPL in a sum not exceeding the amount for which the Bank Guarantee is provided. After the above general reference to the purchase orders in Article 1, the subsequent Articles have made it clear that the Bank Guarantees are absolute and unconditional by **a clear assertion that the bank shall not be entitled to dispute or inquire into whether** TCTPL has become entitled to claim the guaranteed amount under the purchase order or not ; or whether FGIPL has committed any breach of purchase order and/or general terms and conditions applicable thereto or not ; or whether TCTPL is entitled to recover any damages from the Supplier/FGIPL for breach thereof or not. It is further clearly asserted in Articles 3, 6, 7(D) and 15 of the Bank Guarantees that TCTPL need not initiate any proceeding or claim against FGIPL before lodging any claim under the guarantee; that the liability of the Guarantor/Bank under the Guarantees shall be primary, direct and immediate, and not conditional and/or contingent upon pursuit by the purchaser/TCTPL of any remedies that it may have against the seller/FGIPL and/or any other person in relation to the purchase order ;

that the demand for observance, performance and/or enforcement of any terms and/or provisions of the guarantees and/or purchase order is expressly waived ; and that a demand for payment under the guarantees shall be deemed to have been sufficiently made if a claim in writing is sent by post or hand delivered to the Guarantor/Bank at its office and is received by the guarantor. It is required to be made clear that only because TCTPL has in its invocation letters stated that, *"the delivery obligation is not performed by the seller"* and that *"the seller has failed to perform its obligation/s under the purchase order"*, the submission of FGIPL that TCTPL is conscious of the fact that the Bank Guarantees are conditional, cannot be accepted.

18. Mr. Khambatta, as set out hereinabove, has submitted that the subject Bank Guarantees do not make the beneficiary i.e. TCTPL the sole Judge of whether the conditions for invoking the Bank Guarantees are satisfied. I am not in agreement with the submissions made by Mr. Khambatta, since I am of the view that the language of Article 2 i.e. *"the Guarantor (Bank) shall not be entitled to dispute or inquire into whether the purchaser (TCTPL) has become entitled to claim the said amount under the purchase order or not or whether the supplier (FGIPL) has committed any breach of the purchase order and/or the general conditions applicable thereto or not or whether the purchaser (TCTPL) is entitled to recover any damages from the supplier (FGIPL) for breach thereof or not"*, clearly establishes that the Purchaser/TCTPL is the sole Judge to decide as to whether the conditions for invoking the bank guarantees are satisfied. It is not necessary that the party invoking a bank guarantee cannot be treated as the sole Judge to decide whether

the conditions for invoking the bank guarantees are satisfied, unless the words 'sole Judge' are found in the Bank Guarantee.

19. As pointed out by Mr. Kamdar, the learned Senior Advocate appearing for TCTPL, a similar issue of interpretation of the terms of Bank Guarantee had arisen before the Hon'ble Supreme Court of India in the case of Mahatma Gandhi (supra) in respect of similar clauses of a Bank Guarantee. The relevant portion of the Bank Guarantee in that case was reproduced by the Honble Supreme Court in paragraph 17 of its judgment which is reproduced hereunder:

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

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

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

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

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

From the above Articles of the Bank Guarantee it becomes clear that Article 1 of the Bank Guarantee in that case provided that the Bank had undertaken to pay to the purchaser a sum of Rs. 92.40 lakhs upon the failure of the supplier to conduct the trial test of the sugar plant by 24th July 2003 and also upon the failure of the sellers to commission the project (Plant and Machinery) before December 2003. The aforesaid clause thus contemplated that the Bank Guarantee is payable upon the failure of the trial test and/or failure of commissioning of the project by the dates specified in the Bank Guarantee itself.

Clause 2 of the bank guarantee in the Mahatma Gandhi case (*supra*) was in terms similar to Clause 2 of the subject Bank Guarantees in the captioned Petitions. Clause 2 of the said Bank Guarantee provided that the bank guarantee was payable on demand and without demur. It further provided that the purchaser was not required

to adopt any legal remedy that may be available to it and that the purchaser was to be the sole judge as to whether the Bank Guarantee had become invokable. In the present case also, Clause 2 contemplates that the demand by the Respondent shall not be disputed or enquired into by the Bank, the Bank also will not be entitled to enquire into whether the said claim amount under the purchase order has become payable, or whether FGIPL has committed any breach of the Purchase Order. In fact, it is this language of Clause 2 which makes TCTPL the sole judge in determining whether there is a breach of the Purchase Order and therefore, whether any amount should be claimed under the Bank Guarantee from the guarantor i.e. the Bank.

20. The Hon'ble Supreme Court in the case of Mahatma Gandhi (*supra*) rejected the argument that the Bank Guarantee therein was conditional and held that clauses 1 and 2 of the said Bank Guarantee are capable of harmonious interpretation and no part of the Bank Guarantee was to be discarded. While arriving at the aforesaid finding the Hon'ble Supreme Court held as follows:

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

are pending before any tribunal or court with regard thereto or in connection therewith.

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

21. FGIPL has relied on an earlier decision of the Hon'ble Supreme Court in the case of HCC (supra). The facts of that case and the contents/language of the Bank Guarantee therein are very different from that in the present case. In that case clause 9 of the Principal Agreement reads thus:

“9. ADVANCE MOBILIZATION LOAN:

The Employer, will make an advance loan to the Contractor at 13 per cent simple interest per annum for the costs of mobilization in respect of the works in a lump sum amount equivalent upto 15 per cent of the Contract Price named in the Letter of Acceptance, payable in the proportionate amounts of foreign and local currencies as provided for in the Contract. Payment of the loan will be due under separate certification by the Engineer after (i) execution of the Form of Agreement by the parties thereto, (ii) Provision by the Contract of the Performance security in accordance with Clause 5, and (iii) provision by the Contractor of a Bank Guarantee by a Bank acceptable to the Employer in an amount equal to the advance loan, such Bank Guarantee to remain effective until the advance loan has been completely repaid by the Contractor out of current earnings under the Contract and certified accordingly by the Engineer. A form of bank guarantee acceptable to the Employer is indicated in Section 9. Annex. B. The advance loan shall be used by the contractor exclusively for mobilization expenditures, including the acquisition of Constructional Plant, in connection with the works. Should the Contractor misappropriate any portion of the advance loan, it shall become due and payable immediately, and no further loan will be made to the Contractor thereafter. The advance mobilization loan, shall be paid within 15 days of the date of certification.”

