

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ O.M.P.(I) (COMM.) 420/2017 & IAs 15307/2017, 213/2018 &
CCP(O) 6/2018

Reserved on: 13th April, 2018
Date of decision : 4th May, 2018

CLASSIC-KSM BASHIR JV Petitioner
Through: Mr.K.Datta, Mr.Parijat Kishore,
Advs.

versus

MITES LIMITED & ORS. Respondents
Through: Mr.G.S. Chaturvdi and
Mr.Shrinkar Chaturvedi, Advs. for
R-1 to 3.
Mr.Puneet Taneja and
Ms.Shaheen, Advs. for R-5.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner *inter-alia* praying for the following reliefs:

“(i) Pass and interim order to stay the termination letter dated 20.09.2017 issued by Respondent No.3 till the matter is heard and finally decided by the Arbitrator.

(ii) Pass an order restraining the respondent from creating any third party right with respect to the award of the remaining work as per the agreement dated 08.08.2017 as executed between the parties, till the matter is heard and decided by the Arbitrator.

(iii) Pass an interim order restraining the respondent from invoking/encashing the Bank Guarantees bearing number 087GT02130080001 dated of issue 08.01.2013 renewed on 21.07.2017 till 31.07.2018 issued by HDFC Bank, Ranchi to the tune of Rs.1,93,50,000/-, Bank Guarantee bearing no.087GT02151700001 date of issue 19.06.2015 amended on 20.09.2017 valid till 30.09.2018 issued by HDFC Bank, Ranchi to the tune of Rs.3,45,31,281/- and Bank Guarantee bearing no.087GT02151700002 issued on 19.06.2015 amended on 20.09.2017 and valid till 30.09.2018 issued by HDFC Bank, Ranchi to the tune of Rs.3,45,31,281/- as has been provided by the petitioner to the respondent in terms of clause 21.12 of the General Conditions of Contract;

(iv) Pass an interim order staying the respondent's letter No.RITES/RPO-LKO/ACCTS/2017-18/3290 dated 05.10.2017 issued by Respondents for invocation of Bank Guarantee to Respondent no.4.”

2. The respondent no.1, pursuant to a tender had issued a Letter of Acceptance dated 03.12.2012 in favour of the petitioner awarding the work of Earthwork in formation, Construction of ROB, RUB and Culverts, P-Way works, Workshop, Service Building, Foot Over Bridge, Electrical and Miscellaneous works for Railway Siding and MGR system inside plant of BRBCL Nabinagar TPP(4 x 250 mw). The work was to be executed in Aurangabad District of Bihar. The contract price for the above work was Rs.69,06,25,607.70. The work was to be completed within a period of 15 months which was to be reckoned from 15 days after the issuance of the Letter of Acceptance. An agreement dated 18.01.2013 was also executed by the parties in this regard. The respondent no.1 extended the time for completion of the work till

30.06.2015 vide its letter dated 01.12.2014. The time for completion of the work was further extended till 31.07.2017 by the respondent no. 1 vide its letter dated 01.02.2017.

3. The Engineer-In-Chief for the work vide letter dated 19.05.2017 issued seven days notice under Clause 15.3 to the petitioner *inter-alia* contending therein that the financial progress from April 2016 to March 2017 was only approximately Rs.2.7 crores and in spite of the earlier notice dated 28.02.2017 and assurance given by the petitioner to increase the resources and improve the progress of the work, the desired progress had not been achieved.

4. The petitioner vide its letter dated 24.05.2017 responded to the above notice claiming certain hindrances and at the same time claiming that the execution of the work is being expedited.

5. The respondent no.1 by its letter dated 07.06.2017 called upon the petitioner to submit the proof of investment for considering its request for allowing the continuation of the work. The respondent no. 1 further expressed concern over the deployment of labour being less than the requirement and the supply of blanketing material still not been completed.

6. In a Progress Review Meeting held on 23.06.2017, while *inter-alia* noting that the scheduled target had not been achieved on various parameters, concern was again expressed on insufficient mobilization of resources and the petitioner was called upon to increase the labour.

7. In view of the assurance given by the petitioner to improve the progress of the work, the respondent no.1 vide its letter dated 03.07.2017 informed the petitioner of its decision to allow the petitioner to continue

with the work and called upon the petitioner to submit an application seeking extension of the completion date.