The Bank Guarantee furnished by Hindustan Construction Company provided as under:

“... ..In accordance with the provisions of the Conditions of Contract, Clause 9 (Advance Mobilisation Loan) of the above-mentioned contract, the Hindustan Construction Co. Ltd., incorporated in Bombay under the Companies Act, 1956, and having their registered officer at Construction House, Walchand Hirachand Marg, Ballard Estate, Bombay-400 038 (hereinafter called 'the Contractor') shall deposit with the Executive Engineer, Kharkai Dam Division II, Icha, Chaliama, Post Kesargarhia, Dist. Singhbhum, Bihar, a bank guarantee to guarantee their proper and faithful

performance under the said clause of the contract in an amount of Rs. 10,00,000 (Rupees Ten lakhs only).

*We, the State Bank of India, incorporated under State Bank of India Act, 1955, and having one of our branches at Nyayamurti C.N. Vaidya Marg, Fort, Bombay-400 023 (hereinafter referred to as 'the said Bank'), as instructed by the Contractor, agree unconditionally and irrevocably to guarantee as primary obligator and not as Surety merely, the payment of the Executive Engineer, Kharkai Dam Division II, Icha, Chaliama, Post Kesargarhia, Dist. Singhbhum, Bihar, on his first demand without whatsoever right of objection on our part and without his first claim to the contractor, in the amount not exceeding Rs. 10,00,000 (Rupees Ten lakhs only) **in the event that the obligations expressed in the said clause of the abovementioned contract have not been fulfilled by the contractor giving the right of claim to the employer for recovery of the whole or part of the Advance Mobilisation Loan from the contractor under the contract.** (emphasis supplied)*

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

22. The Hon'ble Supreme Court, whilst interpreting the said Guarantee held that the Bank Guarantee was conditional by observing in paragraphs 13 and 14 of its Order as follows:

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

*...in the event that the obligations **expressed in the said clause of the abovementioned contract have not been***

fulfilled by the contractor giving the right of claim to the employer for recovery of the whole or part of the Advance Mobilisation Loan from the contractor under the contract.

13. This condition clearly refers to the original contract between the HCCL and the defendants and postulates that if the obligations, expressed in the contract, are not fulfilled by HCCL giving to the defendants the right to claim recovery of the whole or part of the "Advance Mobilisation Loan", then the Bank would pay the amount due under the Guarantee to the Executive Engineer. By referring specifically to Clause 9, the Bank has qualified its liability to pay the amount covered by the Guarantee relating to "Advance Mobilisation Loan" to the Executive Engineer only if the obligations under the contract were not fulfilled by HCCL or the HCCL has misappropriated any portion of the "Advance Mobilisation Loan". It is in these circumstances that the aforesaid clause would operate and the whole of the amount covered by the "Mobilisation Advance" would become payable on demand. The Bank Guarantee thus could be invoked only in the circumstances referred to in Clause 9 whereunder the amount would become payable only if the obligations are not fulfilled or there is misappropriation. That being so, the Bank Guarantee could not be said to be unconditional or unequivocal in terms so that the defendants could be said to have had an unfettered right to invoke that Guarantee and demand immediate payment thereof from the Bank. This aspect of the matter was wholly ignored by the High Court and it unnecessarily interfered with the order of injunction, granted by the Single Judge, by which the defendants were restrained from invoking the Bank Guarantee. (emphasis supplied)

Therefore, in view of the peculiar facts and circumstances of the HCC's Case and the language of the bank guarantee therein, the Hon'ble Supreme Court in that case held that the bank guarantee therein was conditional. The contents of none of the Articles

found in the subject Bank Guarantees, i.e. Articles 2, 3, 6, 7(D) and 15 are found in the HCC's Case and therefore the decision in that case will not apply to the present case.

23. The Hon'ble Supreme Court in *Mahatma Gandhi's* case (supra) has also dealt with a similar argument based on the decision in *Hindustan Construction's* case (supra) and has distinguished the same in paragraph 28, which is reproduced as hereunder:

"28. The learned counsel in support of his submission relied upon the decision of this Court in Hindustan Construction Co. Ltd. Vs. State of Bihar & Ors. [(1999) 8 SCC 436]. This Court in Hindustan Construction Co. (supra) having referred to the terms of clause (9) of principal contract between the parties therein came to the conclusion that the bank guarantee specifically refers to the original contract and postulates that the obligations expressed in the contract, are not fulfilled by HCCL, the right to claim recovery of the whole or part of the "advance mobilisation" then alone the bank was liable to pay the amount due under the guarantee to the Executive Engineer. The court found that the bank guarantee specifically refers to clause (9) of the principal agreement and it is under those circumstances came to the conclusion that the amount covered by the bank guarantee becomes payable and the same could be invoked only in the circumstances referred to in clause (9) of the principal agreement. The bank guarantee executed by the bank in the instant case in favour of the appellant herein does not contain any such clause. Mere fact that the bank guarantee refers to the principal agreement without referring to any specific clause in the preamble of the deed of guarantee does not make the guarantee furnished by the bank to be a conditional one. In the very said judgment this Court observed that "what is important, therefore, is that the bank guarantee should be in unequivocal terms, unconditional and recite that the amount would be paid without demur or objection and irrespective of any dispute that might have cropped up or might have been pending between the beneficiary under the bank guarantee or the person on whose behalf the guarantee was furnished. The terms of the bank guarantee are, therefore, extremely material. Since the bank guarantee represents an independent contract between the bank and the beneficiary, both the parties would be bound by the terms thereof. The invocation, therefore, will have to be in accordance with the terms of the bank guarantee, or else, the invocation itself would be bad."

24. I am therefore, of the view that Articles 1 and 2 of the subject Bank Guarantees and the other Articles set out hereinabove can be harmoniously construed, and since I do not find any conflict between Articles 1 and 2 of the subject Bank Guarantees and/or any other Article/s of the subject Bank Guarantees, I hereby hold that the Bank Guarantees in question are absolute and unconditional. The submissions made on behalf of FGIPL in support of their contention that the Bank Guarantees are conditional, therefore cannot be accepted and the case laws relied upon by them do not assist them. The distinction sought to be made by them, with regard to the case laws relied upon by TCTPL, also cannot be accepted. The principles laid down by the Hon'ble Supreme Court in the case of *Saheb Zada Mohd. Kamgar Shah* (supra) and *Radha Sundar Dutta* (supra) also do not assist FGIPL. Since I am of the view that there is no ambiguity qua the construction of the Bank Guarantees, the question of applying the contra proferentum rule also does not arise.