8. The petitioner duly applied for the extension of time vide its letter dated 20.07.2017.

9. In another Progress Review Meeting held on 04.08.2017, while noting that the work at various sections could not be done due to heavy rains and muddy approaches, it was *inter-alia* directed to the petitioner to increase the number of labour. It was further directed that the balance sleepers be supplied by the petitioner as soon as possible.

10. The Engineer-In-Charge, by its letter dated 08.08.2017 issued a fresh notice under Clause 51.3 of the Agreement noting therein that the financial progress from April 2016 to July 2017 was only approximately Rs.4.10 crores and in spite of the assurance given, the progress of the work had not improved till the issuance of the notice.

11. The petitioner responded to the above Show Cause Notice by way of its letter dated 14.08.2017. While recording the various hindrances in the execution of the work, including heavy rains, the petitioner further stated as under in its letter:

“Times and again we have been served with seven days notice keeping us confused whether our contract is going to survive or is going to be terminated in a few days. In such an unsecured position any contractor will hesitate to make a big investment. In this way you are yourself responsible for slowing down the pace of work time to time by demoralizing us.”

12. The petitioner also annexed with the letter a table showing the amount of work done by it on the project.

13. The respondent no.1, however, vide its Impugned Notice dated 20.09.2017 terminated the contract. This Impugned Notice *inter-alia* records as under:

“In spite of the notice issued to you vide letter referred above in connection with execution of above mentioned contract, you have failed to expedite the progress of work at any front. You have failed to complete the work within the extended stipulated date of completion of work i.e. by 31.07.2017. Although further Extension of time for completion of work up to 31.12.2017 has been sought by you but work cannot be completed even by this date considering the labour deployed at site at present.

1. Your reply vide your letter no.CKB/NBG/2017-18/241 dated 14.08.2017 in response of the 7 day notice has been considered carefully but not found to the satisfaction of the of the engineer-in-charge due to reason mentioned below:

(a) No action has been taken for supply of sleepers which has be taken up any whether condition.

(b) You have not been even placed order for fabrication of girder for Road over Bridge.

(c) You have fail to mobilized adequate reasons i.e. manpower and machine and financially input at site to so you careens of completion of work.”

14. The petitioner replied to the said termination notice vide its letter dated 25.09.2017. As far as the specific defaults pointed out by the respondent no.1 in its termination notice are concerned, the petitioner stated as under:-

“5. Reason for action of termination as stated by RITES and actual facts are tabulated below:

<i>S. No.</i>	<i>Reason shown in the termination letter dated 20.09.2017 (actual text copied from the letter of termination)</i>	<i>Actual position as may be ascertained by perusal of document proofs</i>
<i>(a)</i>	<i>No action has been taken for supply of sleepers which has be taken up any weather condition</i>	<i>Order along with advance was placed even before issue of seven day's notice. Arrival of sleepers at site resumed from 5.9.2017 and stopped due to termination of the contract.</i>
<i>(b)</i>	<i>You have not been even placed order for fabrication of girder for Road over Bridge</i>	<i>Purchase order was placed before issue of seven day's notice and copy of purchase order of girder and bearings were already submitted to the RITES. QAP and WPSS have been also submitted to RITES for approval.</i>
<i>(c)</i>	<i>You have fail to mobilized adequate reasons i.e. manpower and machine and financially input at site to so you careens of completion of work.</i>	<i>We had already mobilized adequate manpower and machinery required for the work at available fronts. After start of continues heavy rain causing flood like situation when only 600 T/M stretch remain available the number of labours was somewhat reduced but even than machineries were not removed although most of them were sitting idle.</i>

15. Impugning the above termination notice and *inter-alia* praying for a stay of the invocation of the Bank Guarantee, the present petition was filed by the petitioner.

16. This Court vide its Order dated 13.10.2017 restrained the HDFC Bank, who has been impleaded as respondent no.4, from taking any steps in relation to the encashment of the bank guarantee.

17. In the meantime, the respondent no.1 had already invoked the bank guarantees submitted by the petitioner vide its invocation letter dated 05.10.2017.

18. During the pendency of the petition, the respondent no.1 floated a new tender for completion of the remaining work of the same project. The petitioner, therefore, filed an application being I.A. No.15307/2017 praying for the stay of the termination letter dated 20.09.2017 as also for an order restraining the respondents from creating any third party rights by the award of the remaining work.

19. As the petition was already listed for final hearing, this Court vide its Order dated 20.12.2017 directed that the respondent no.1 may continue with the tender process, however, it will not award the contract to the successful bidder till the next date of hearing. This order has been continued thereafter.

20. Learned counsel for the petitioner submits that the impugned termination notice issued by the respondent no.1 is contrary to facts and based on incorrect grounds. He further submits that the termination notice has been issued on the basis of grounds which did not form part of the Show Cause Notice on 08.08.2017. He submits that there has been a violation of the Principles of Natural Justice apart from a violation of the

contractual terms itself. On merits, he submits that all the three grounds mentioned in the termination notice are incorrect and in this regard he has drawn my reference to the pleadings made by the petitioner in the petition and the additional affidavit dated 28.10.2017 filed on behalf of the petitioner. He has placed reliance on the judgment of the Supreme Court in ***Gorkha Security Services v. Govt of NCT of Delhi & Ors.*** (2014) 9 SCC 105 and ***Chairman Board of Mining Examinatin v. Ramji***, (1977) 2 SCC 256, to contend that the respondent no.1 being an instrumentality of the State under Article 12 of the Constitution of India, is bound to pass rigorous inquisition of fair play, lack of arbitrariness, and its decision must be found to be based on good and sound reason. He submits that in the present case, the grounds taken by the respondent no.1 for terminating the Agreement are incorrect and therefore, the Impugned Termination Notice dated 20.09.2017 is liable to be stayed during the pendency of the arbitration proceedings. Relying upon the judgment of this Court in ***K&L Industries Ltd. v. National Textiles Corporation Ltd.***, 2012 SCC OnLine Del 14189; ***Pioneer Publicity Corporation vs. Delhi Transport Corporation***, 103(2003) DLT 442; ***Softline Media Ltd. Softlines & Shalimar Advertisers vs. Delhi Transport Corporation***, 2002 II AD (Delhi) 849; and ***M/S Gwalior –Jhansi Expressway Limited Vs NHAI***, (2014) SCC Online Del 1124, it is contended that Section 14 of the Specific Relief Act would not bar the relief of injunction as respondent is an instrumentality of the State and even in contractual matter has to act in a fair and just manner.

21. On the other hand, learned counsel for the respondent nos.1 to 3 has submitted that the termination of the contract has been done on valid

and cogent grounds as the petitioner, in spite of opportunities being granted, was unable to perform the work in an expeditious manner. He further submits that the Agreement being determinable by its very nature and damages being an adequate remedy, in any case, an injunction cannot be granted against the termination notice. For this proposition he relies upon the following judgments:

- i. ***Rajasthan Brewery Ltd. v. Stroh Brewery Company***, AIR (2000) Delhi 450;
- ii. ***Indian Railways Catering & Tourism Corporation Limited v. Cox & King***, (186) 2012 DLT552;
- iii. ***ONGC v. Streamline Shipping Co. Pvt. Ltd.***, AIR (2002) Bom.420

22. I have considered the submissions made by the learned counsels for the parties. At the outset, it is noted that it cannot be denied by the petitioner that the work at the project could not be completed by the petitioner within the stipulated date and also within the time extended by the respondent no.1. There is a dispute between the parties as to whether the petitioner or respondent no.1 is responsible for such delay. At the same time, the documents and specially the letter dated 07.06.2017 from the respondent no.1 to the petitioner, Minutes of Joint Progress Review Meeting dated 23.06.2017 and Minutes of Joint Progress Review Meeting dated 04.08.2017 show that the respondent no.1 has been insisting upon the petitioner to increase the number of the labour employed by the petitioner and also calling upon it to expedite the various works undertaken by it. As far as the three specific issues mentioned in the termination letter dated 20.09.2017 are concerned, it may be noted that

the respondent no.1 in its reply has submitted that in spite of the assurance given by the petitioner to procure the balance sleepers to be supplied by it as soon as possible, as recorded in the Minutes of the Joint Progress Review Meeting dated 04.08.2017, only an order of 578 number of sleepers as against 13000 further number required in the project, was placed by the petitioner and that to only in September, 2017.

23. On the issue of placing of the order for fabrication of girder for Road Over Bridge, it is stated by the respondent no.1 that the resources for Quantity Assurance Plan and the Welding Procedure Specification (WPSS) was given by the petitioner as late as on 29.07.2017 that is only two days before the date of the extended completion of time, which was 31.07.2017. It is further asserted that even during the monsoon, certain activities could have been done by the petitioner on the project, however, the petitioner had failed to do so with expedition, forcing the respondent no.1 to terminate the agreement.