25. The next submission advanced by Mr. Khambatta on behalf of FGIPL is that the conditions for invocation of the Bank Guarantees in question are not satisfied. In support of this contention Mr. Khambatta has relied on the correspondence exchanged between FGIPL and TCTPL and has submitted that the said correspondence shows that the work could not be completed till the scheduled commissioning date only on account of the reasons attributable to TCTPL. Mr. Khambatta has also submitted that the submission of TCTPL that the correspondence between the parties were without prejudice as it was in the nature of

settlement, is also liable to be rejected. Since for reasons set out hereinabove, I have already held that the Bank Guarantees are unconditional Bank Guarantees, the question of 'the conditions for invocation of the Bank Guarantees in question' not being satisfied, does not arise and the question of looking into the correspondence relied upon by Mr. Khambatta in support of the above submission does not arise.

26. It is settled law that a bank guarantee is an independent contract and a challenge to the invocation/encashment of an irrevocable and unconditional bank guarantee has to be considered without any reference to the underlying or main contract or to the disputes/claims thereunder. However, the two exceptions which have been carved out by several decisions of the Hon'ble Supreme Court under which the invocation/encashment of such Bank Guarantee/s could be restrained are fraud and irretrievable injury. FGIPL has averred in the Petitions that the invocation of the Bank Guarantees would be fraudulent, more so because TCTPL has not challenged the suspension of the works by FGIPL. It is trite law that a Court can restrain encashment of bank guarantee in cases of established fraud in issuance of the bank guarantee. The fraud has to be absolute and egregious, vitiating the very foundation of the bank guarantee. The Hon'ble Supreme Court has in its decision in *U.P. State Sugar Corporation vs. Sumac International Ltd.*¹³ (supra) held as follows:

“12. 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

13 (1997) 1 SCC 568

*disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. In the case of [U.P. Cooperative Federation Ltd. v. Singh Consultants and Engineers \(P\) Ltd.](#) (1988 [1] SCC 174), which was the case of works contract where the performance guarantee given under the contract was sought to be invoked, this Court, after referring extensively to English and Indian cases on the subject, said that the guarantee must be honoured in accordance with its terms. The bank which gives the guarantee is not concerned in the least 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 condition. There are only two exceptions to this rule. The first exception is a case when there is a clear fraud of which the bank has notice. The fraud must be of an egregious nature such as to vitiate the entire underlying transaction. Explaining the kind of fraud that may absolve a bank from honouring its guarantee, this Court in the above case quoted with approval the observations of Sir John Donaldson, M.R. in *Bolivinter Oil SA v. Chase Manhattan Bank NA* (1984 [1] AER 351 (All ER at p. 352) : (at SCC p.197)*

"The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear both as to the fact of fraud and as to the bank's knowledge. It would certainly not normally 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 charged".

This Court set aside an injunction granted by the High Court to restrain the realisation of the bank guarantee."

27. On the issue of the first exception viz. fraud, the Hon'ble Supreme Court in the case of *Vinitec Electronics Pvt. Ltd. vs. HCL Infosystems Ltd. (supra)* held thus:

“25. This Court in more than one decision took the view that fraud, if any, must be of an egregious nature as to vitiate the underlying transaction. We have meticulously examined the pleadings in the present case in which no factual foundation is laid in support of the allegations of fraud. There is not even a proper allegation of any fraud as such and in fact the whole case of the appellant centres around the allegation with regard to the alleged breach of contract by the respondent. The plea of fraud in the appellant's own words is to the following effect:

“ That despite the respondent HCL being in default of not making payment as stipulated in the bank guarantee, in perpetration of abject dishonesty and fraud, the respondent HCL fraudulently invoked the bank guarantee furnished by the applicant and sought remittance of the sums under the conditional bank guarantee from Oriental Bank of Commerce vide letter of invocation dated 16-12-2003. ”

26. In our considered opinion such vague and indefinite allegations made do not satisfy the requirement in law constituting any fraud much less the fraud of an egregious nature as to vitiate the entire transaction. The case, therefore does not fall within the first exception. ”

28. FGIPL has pleaded fraud in the Petition primarily on the basis that TCTPL has committed breaches of the underlying contract, has not even challenged the suspension of the works by FGIPL, and as such the invocation of Bank Guarantees is illegal and fraudulent. In my view, FGIPL has not made out any case of fraud, much less a case of an absolute and egregious fraud to the knowledge of the Bank, which would affect the very foundation of the Bank Guarantee, as is required in law. In view

thereof it cannot be held that the invocation of the Bank Guarantee by TCTPL is fraudulent as alleged by FGIPL.

29. As regards the second exception viz. irretrievable injury, it has been repeatedly held by the Hon'ble Apex Court that to avail of the said ground it must be decisively established and proved to the satisfaction of the court that there would be no possibility whatsoever of recovering the amount by the beneficiary. In this context, paragraph 14 of the decision of the Hon'ble Supreme Court in *U.P. State Sugar Corporation* (supra) is relevant and reproduced hereunder:

“14. On the question of irretrievable injury which is the second exception to the rule against granting of injunctions when unconditional bank guarantees are sought to be realised the court said in the above case that the irretrievable injury must be of the kind which was the subject-matter of the decision in the Itek Corporation case (supra). In that case an exporter in the U.S.A. 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 U.S. Government had blocked all Iranian assets under the jurisdiction of 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 realization of the bank guarantee/Letters of credit would cause irreparable harm to the plaintiff. This contention was upheld. To avail of this exception, therefore, exceptional circumstances which make it impossible for the guarantor to reimburse himself if the ultimately succeeds, will have to be decisively established. Clearly, a mere apprehension that the other party will not be able to pay, is not enough. In the Itek case (supra) there was a certainty on this issue. Secondly, 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.

The above view is also reiterated by the Hon'ble Apex Court in paragraph 22 of its decision in the case of *Dwarikesh Sugar Industries Ltd. vs. Prem Heavy Engineerings Works (P) Ltd.* (supra).

30. However, Mr. Khambatta on behalf of FGIPL has made the following submissions :

(i) That the law laid down by the Hon'ble Supreme Court on the definition of special equities is quite clear and the term special equities is wide enough to cover any other miscellaneous issues that might arise among the parties, other than just irretrievable injury/harm, as has been claimed by TCTPL.

(ii) That in the HCC's case, the Supreme Court went on to hold that, *"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."* The Supreme Court after analyzing the bank guarantee in the case and the facts surrounding the contract between the parties came to the finding that the special equities had arisen due to which an injunction could be granted against the invocation and encashment of the bank guarantee. In fact the Supreme Court does not even mention irretrievable injuries while holding that Special Equities had arisen in favor of FGIPL.