24. The above contention and counter contention would only show that there is a dispute to be tried by the Arbitral Tribunal on whether the termination of the agreement by the respondent no.1 by its Impugned Notice is for a valid reason or not. It cannot prima facie be concluded at this stage that such termination is totally arbitrary and vexatious in nature.

25. Clause 51.3.1(a)(b) of the agreement empowers the respondent no.1 to terminate the agreement, incase the contractor defaults in proceeding with the work with due diligence and continues to delay in doing so, after a notice of seven days in writing from the Engineer-In-Charge, or defaults in complying with any of the terms and conditions of

the contract and does not remedy it or take effective steps to remedy it within seven days after a notice in writing is given to him in that behalf by the Engineer-In-Charge. In the present case, such notice had been given by the Engineer-In-Charge to the petitioner on 08.08.2017. The petitioner replied to the same vide its reply dated 14.08.2017. Along with the reply the petitioner also gave a progress report of the work. The respondent no.1, after considering the reply, considered it fit to terminate the agreement giving three specific area of default on part of the petitioner. As stated above, whether these grounds are valid or not cannot be determined at this stage, however, in view of the specific provision allowing the respondent no.1 to terminate the agreement alleging default on part of the petitioner and also as damages can be an adequate relief to the petitioner incase such termination of the contract is found to be based on an unjustified ground, the petitioner is not entitled to a stay of the termination notice. The judgments cited by the learned counsel for the petitioner would therefore, have no application to the facts of the present case.

26. As far as the plea of the denial of the Principles of Natural Justice is concerned, it may only be noted that the petitioner was well aware of the various issues being considered by the respondent no.1 while alleging defaults on part of the petitioner in execution of the work. These were not only recorded in the above mentioned communications from the respondent no.1 but also in the Minutes of Joint Progress Review Meetings. The fact that the petitioner was aware of these issues is also evident from its reply to the Show Cause Notice, wherein the petitioner, other than claiming hindrance in the execution of the work undertaken by

it, has also requested for withdrawal of the seven day notice and extension of time for completion of the work. Merely because in the termination notice three specific issues were highlighted by the respondent no.1 for justifying its termination, it cannot be said that the respondent no.1 did not follow the Principles of Natural Justice as these were not specifically mentioned in the Show Cause Notice.

27. In ***Indian Railways Catering & Tourism Corporation Limited*** (supra), this Court had considered the scope of the grounds for stay of an injunction under Section 9 of the Act and held as under:

*“25. Based on the facts projected above, we come back to the main issue, namely, whether direction in the nature given, which are in the nature of mandatory injunction amounting to specific performance or directing continuation of the arrangement even when the agreement had been terminated could be given or not. Once the Joint Venture Agreement is terminated, prima facie we feel that even in the main arbitration proceedings, it would be difficult for M/s C&K to seek the final relief of specific performance and for restoration of the agreement. There is a huge possibility that in such a situation, normally M/s C&K would be entitled to damages even if it is held that Joint Venture Agreement was illegally terminated. After all, Joint Venture Agreement was a contract between the parties. It was only in the realm of contractual arrangement with no statutory flavour and no element of public law. While dealing with the contractual obligations under the realm of contract in a private field without any insignia of public element, it may be somewhat difficult for M/s C&K to maintain the relief of specific performance. The agreement was in commercial field to be governed by contract law, as between two private parties. In *Rajasthan Breweries Ltd. v. The Stroh Brewery Company*, AIR 2000 Delhi 450, the Court enunciated the principle on this aspect in the following words:*

“Even in the absence of specific clause authorising and enabling either party to terminate the agreement in the event of happening of the events specified therein, from the very nature of the agreement, which is private commercial transaction, the same could be terminated even without assigning any reason by serving a reasonable notice. At the most, in case ultimately it is found that termination was bad in law or contrary to the terms of the agreement or of any understanding between the parties or for any other reason, the remedy of the appellants would be to seek compensation for wrongful termination but not a claim for specific performance of the agreements and for that view of the matter learned Single Judge was justified in coming to the conclusion that the appellant had sought for an injunction seeking to specifically enforce the agreement. Such an injunction is statutorily prohibited with respect of a contract, which is determinable in nature. The application being under the provisions of Section 9(ii)(e) of the Arbitration and Conciliation Act, relief was not granted in view of Section 14(i)(c) read with Section 41 of the Specific Relief Act. It was rightly held that other clauses of Section 9 of the Act shall not apply to the contract, which is otherwise determinable in respect of which the prayer is made specifically to enforce the same.”

26. *We are unable to accept the contention of learned counsel for the appellant that since IRCTC is a corporation which is wholly owned by the Ministry of Railways and is, thus, subjected to Article 12 of the Constitution of India, the appellant can maintain the prayer for mandatory injunction. This plea of the appellant flows from the argument that the action of the State or instrumentality of the State has to be fair, just and non-arbitrary even in contractual matters and for this purpose, the appellant has referred to the judgment of this Court in Pioneer Publicity Corporation v. DTC, 103 (2003) DLT 442 and that of Supreme Court in Mahabir Auto Sales (supra). While there is no denial of the legal principle, per se,*

laid down in the aforesaid cases, we are unable to accept the applicability of these judgments insofar as the present case is concerned and that too, when we are dealing with the question of interim arrangement and not concerned with the final stage of the proceedings. Specific performance would require day to day supervision. In any event, M/s C&K can be compensated in terms of money if they prove losses due to alleged wrongful treatment. There is a serious dead lock between IRCTC and M/s C&K in relation to the affairs of Joint Venture company cannot be given a go-by.”

28. In view of the above, the prayer made by the petitioner against the respondents restraining it from terminating the work or awarding the balance work to a third party cannot be granted. In fact, the grant of such an injunction would be contrary to the rights vested in the respondent no.1 under Clause 51.3.2 of the agreement which is reproduced herein below:

“51.3.2 The Employer shall on such cancellation have rights to:

- (a) take possession of the Works and any materials, construction plant, implements, stores, etc., thereon; and/or*
- (b) carry out the incomplete Work by any means at the risk and cost of the Contractor.”*

29. As far as the bank guarantees are concerned, the same have been given by the petitioner in terms of Clause 22 and 23 of the agreement in the form of Contract Performance Bank Guarantee and Mobilization Advance Guarantee.

30. Learned counsel for the petitioner submits that there is no Clause in the agreement which authorizes the respondent no.1 to invoke the bank guarantee on the termination of the agreement. He submits that on the other hand, Clause 51.3.3 of the agreement requires the respondent no.1 to determine, on cancellation of the contract, what amount, if any, is recoverable from the contractor for completion of the work or as loss or damages suffered by the employer. He submits that in the absence of such determination, the bank guarantees given by the petitioner cannot be invoked.

31. I have considered the submissions made by the learned counsel for the petitioner, however, I am unable to agree with the same. Clause 51.3.3 relied upon by the learned counsel for the petitioner is in the sequences of various clauses in the agreement which provide for settling of the accounts upon termination of the agreement. This clause, in my opinion, would have no bearing on the right of the respondent no.1 to invoke the bank guarantee, which has to be determined on its own terms. Clause 51.3.3 to 51.3.6 of the agreement support my above conclusion and are reproduced herein below:

51.3.3. *On cancellation of the Contract in full or in part, the Employer shall determine what amount, if any, is recoverable from the Contractor for completion of Works or part of the Works or in case the Works or part of the Works is not completed, the loss or damage suffered by the Employer. In determining the amount, credit shall be given to the Contractor for the value of the work executed by him up to the time of cancellation, the value of*

Contractor's material taken over as well as incorporated in the work, and use of tools and plants belonging to the Contractor.

51.3.4 *Any excess expenditure incurred or to be incurred by the Employer in completing the Works or part of the Works or the excess loss or damages suffered or may be suffered by the Employer as aforesaid after allowing such credit shall be recovered from any money due to the Contractor on any account, and if such money is not sufficient the Contractor shall be called upon in writing to pay the same within twenty-eight (28) days.*

51.3.5 *If the Contractor shall fail to pay the required sum within the aforesaid period of twenty-eight (28) days, the Engineer-in-Charge shall have the right to sell any or all of the Contractor's unused materials, construction plant, implements, temporary buildings etc. and apply the proceeds of sale thereof towards the satisfaction of any sums due from the Contractor under the Contract and if thereafter there be any balance outstanding from the Contractor, it shall be recovered from him.*

51.3.6 *Any sums in excess of the amounts due to the Employer and unsold materials, construction plant etc., shall be returned to the Contractor, provided always that if cost or anticipated cost of completion by the Employer of the Works or part of the Works is less than the amount which the Contractor would have been paid had he completed the Works or part of the Works, such benefit shall not accrue to the Contractor."*

32. It is not denied by the learned counsel for the petitioner that the bank guarantees in question are unconditional in nature and in terms

thereof the bank had undertaken to pay the amount due and payable under the guarantee(s) without any demure and merely on a demand from the respondent no.1 stating that the amount claimed is required to be paid as recoveries due or likely to be due from the petitioner.