(iii) That in the case of BSES Ltd. (supra), the Supreme Court has clarified that "

"Hence, only one more point remains: whether encashment of the guarantees will create special equities (in particular, "irretrievable injury") in favour of the First Respondent? We are not satisfied on facts that such is the present situation."

The Supreme Court clearly comes to the conclusion that irretrievable injury is only one of the aspects of Special Equity. The Supreme Court observed that:

"The second exception to the general rule of non-intervention is when there are "special equities" in favour of injunction, such as when "irretrievable injury" or "irretrievable injustice" would occur if such an injunction were not granted."

It is apparent on analysis of this judgment that the Supreme Court does not intend to use irretrievable injury as a synonym for Special Equities. Thereafter, the Supreme Court goes on to hold that:

"Therefore, since this prayer is already pending before the Arbitral Tribunal, we see no situation of "irretrievable injustice" if, at the present moment, the Appellant is allowed to encash the bank guarantees. For justice can always be rendered to the First Respondent, if he succeeds before the Arbitrators. Nor do we see any special equity in favour of the First Respondent, when there is in fact a dispute that performance was prima facie not satisfactory, which enabled the Appellant to encash all or any of the four bank guarantees."

The Supreme Court in the subsequent paragraph in fact goes on to say that Special Equities and irretrievable injustice are actually distinct criterion for granting an injunction on encashment of the bank guarantee, when it says that neither have any special equities been shown, nor has a situation of irretrievable injuries arisen.

(iv) That the Supreme Court analyses special equities in *U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd.*¹⁴, *General Electric Technical Services Company Inc. Vs. M/s. Punj Sons (P) Ltd. and another*¹⁵ and *Svenska Handelsbanken Vs. M/s. Indian Charge Chrome and others* by saying¹⁶, “special equities in the form of preventing irretrievable injustice between the parties”. Irretrievable injustice has clearly been held to be a form of Special Equities in these Judgments but it has nowhere been said that irretrievable harm covers all forms of Special Equities and that there can be no Special Equities other than irretrievable injustice/harm.

(v) That, further in the case of *U.P. State Sugar Corporation Vs. Sumac International Ltd.* (supra) and *Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works (P) Ltd. and another* (supra) whilst relying upon *Svenska Handelsbanken Vs. M/s. Indian Charge Chrome and others* (supra) and *U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd.* (supra), the Bench held that fraud and irretrievable injury are the only two exceptions to the rules for granting an injunction in matters of bank guarantee. In both the abovementioned judgments i.e. *Svenska Handelsbanken Vs. M/s. Indian Charge Chrome and others* (supra) and *U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd.* (supra), irretrievable injury was discussed to be a part of special equities and therefore it is apparent that in the subsequent judgments

¹⁴ (1988)1SCC174

¹⁵ (1991)4 SCC 230

¹⁶ (1994)1 SCC 502

the intention of the Learned Judge clearly was to state that fraud and special equities are the only two exceptions to the rules for granting injunction in matters of bank guarantee, but because irretrievable injury is a part of special equities these judgments did not feel the need to clarify and show a distinction between irretrievable injury and special equity.

(vi) That in fact, the case of *Vinitec Electronics Private Limited Vs. HCL Infosystems*¹⁷ cited by the TCTPL is against it, in as much as the said Judgment makes it clear that there can be other instances of Special Equities without actually stating them:

“The next question that falls for our consideration is as to whether the present case falls under any of or both the exceptions namely whether there is a clear fraud of which the bank has notice and a fraud of the beneficiary from which it seeks to benefit and another exception whether there are any 'special equities' in favour of granting injunction.”

“Whether encashment of the bank guarantee would cause any 'irretrievable injury' or 'irretrievable injustice'. There is no plea of any 'special equities' by the appellant in its favour. So far as the plea of 'irretrievable injustice' is concerned the appellant in its petition merely stated...”

It is submitted that, it is clear looking at the abovementioned para that whilst the judgment holds irretrievable injury/injustice and Special Equities to be connected to each other it is apparent that the Judgment does not intend to say that Special Equities are synonymous with irretrievable injury/injustice. In fact when the Judgment says “any special equities” it clearly means to say any special equities other than

¹⁷ (2008) 1 SCC 544

irretrievable injury/injustice. This clearly shows that irretrievable injury/injustice has been held to be a part of special equities and not the whole of it.

(vii) That though in the case of Roadway Solution India Pvt. Ltd. (supra), the Learned Single Judge felt it necessary to establish a strong connection between irretrievable injustice and special equities, but it would not be right to read the judgment as if to say that special equities and irretrievable injuries are the same.

31. Mr. Khambatta thereafter submitted that in the present matter there are overwhelming circumstances creating a situation of special equities in favour of an injunction such as:

(i) TCTPL has consistently admitted that the said sum of Rs. 32 crores is due and payable to FGIPL and that it has never exercised any of its contractual remedies and/or protested and/or disputed FGIPL's suspension of work due to such non-payment. In fact, TCTPL has accepted and acquiesced in the said suspension and/or has confirmed the position that work need not resume till further payment is made by TCTPL.

(ii) That TCTPL had agreed its liability to the tune of Rs. 32 Crores for works completed by FGIPL as per the six Purchase Orders in the meeting held on 5th July, 2015 and reiterated subsequently vide various other communications exchanged between both parties. That FGIPL and TCTPL during commercial discussions held during February-March, 2016, had, inter-alia, agreed and arrived at revised contract

price, extra/ escalation costs, timeline for completing remaining works and right of suspending works in case substantial payments were not made by TCTPL. TCTPL had agreed to pay the escalation cost despite being aware that the contract was a fixed price contract with an express provision, being Clause 3.1, against any escalation. The very fact that both parties were discussing the terms for the resumption of works, including revisiting the contract due to the inability of TCTPL to pay for the works, also strengthens FGIPL's contention that special equities are greatly in its favour and against the invocation of the Bank Guarantees.

(iii) A perusal of the Directors' Report and the Auditor's Report filed along with the Balance Sheet for the period 01.04.2013 to 31.03.2014 revealed that TCTPL has during the financial year 2013-2014 incurred huge losses. FGIPL verily believes that the financial situation of TCTPL has worsened since and that TCTPL has also defaulted in payments of certain other sub-contractors. The attempt to invoke the Bank Guarantees furnished by FGIPL to TCTPL was to tide over these financial difficulties. TCTPL is becoming commercially insolvent day by day and is unable to pay its debts.

(iv) That if the Arbitral Tribunal ultimately decides in favour of FGIPL, it would be impossible to recover the amounts under the Bank Guarantees from TCTPL, causing great irretrievable injury/ injustice to FGIPL. TCTPL being a Special Purpose Vehicle has no other assets or businesses apart from its Concession

Agreement with V.O. Chidambaranar Port Trust and the assets created therein. FGIPL verily believes that all the loans given by the lenders to TCTPL are secured by exclusive first charge on all the assets provided under the Concession Agreement. FGIPL verily believes that lenders were also furnished the Corporate Guarantee by ALBA Aisa Pvt. Ltd. (Holding Company of TCTPL). TCTPL is not making much revenue or operating cash inflow since the project has not been commissioned, on account of issues between TCTPL and V.O. Chidambaranar Port Trust.

(v) That the total value of the invoked Bank Guarantees is approximately Rs. 43,98,13,832/-. The aggregate of this amount and admitted dues of Rs. 32 crores, comes to Rs. 75,98,13,832/-, which is greater than the total payments made by TCTPL till date to FGIPL under the six purchase orders. Therefore, if the Bank Guarantees are encashed by TCTPL, severe irretrievable injustice will be caused to FGIPL. In support of the above submissions, FGIPL relied on paragraph 22 of HCC's case which reads thus:

"22. We have scrutinised the facts pleaded by the parties in respect of both the Bank Guarantees as also the document filed before us 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."

FGIPL has also relied on the decision of the Delhi High Court in the case of

*Meena Advertisers vs. Delhi Metro Rail Corporation Ltd.*¹⁸

18 OMP (I) No. 344/2015 and I.A. No. 13973/2015 dated 16th July, 2015.

32. The Learned Senior Advocate appearing for TCTPL has submitted that special equities and irretrievable injustice are not two independent and separate grounds for granting injunction against invocation of the Bank Guarantee and the above submissions advanced by Mr. Khambatta cannot be accepted in view of the several decisions of the Hon'ble Apex Court having clearly laid down that the only two grounds on which a beneficiary can be restrained from invoking the Bank Guarantee are in case of absolute and egregious fraud vitiating the very foundation of the Bank Guarantee and in case where injunction is sought to prevent irretrievable injustice, which must be of the kind which was the subject matter of the decision in the Itek Corporation case as held in paragraph 19 of the decision in U.P. Sugar Corporation (supra) set out in paragraph 29 above. In this regard Mr. Kamdar has also relied on the decision of the Calcutta High Court in the case of *Texmaco Ltd. vs. State Bank of India and others*¹⁹ and the decision of the Hon'ble Supreme Court in the case of *U.P. Co-operative Federation Ltd. (supra)*.

33. I am in agreement with the above submissions of Mr. Kamdar. The word "special equities" came to be coined for the first time by Sabyasachi Mukharji J. sitting as a judge of the Calcutta High Court in the case of *Texmaco Ltd. v. State Bank of India and Ors. (supra)*, in which he observed as follows:

"10. In my opinion, the position in law is as follows, whether the bank is obliged to pay and pay on what terms must depend upon both in the case of bank guarantee and in the case of letter of credit on the terms of the

19 AIR 1974 Cal 44

document. With respect to the Court of Appeal, it is not necessary for this Court to go to the extent of saying whether the performance guarantee stands on a similar footing of a letter of credit but so far as the Court of Appeal says the bank must pay according to the guarantee on demand, if so stipulated, without proof or conditions, I respectfully agree. The Court of Appeal has referred to the exception of a clear fraud. I venture to suggest there may be another exception in the form of special equities arising from a particular situation which might entitle the party to an injunction restraining the performance of bank guarantee. But in the absence of such special equities and in the absence of any clear fraud, the Bank must pay on demand, if so stipulated, and whether the terms are such must have to be found out from the performance guarantee as such.” (Emphasis supplied) [See at Page 49]

Sabyasachi Mukharji J., when sitting as a Judge of the Hon’ble Supreme Court explained the above observation in the *Texmaco* case whilst deciding the case of *U.P. Co-operative Federation Ltd. v. Singh Consultants and Engineers (P) Ltd.* (*supra*) in the following terms:

*“16. The Court of Appeal in England had occasion once again to consider this question in *Eliau and Rabbath v. Matsas and Matsas* – (1966) 2 Lloyd’s List Law Reports 495. In that case injunction was granted to prevent irretrievable injustice...*

...

21. In the instant case, the learned Judge has proceeded on the basis that this was not an injunction sought against the bank but this was the injunction sought against the appellant. But the net effect of the injunction is to restrain the bank from performing the bank guarantee. That cannot be done. One cannot do indirectly what one is not free to do directly. But a maltreated man in such circumstances is not remedyless. The respondent was not to suffer any injustice which was irretrievable. The respondent can sue the appellant for damages. In this case there cannot be any basis for apprehension

that irretrievable damages would be caused if any. I am of the opinion that this is not a case in which injunction should be granted. An irrevocable commitment either in the form of confirmed bank guarantee or irrevocable letter of credit cannot be interfered with except in case of fraud or in case of question of apprehension of irretrievable injustice has been made out. This is the well-settled principle of the law in England. This is also a well-settled principle of law in India, as I shall presently notice from some of the decisions of the High Court and decisions of this Court.

...

24. I may notice that in India, the trend of law is on the same line. In the case of Texmaco Ltd. v. State Bank of India and ors. – AIR 1979 Calcutta 44, one of us (Sabyasachi Mukharji, J.) held that in the absence of special equities arising from a particular situation which might entitle the party on whose behalf guarantee is given to an injunction restraining the bank in performance of bank guarantee and in the absence of any clear fraud, the bank must pay to the party in whose favour guarantee is given on demand, if so stipulated, and whether the terms are such have to be found out from the performance guarantee as such. There the Court held that where though the guarantee was given for the performance by the party on whose behalf guarantee was given, in an orderly manner its contractual obligation, the obligation was undertaken by the bank to repay the amount on “first demand” and “without contestation, demur or protest and without reference to such party and without questioning the legal relationship subsisting between the party in whose favour guarantee was given and the party on whose behalf guarantee was given,” and the guarantee also stipulated that the bank should forthwith pay the amount due “notwithstanding any dispute between the parties,” it must be deemed that the moment a demand was made without protest and contestation, the bank had obliged itself to pay irrespective of any dispute as to whether there had been performance in an orderly manner of the contractual obligation by the party. Consequently, in such a case, the party on whose behalf guarantee was given was not entitled to an injunction restraining the bank in performance of its guarantee. It

appears that special equities mentioned therein may be a situation where the injunction was sought for to prevent injustice which was irretrievable in the words of Lord Justice Denning, M.R. in Elia and Rabbath v. Matsas and Matsas.

...