33. The law of injunction in the case of bank guarantee is no longer *res integra*. In ***Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineering Works (P) Ltd.*** (1997) 6 SCC 450, Supreme Court reiterated this law as under:

“21. Numerous decisions of this Court rendered over a span of nearly two decades have laid down and reiterated the principles which the courts must apply while considering the question whether to grant an injunction which has the effect of restraining the encashment of a bank guarantee. We do not think it necessary to burden this judgment by referring to all of them. Some of the more recent pronouncements on this point where the earlier decisions have been considered and reiterated are Svenska Handelsbanken v. Indian Charge Chrome [(1994) 1 SCC 502] , Larsen & Toubro Ltd. v. Maharashtra SEB [(1995) 6 SCC 68] , Hindustan Steel Workers Construction Ltd. v. G.S. Atwal & Co. (Engineers) (P) Ltd. [(1995) 6 SCC 76] and U.P. State Sugar Corpn. v. Sumac International Ltd. [(1997) 1 SCC 568] The general principle which has been laid down by this Court has been summarised in the case of U.P. State Sugar Corpn. [(1997) 1 SCC 568] as follows: (SCC p. 574, para 12)

“The law relating to invocation of such bank guarantees is by now well settled. When in the course

of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. 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 the advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country.”

Dealing with the question of fraud it has been held that fraud has to be an established fraud. The following observations of Sir John Donaldson, M.R. in Bolivinter Oil SA v. Chase Manhattan Bank [(1984) 1 All ER 351, CA] are apposite:

“... 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 discharged.”

(emphasis supplied)

The aforesaid passage was approved and followed by this Court in U.P. Coop. Federation Ltd. v. Singh Consultants and Engineers (P) Ltd. [(1988) 1 SCC 174]

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.

34. In *Vinitec Electronics Private Ltd. v. HCL Infosystems Ltd.* (2008)1 SCC 544, the Supreme Court after relying upon various earlier judgments of the Court reiterated that the allegation with regard to the alleged breach of a contract by the respondent is not a plea of fraud of an egregious nature so as to vitiate the entire transaction. Paragraphs 24 to 28 of the Judgment are quoted herein below:

“24. 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.

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 allegation 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.

27. 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:

“That should the respondent be successful in implementing its evil design, the same would not only amount to fraud, cause irretrievable injustice to the applicant, and render the arbitration nugatory and infructuous but would permit the respondent to take an unfair advantage of their own wrong at the cost and extreme prejudice of the applicant.”

28. The plea taken as regards “irretrievable injustice” is again vague and not supported by any evidence.

35. In *Gujarat Maritime Board v. Larsen and Toubro Infrastructure Development Projects Limited and Anr.* (2016) 10 SCC 46, the Supreme Court once again cautioned that bank guarantee is a separate contract and is not qualified by the contract under which it is given. Whether the cancellation was just and proper is a question to be decided by the Arbitrator and not by this Court under Section 9 of the Act. I would only quote the relevant paragraphs of the said Judgment:

“9. Unfortunately, the High Court went wrong both in its analysis of facts and approach on law. A cursory reading of LoI would clearly show that it is not a case of forfeiture of security deposit “... if the contract had frustrated on account of impossibility...” but invocation of the performance bank guarantee. On law, the High Court ought to have noticed that the bank guarantee is an independent contract between the guarantor Bank and the guarantee appellant. The guarantee is unconditional, no doubt, the performance guarantee is against the breach by the lead promoter viz. the first respondent. But between the bank and the appellant, the specific condition incorporated in the bank guarantee is that the decision of the appellant as to the breach is binding on the Bank. The justifiability of the decision is a different matter between the appellant and the first respondent and it is not for the High Court in a proceeding under Article 226 of the Constitution of India to go into that question since several disputed questions of fact are involved.