28. I am however, of the opinion that these observations must be strictly considered in the light of the principle enunciated. It is not the decision that there should be a prima facie case. In order to restrain the operation either of irrevocable letter of credit or of confirmed letter of credit or of bank guarantee, there should be serious dispute and there should be good prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Otherwise the very purpose of bank guarantees would be negated and the fabric of trading operation will get jeopardised.

...

34. On the basis of these principles I reiterate that commitments of banks must be honoured free from interference by the courts. Otherwise, trust in commerce internal and international would be irreparably damaged. It is only in exceptional cases that is to say in case of fraud or in case of irretrievable injustice be done, the Court should interfere."
(Emphasis supplied) [see at pages 183; 186; 187 – 188; 189; 190]

34. The Learned Senior Advocate appearing for FGIPL has only tried to infer from various sentences of the judgments of the Hon'ble Supreme Court that there could be other species of special equities. The submission is directly contrary to the above Judgments of the Hon'ble Supreme Court, where it has repeatedly held that there are only two exceptions to the principle that Bank Guarantee invocation and encashment should not be stopped by the Court except in cases of fraud and special equities. Both these words have been interpreted by the Hon'ble Supreme Court in

a series of judgments. Fraud has been held to be a fraud of an egregious nature vitiating the entire underlying contract of bank guarantee; and special equities, to be such special equities which result in irretrievable injustice. In fact, an endeavour was made to expand the exceptions before the Hon'ble Supreme Court in the case of BSES Ltd. (supra) which the Hon'ble Supreme Court has rejected. The same is clear from the following extracts taken from the Judgment set out hereunder:

"9. Mr. Rohtagi, learned Senior Counsel for the appellant, urged that the settled law in this country is that a bank guarantee is an independent contract between the bank and the beneficiary thereof. Accordingly, irrespective of any dispute between the beneficiary and the party at whose instance the bank has given the guarantee, the bank is obliged to honour its guarantee, as long as the guarantee is unconditional and irrevocable. Our attention was drawn to the judgment of this Court in U.P. Coop. Federation Ltd. v. Singh Consultant and Engineers (P) Ltd. (1988) 1 SCC 174 (hereinafter "U.P. Cooperative Federation"). It was pointed out in that case that a bank guarantee must be honoured in accordance with its terms as the bank, which gives the guarantee, is not concerned with the relations between the supplier and the customer. Neither is the bank concerned with the question whether any of them have failed in their contractual obligations or not. In other words, the bank must pay according to the tenor of its guarantee, on demand, without proof or condition.

10. There are, however, two exceptions to this rule. The first is when there is a clear fraud of which the bank has notice and a fraud of the beneficiary from which it seeks to benefit. The fraud must be of an egregious nature as to vitiate the entire underlying transaction. The second exception to the general rule of non-intervention is when there are "special equities" in favour of injunction, such as when "irretrievable injury" or "irretrievable injustice" would occur if such an injunction were not granted. The general rule and its exceptions has been reiterated in so many judgments of this Court, that in U.P. State Sagar Corporation vs. Sumac International Ltd., (hereinafter "U.P. State Sugar Corporation") this Court, correctly declared that the law was "settled".

11. *Mr. Sorabjee, however, tried to expand upon the settled exceptions to the rule by first, relying on an order of this Court in State of Haryana v. Continental Construction Ltd. (hereinafter "Continental Construction Ltd."). We are afraid that the short order in Continental Construction Ltd. (supra) appears to have been made on the narrow facts of that case and does not constitute a precedent binding us. Moreover, as mentioned earlier, a line of judgments of this Court have long settled the law relating to the invocation of bank guarantees.*

12. *Second, Mr. Sorabjee placed reliance on a number of foreign judgments, especially that of the Queen's Bench Division in TTI Team Telecom Ltd. v. Hutchison 3G UK Ltd., wherein, the rule and its exceptions in England have been elegantly summarized. Mr. Sorabjee placed special emphasis on the following propositions:*

....

....

.....

13. *Mr. Sorabjee, finally contended that in Singapore, where commercial cases are expeditiously disposed of, the Court of Appeal in Samwoh Asphalt Premix Pte. Ltd. v. Sum Cheong Piling Pte. Ltd. has held that calling a performance guarantee for an oblique purpose was not permissible. Specifically, using it as a "bargaining chip", as a "deterrent" or in an "abusive" manner, would invite an injunction from the court. He submitted that the Singapore court has gone so far as to say that the unconscionable calling of a bank guarantee was an exception independent of fraud.*

14. *We are afraid that in the face of the law succinctly laid down in U.P. Cooperative Federation (supra) and reiterated in numerous judgments of this Court referred to earlier, we are unable to accept the wide proposition of law laid down in the foreign judgments cited by Mr. Sorabjee. Whatever may be the law, as to the encashment of bank guarantees in other jurisdictions, when the law in India is clear, settled and without any deviation whatsoever, there is no occasion to rely upon foreign case law." (emphasis supplied)*

35. The Hon'ble Supreme Court has in the case of *Dwarikesh Sugar Industries Ltd.*

*vs. Prem Heavy Engineering Works (P) Ltd. and another*²⁰ observed as follows:

20 (1997) 6 SCC 450

"22. The second exception to the rule of granting injunction i.e. the resulting of irretrievable injury, has to be such a circumstance which would make it impossible for the guarantor to reimburse himself, if he ultimately succeeds. This will have to be decisively established and it must be proved to the satisfaction of the Court that there would be no possibility whatsoever of the recovery of the amount from the beneficiary, by way of restitution.

29. We also do not find any justification for the High Court in invoking the alleged principle of unjust enrichment to the facts of the present case and then deny the appellant the right to encash the bank guarantee. If the High Court had taken the trouble to see the law on the point it would have been clear that in encashment of bank guarantee the applicability of the principle of undue enrichment has no application". (emphasis supplied)

36. In any event, the alleged admitted non-payment of claim by TCTPL to FG IPL cannot create a special equity so as to injunct the invocation of the Bank Guarantee. Whether there is any payment due or not under the underlying contract is not the subject matter which can be considered or taken into account while granting or refusing to grant injunction against invocation and/or encashment of bank guarantee. The Hon'ble Supreme Court has in its decision in the case of *Mahatma Gandhi Sahakra Sakkare Karkhane (supra)* held as under:

"25. ... It is specifically alleged that required funds were not available with the appellant. On account of non availability of funds there were two halts of nine months and five months during the execution of the project from 03.12.2001 to 14.08.2002 and from 14.08.2002 to 10.01.2003. It is further alleged that the appellant failed to arrange for all the pre-requisites. It is not necessary for the purpose of disposal of this appeal to notice all the allegations and averments filed by the respondents except to note that the main thrust of the allegation relate to alleged breach of the

conditions of the agreement by the appellant. ... Once it is held that the bank guarantee furnished by the banker is an unconditional one, the appellant in our considered opinion cannot be restrained from encashing the bank guarantee on the ground that a serious dispute had arisen between the parties and on the allegations of breach of terms and conditions of the agreement entered between the parties.”. (emphasis supplied)

In the case of *BSES Ltd. vs. Fenner India Ltd. and Anr.* (supra), it was held:

“27. This was also a case where, after having recovered certain amount from the running bills, a call was made on the bank guarantee in respect of the full guaranteed amount. In an observation with direct relevance for the present case, this Court pointed out that the bank was not concerned with the outstanding amount payable under the running bills: "The right to recover the amount under the running bills has no relevance to the liability of the Bank under the guarantee. The liability of the Bank remained intact irrespective of the recovery of mobilisation advance or the non-payment under the running bills. The failure on the part of (the Beneficiary) to specify the remaining mobilisation advance in the letter for encashment of bank guarantee is of little consequence to the liability of the bank under the guarantee."

In the case of *General Electric Technical Services Company Inc. v. Punjab Sons (P) Ltd.*²¹, it was held that:

“10. The High Court has observed that failure on the part of GETSCO to make a reference to mobilisation advance in the letter seeking encashment of the bank guarantee would be tantamount to suppression of material facts, in the sense that the mobilisation advance was, under the contract to be recovered from the running bills. It was further observed that disclosure of such facts would have put the bank to further inquiry as to what was the amount covered by those bills and what was the corresponding amount of the mobilisation advance and to what extent the amount covered by the bank guarantee remained payable. In

²¹ (1991) 4 SCC 320

any event, the High Court said, that GETSCO could not demand full amount of the bank guarantee on 17 April 1989. It seems to us that the High Court has misconstrued the terms of the bank guarantee and the nature of the inter-se rights of the parties under the contract. The mobilisation advance is required to be recovered by GETSCO from the running bills submitted by the respondent. If the full mobilisation advance has not been recovered, it would be to the advantage of the respondent. Secondly, the Bank is not concerned with the outstanding amount payable by GETSCO under the running bills. The right to recover the amount under the running bills has no relevance to the liability of the Bank under the guarantee. The liability of the Bank remained intact irrespective of the recovery of mobilisation advance or the non-payment under the running bills. ... ” (emphasis supplied).

In the case of *ANCL & Co. India Ltd. v. Corporation Bank (supra)*, it was held that:

“55. In my view, other correspondence exchanged between the parties need not be dealt with for the purpose of deciding whether the intent of the beneficiary to invoke the bank guarantee was for any other purpose other than for which such bank guarantee was furnished. Issue raised by Mr. Kamdar, the learned senior counsel appearing for the petitioner that the petitioner has to recover substantial amount from the respondents or the issue raised by Dr. Sathe, the learned senior counsel appearing for the respondents that the petitioner had committed breaches of the contract and in view of the termination of the contract, respondents would be entitled to get the balance work done at the risk and cost of the petitioner and would have counter claim against the petitioner are concerned, I am of the view that both these issues can't be decided in the present proceedings while considering application for injunction in respect of the unconditional bank guarantee and such issues in my view can be decided only by the Arbitral Tribunal.”

37. FGIPL has in support of its contention that special equities have arisen in its favour, has placed reliance on the Judgment of the Hon'ble Supreme Court in the case of *Hindustan Construction Company (supra)* and in particular, paragraph 22 thereof which reads thus:

“22. We have scrutinized the facts pleaded by the parties in respect of both the Bank Guarantees as also the document filed before us 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”.

The Judgment of the Hon'ble Supreme Court in the case of *Hindustan Construction Company* (supra), as can be seen from Paragraph 9 of the Judgment, is purely on the basis of the terms of the Bank Guarantee. The observations at para 22 therein was in the context of a conditional bank guarantee. The Court has in the said case considered the clauses of the bank guarantee and in paragraphs 12 and 13 held that the bank guarantee was not an unconditional bank guarantee. The Hon'ble Supreme Court has held that by referring specifically to Clause 9, the Bank has qualified its liability to pay the amount covered by the Guarantee relating to “Advance Mobilisation Loan” to the Executive Engineer only if the obligations under the contract were not fulfilled by HCCL, or if HCCL has misappropriated any portion of the “Advance Mobilisation Loan”. The Hon'ble Supreme Court further held that it is in these circumstances that clause 12 of the bank guarantee would operate and the whole of the amount covered by the “Mobilisation Advance” would become payable on demand and the bank guarantee thus could be invoked only in the circumstances referred to in Clause 9. The Supreme Court has held that, that being so the bank guarantee could not be said to be unconditional and unequivocal in terms so that the Defendants could be said to have an unfettered right to invoke that Guarantee and demand immediate payment

thereof from the Bank. Further, the Court has also held at paras 19 and 20 that the invocation was done wrongfully. It was in the context of such bank guarantee that the Hon'ble Supreme Court made observations in para 22 in the case of *Hindustan Construction Company* (supra). The Judgment and observations of the Hon'ble Supreme Court in para 22 of the Judgment in *Hindustan Construction Company* (supra) cannot by any stretch of reasoning be said to have diluted the law on bank guarantees which has been reiterated repeatedly by the Hon'ble Supreme Court even after the Judgement in the case of *Hindustan Construction Company*. In the case of *Vinitec Electronics Pvt. Ltd. vs. HCL Infosystems Ltd.*²², the Hon'ble Supreme Court expressly dealt with and distinguished the Judgment in the case of *Hindustan Construction Company* at paragraphs 20 and 21 thereof.

38. In the light of aforesaid judgments, the alleged admitted non-payment can never be a ground of special equity because the Court cannot even go into that aspect as it is a dispute arising under the underlying contract and not in respect of the Bank Guarantee. In fact at the cost of repetition, I would again point out that under Article 2 of the subject Bank Guarantees, it is agreed that the Guarantor Bank is not entitled to dispute or enquire into whether the purchaser (TCTPL) has become entitled to claim the amount under the Purchase Order or not, or whether the Supplier (FGIPL) has committed any breach of Purchase Order and/or the General terms and conditions applicable thereto or not, or whether the Purchaser (TCTPL) is entitled to

22 (2008) 1 SCC 544

recover any damages from the Supplier (FGIPL) for breach thereof or not. It is also clearly agreed that the Purchaser (TCTPL) need not initiate any proceeding or claim against the Seller (FGIPL) before lodging any claim under the Guarantee. The liability of the Guarantor under the Guarantee is primary, direct and immediate and not conditional and/or contingent upon pursuit by the Purchaser (TCTPL) of any remedies that it may have against the Seller (FGIPL) and/or any other person in relation to the Purchase Order.