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11. It is contended on behalf of the first respondent that the invocation of bank guarantee depends on the cancellation of the contract and once the cancellation of the contract is

not justified, the invocation of bank guarantee also is not justified. We are afraid that the contention cannot be appreciated. The bank guarantee is a separate contract and is not qualified by the contract on performance of the obligations. No doubt, in terms of the bank guarantee also, the invocation is only against a breach of the conditions in the LoI. But between the appellant and the Bank, it has been stipulated that the decision of the appellant as to the breach shall be absolute and binding on the Bank.

12. *An injunction against the invocation of an absolute and an unconditional bank guarantee cannot be granted except in situations of egregious fraud or irretrievable injury to one of the parties concerned. This position also is no more res integra. In Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co. [Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co., (2007) 8 SCC 110] , at para 14: (SCC pp. 117-18)*

“14. From the discussions made hereinabove relating to the principles for grant or refusal to grant of injunction to restrain enforcement of a bank guarantee or a letter of credit, we find that the following principles should be noted in the matter of injunction to restrain the encashment of a bank guarantee or a letter of credit:

(i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional bank guarantee or letter of credit is given or accepted, the beneficiary is entitled to realise such a bank guarantee or a letter of credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.

(ii) The bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.

(iii) The courts should be slow in granting an order of injunction to restrain the realisation of a bank guarantee or a letter of credit.

(iv) Since a bank guarantee or a letter of credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of bank guarantees or letters of credit.

(v) Fraud of an egregious nature which would vitiate the very foundation of such a bank guarantee or letter of credit and the beneficiary seeks to take advantage of the situation.

(vi) Allowing encashment of an unconditional bank guarantee or a letter of credit would result in irretrievable harm or injustice to one of the parties concerned.”

13. *The guarantee given by the Bank to the appellant contains only the condition that in case of breach by the lead promoter viz. the first respondent of the conditions of LoI, the appellant is free to invoke the bank guarantee and the Bank should honour it “... without any demur, merely on a demand from GMB (appellant) stating that the said lead promoter failed to perform the covenants...”. It has also been undertaken by the Bank that such written demand from the appellant on the Bank shall be “... conclusive, absolute and unequivocal as regards the amount due and payable by the Bank under this guarantee”. Between the*

appellant and the first respondent, in the event of failure to perform the obligations under the LoI dated 6-2-2008, the appellant was entitled to cancel the LoI and invoke the bank guarantee. On being satisfied that the first respondent has failed to perform its obligations as covenanted, the appellant cancelled the LoI and resultantly invoked the bank guarantee. Whether the cancellation is legal and proper, and whether on such cancellation, the bank guarantee could have been invoked on the extreme situation of the first respondent justifying its inability to perform its obligations under the LoI, etc. are not within the purview of an inquiry under Article 226 of the Constitution of India. Between the Bank and the appellant, the moment there is a written demand for invoking the bank guarantee pursuant to breach of the covenants between the appellant and the first respondent, as satisfied by the appellant, the Bank is bound to honour the payment under the guarantee.”

36. As far as the Mobilization Advance Guarantee is concerned, learned counsel for the petitioner further submits that the invocation letter is not in accordance with the bank guarantee and therefore, the bank cannot give effect to such invocation. The relevant condition of the Mobilization Advance Guarantee is reproduced herein below:

*“We HDFC, Bank Ltd. xxxx do hereby guarantee the due recovery by the Employer of this said advance with interest thereon as provided according to the terms and conditions of the Contract. If the said Contractor fails to utilize the said advance for the purpose of the Contract and/or the said advance together with interest thereon as aforesaid is not fully recovered by the Employer. **We, HDFC Bank Ltd., Circular Road, Ranchi** hereby unconditionally and irrevocably undertake to pay to the RITES LTD.*

(Employer) on demand and without demur to the extent of the said sum of Rs.2,76,25,025/- (Rupees Two Crore Seventy Six Lacs Twenty Five Thousand Twenty Five only), any claim made by the Employer on us for the loss or damage caused to or suffered by the Employer by reason of the Employer not being able to recover in full the said sum of Rs.2,78,25,025/- (Rupees Two Crore Seventy Six Lacs Twenty Five Thousand Twenty Five only) with interest as aforesaid.