The aforestated submissions advanced by Mr. Khambatta on behalf of FGIPL, therefore, cannot be accepted and are rejected.

39. As regards the submission on behalf of FGIPL, that FGIPL will suffer irretrievable injustice if the Bank Guarantees are permitted to be encashed as the financial situation of TCTPL is precarious and the Bankers of TCTPL have stopped disbursements to it, it is submitted on behalf of TCTPL as follows:

(i) That TCTPL is a financially sound company and has already invested in excess of Rs. 350 crores to develop and commission a Rs. 640 crore Coal Terminal for the V.O. Chadambaranar Port Trust, Tuticorin;

(ii) that the accounts of TCTPL are standard and regular with NIL overdue with all its 7 consortium lenders as evidenced by the certificates issued by all its lenders [Exhibit A (Colly.) / Pages 504-511/ Additional Affidavit in Petition (L) No. 366/2016] and disbursements have been made to TCTPL as late as on 11th March,

2016 as evidenced by TCTPL 's Bank Account Statement [Exhibit B / Pages 512-515/ Additional Affidavit to Petition (L) No. 366/2016];

(iii) that an amount of over Rupees Sixty One crores has already been paid by Respondent No. 1 to FGIPL pursuant to the Purchase Order.

40. TCTPL has also produced a letter dated 5th July, 2017, issued by the Bank of India to TCTPL which reads as under:

" 1. The subject project is for providing port handling infrastructure and has been financed by the consortium of seven lenders comprising Bank of India (Lead Bank), Oriental Bank of Commerce, Indian Bank, Indian Overseas Bank, India Infrastructure Finance Company Ltd., Bajaj Finance and Export Import Bank of India.

2. The account of all lenders with TCTPL is Standard Asset in the books of the Lenders as on date.

3. As on date amount disbursed by the lenders is Rs.255.10 crores and equity injected by Promoters is Rs. 170.07 crores totaling the incurred cost Rs. 425.17 out of the total assessed project cost of Rs. 645.50 crores. The total project cost of Rs. 645.50 crores is to be funded in the debt equity ratio of 60 : 40. Based on the confirmation received from the Company for bringing its equity and the available debt of the consortium of lenders, company seems to be well placed to meet its project expenses.

4. It is clarified that this information is furnished without any risk and responsibility on our part in any respect, whatsoever, more particularly either as a guarantor or otherwise. This certificate is issued on the specific request of M/s. Tuticorin Coal Terminal Pvt. Ltd."

41. Though Mr. Khambatta has submitted that this letter only shows that TCTPL is meeting their financial obligations and there is no default for more than 90 days, the fact remains that there is no default on the part of TCTPL qua their financial obligations till date. As regards the allegation that TCTPL is making losses, the same cannot be a ground for the Court to grant an injunction against TCTPL from invoking the Bank Guarantees. TCTPL is yet to start the project commercially. Prior to the commencement of its commercial operations it certainly cannot be expected to make profits. However, it is important to note that the Civil Engineering Department of VOCPT has sent a communication to TCTPL dated 4th August, 2017, wherein the independent Engineer M/s. CES (India) Pvt. Ltd. had issued a provisional certificate of the same date which is attached to the said communication. The certification by the independent Engineer appointed under the Concession Agreement dated 11th September, 2010 is to the effect that the independent Engineer is satisfied that the project can be safely and reliably placed into commercial service in terms of the said agreement and the project was provisionally declared fit for entry into commercial operation. The said satisfaction provisionally declared, is subject to works that were found to be incomplete or deficient which are specified in a "Punch List". The Punch List appears as an annexure to the said provisional certificate and records 4 items remaining to be completed as on 4th August, 2017. These items are as follows:

- (i) Conveyor - The mechanised conveyor system yet to be installed.

- (ii) Stackyard Machines (Stacker Reclaimers - 2 Nos. and 2 No.stacker) -- Major erections completed and not yet commissioned.
- (iii) Dust suppression and Fire Fighting systems.
- (iv) Electrical and plumbing works in stackyard.

Therefore save and except for the four items, there is prima facie evidence of the fact that the VOCPT is satisfied with the readiness of TCTPL to commence commercial operations.

42. Though it is submitted on behalf of FGIPL that TCTPL does not have any assets of its own and FGIPL will be left high and dry if it is unable to execute the award passed in Arbitration in their favour by the Arbitral Tribunal, as correctly pointed out by Mr. Kamdar, Learned Senior Advocate appearing for TCTPL, the promoters of TCTPL have already infused capital of Rs. 170 crores in the project. The Concession Agreement executed by and between FGIPL and TCTPL is for 30 years. During this period TCTPL will be entitled to recover tariff from the users of the Project Facilities and services. The cargo handling charges are levied per metric ton of cargo which is discharged from the ship. The total estimated revenue during the balance concession period shall be Rs. 10,067.14 crores which shall be apportioned in the following order as per the Concession Agreement:

- (i) Taxes and Statutory dues;

- (ii) License Fees;
- (iii) Construction/implementation Expenses relating to the project;
- (iv) Operations and Management expenses relating to the project;
- (v) Debt Service obligations;
- (vi) Royalty payable to the Government and liquidated damages (52.17%);
- (vii) Towards any Reserve requirement; and
- (viii) Concessionaire (TCTPL).

43. Again, TCTPL has also filed a counter claim in the sum of Rs. 600 crores before the Arbitral Tribunal. The Court cannot proceed on the basis that the claim of FGIPL will be accepted by the Arbitral Tribunal whereas the counter claim of TCTPL will be dismissed. FGIPL had also filed a Company Petition being Company Petition No. 780 of 2015 before the Company Court seeking winding up of Respondent No. 1 on the ground that TCTPL has admitted to pay Rs. 32 crores to FGIPL but has failed to pay the same and is therefore unable to pay its debts. The said Petition has been rejected. It is also pertinent to note that as regards the admission of liability, the Learned Company Judge has recorded in his Order that, "*I find that the admissions of liability were all as a result of negotiations which were in anticipation of continuation of work under the contract and not as a result of the termination of the contract*".

44. Therefore, FGIPL's submission that it will suffer irretrievable injustice if the Bank Guarantees are permitted to be encashed, is rejected.

45. In the circumstances, the above Arbitration Petitions are dismissed.

(S.J. KATHAWALLA, J.)