2. *We, HDFC Bank Ltd. Circular Road, Ranchi further agree that the Employer shall be the sole judge of and as to whether the said Contractor has not utilized the said advance or any part thereof for the purpose of the Contract and the extent of loss or damage caused to or suffered by the Employer on account of the said advance together with interest not being recovered in full and the decision of the Employer that the said Contractor has not utilized the said advance or any part thereof for the purpose of the Contract and as to the amount or amounts of loss or damage caused to or suffered by the Employer shall be final and binding on us.*”

(emphasis supplied)

37. A reading of the above would show that the bank guarantee has to be invoked with the assertion that the contractor has failed to utilize the said advance for the purpose of the contract and/or the said advance together with interest thereon is fully recoverable by the employer and such invocation should thereafter mention the amount as the loss or damages caused to or suffered by the employer on account of such an advance together with interest not being recovered in full from the contractor. Once such assertion is made, the same is final as far as the

bank is concerned and it cannot refuse to honour the invocation of the bank guarantee.

38. In the present case, however, there is a common invocation letter dated 05.10.2017 with respect to the Contract Performance Bank Guarantee(s) and the Mobilization Advance Guarantee. Paragraph 3 of the said letter gives the reason for invocation of the bank guarantees and is reproduced herein below:

“3. RITES LTD., also states that under the Clauses of the subject BGs, the total amount of above referred all three BGs i.e. Rs.8,84,12,562/- (Rs. Eight Crore Eighty Four Lacs Twelve Thousand Five Hundred and Sixty Two only) is required by us to meet the recoveries due and likely to the due from the contractor because the contractor has failed to comply with its obligations in accordance with agreement.”

39. A reading of the above would clearly show that the invocation, so far as the Mobilization Advance Guarantee is concerned, is not in terms of the said Guarantee.

40. This Court in ***Jyoti Structure Ltd. v. Dakshinachal Vidyut Vitran Nigam Ltd. and Ors.***, (2016) 233 DLT 207 had emphasized that the letter invoking the bank guarantee must be strictly in terms thereof. It was held:-

“24. In so far as the invocation of the bank guarantees provided for securing the advance payment is concerned, the same can be invoked only in the event that the contractor fails to commence or fulfil its obligation under the terms of the contract and in the event of such failure, refuses to repay all or part of the advance payment. It is

necessary that the aforesaid condition be met before the said bank guarantees can be invoked. Similarly, insofar as performance bank guarantees are concerned, the same can be invoked in the event JSL is in default under the contract. It is well settled that a bank guarantee is an independent contract between the bank and the beneficiary. Banks are not concerned with the disputes between the beneficiary and person at whose instance, the guarantees have been furnished; in this case, JSL and DVVNL. A bank has also no means to ascertain whether the conditions as specified in the bank guarantee have been met and is obliged to make payments against the bank guarantee on a demand being made. However, the demands must be in terms of the bank guarantee.

25. *The decision of the Supreme Court in United Commercial Bank v. Bank of India and Ors.: AIR 1981 SC 1426, underscores the importance of claims being made in the terms of the letter of credit/bank guarantee. In that decision, the Court referred to the following passage from the Paget's Law of Banking, 8th Edition:-*

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

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

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

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

28. In M/s Ansal Properties & Industries P Ltd v. Engineering Projects (India) Ltd: 1997 (41) DRJ 618, the letter of invocation issued did not specifically state that any loss was caused and, therefore, this Court held that the invocation letter did not fulfil the requirements for invoking the bank guarantee. A similar view was also held by this Court in Punj Sons (P) Ltd. v. Hong Kong & Shanghai Banking Corporation and Anr.: 1991 (20) DRJ 154., Puri International Ltd. v National Building Construction Co. Ltd.: (1997) 41 DRJ 592 and Basic Tele Services Ltd.v. Union of India (UOI) and Anr: (2009) 112 DRJ 688.

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

41. In view of the above, respondent no.4 HDFC Bank is restrained from giving effect to the invocation letter dated 05.10.2017 in so far as the Mobilization Advance Guarantee is concerned. However, it is clarified that this would not preclude the respondent no.1 to issue fresh letter of invocation in accordance with the terms of the Mobilization

Advance Bank Guarantee. There shall be no stay on invocation and encashment of the Performance Bank Guarantee(s).

42. I may only hasten to add that the observations made in the present order shall not bind or influence the Arbitral Tribunal in any manner and the Arbitral Tribunal shall adjudicate on the disputes between the parties uninfluenced by any observation made herein.

43. The petition is partly allowed in the above terms, with no order as to cost.

NAVIN CHAWLA, J

MAY 4, 2018/Arya



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