

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ORDINARY ORIGINAL CIVIL JURISDICTION****ARBITRATION PETITION (L.) NO.1085 OF 2018**

Mercator Oil & Gas Limited

..Petitioner

Vs.

1.ONGC Limited

2.Axis Bank Limited.

...Respondents

WITH

ARBITRATION PETITION (L.) NO.1162 OF 2018

1.Mercator Oil & Gas Limited

2.Mercator Offshore (P) Pte. Ltd.

..Petitioners

Vs.

1.Oil & Natural Gas Corporation Ltd.

2.Gulf Piping Company W.L.L.

3.Abu Dhabi Commercial Bank

...Respondents

Mr.Janak Dwarkadas, Senior Advocate with Mr.Sharan Jagtiani,
Prateek Bagaria, Rohit Bhattacharya I/b.Singularity Legal LLP, for
the Petitioner.

Mr.Vikram Nankani with Amir Arsiwala, Shivani Kumbhojkar,
Omprakash Jha I/b. The Law Point, for Respondent No.1.

Mr.K.A.Suryanarayanan & Rajkumar Gaikwad, for Respondent
No.2 in ARBPL 1085/18.

Ms.Priyanka Shetty with Ranjit Shetty I/b. Argus Partners for
Respondent No.3 in ARBPL 1162/18.

CORAM : G.S. KULKARNI, J.

RESERVED ON : 2 May 2019.

PRONOUNCED ON : 3 June 2019

JUDGMENT:

The genesis of both the above petitions is the contract awarded by the respondent-ONGC to the consortium of the petitioner. The facts involved in these petitions are quite similar, hence, these petitions are disposed of by this common judgment.

Arbitration Petition (L.) No.1085 OF 2018

1. This is a petition under Section 9 of the Arbitration and Conciliation Act, 1996 (for short, “the Act”) whereby the petitioner has prayed for interim reliefs pending invocation of the arbitration. The reliefs principally pertain to the different bank guarantees furnished by the petitioner in favour of respondent no.1-Oil and Natural Gas Commission (for short 'ONGC') of respondent no.2-Axis Bank Ltd. The following are the prayers as made in the petition:-

“(a) Restraining the Respondent no.1 from terminating the Contract (Exhibit “A” hereto);

(b) Restraining the Respondent No.1 from invoking the BGs (Exhibit “C” hereto);

(c) Restraining the Respondent No.2 from making any payments to the Respondent No.1 under the invocation dated 25 September 2018 of the BGs;

(d) In the event any monies have been paid to the Respondent No.1 by the Respondent No.2 under the BGs, Ordering and Directing the Respondent No.1 to forthwith refund and return the said sums to the Petitioner;

(e) Ordering and Directing the Respondent No.1 to maintain status quo on the validity of the Contract;

(f) Ordering and Directing the Respondents No.1 and 2 to

maintain status quo on the BGs;

(g) Ordering and Directing the Respondent No.1 to forthwith issue the pending Change Orders and release the pending payments;

(h) Ordering and Directing the payment of costs in this Petition and the orders therein;

(i) Ordering and granting such further and other reliefs as may be appropriate in the facts and circumstances of the case.”

2. In nutshell the case of the petitioner is as follows:-

ONGC owns several ocean-going vessels which are used by it in connection with the conduct of petroleum operations in its various oil and gas blocks. One such vessel “Sagar Samrat” which is a jack up self-propelled, self-elevating drill ship, which struck oil on 19 February 1974. It was the first offshore drilling rig in India and is a prestigious asset for ONGC.

3. In or about 2011 ONGC decided to re-purpose the “Sagar Samrat Conversion Project” for use as mobile off-shore production unit and floated a tender titled as “**Sagar Samrat Conversion Project**” (for short “**the SSCP**”). The petitioner being experienced and qualified, decided to participate and bid in the said tender. Accordingly a consortium was formed between the petitioner, its group company Mercator Offshore (P) Pte. Ltd., Singapore (for short '**MOPPL**') and one Gulf Piping Co. W.L.L., UAE (for short '**GPC**') (for short the '**consortium**'). The consortium submitted its bid.

4. The consortium was declared to be the successful bidder and a notice of award of the contract dated 17 November 2011 was issued in favour of the consortium. Thereafter, a contract dated 15 December 2011 was entered between the ONGC and the consortium with a schedule date of completion being 31 May 2013.

5. The petitioner was the lead member of the consortium. The petitioner, its group company MOPPL and GPC also entered into a consortium agreement agreeing to work together mutually and exclusively on the SSCP of respondent no.1. The consortium agreement provided for contractual work to be split as provided in 'Annexure A' wherein the topside engineering work was the petitioner's scope of work, and also as per Article 7 of the Consortium Agreement, GPC submitted counter guarantees of US\$ 9.2 million. There was an amendment to the consortium agreement being amendment no.4 dated 15 December 2011 which provided that the petitioner and MOPPL are responsible for 54% of the liabilities under the contract and the GPC shall be responsible for 46% of the liability for the project.

6. In pursuance of the notice of award of the contract, the petitioner on behalf of the consortium had submitted bank guarantees for a sum

equivalent to 10% of the total contract price. The bank guarantees are in the nature of performance bank guarantees and advance payment bank guarantees (for short referred as “bank guarantees”), the details of which are set out in paragraph (7) of the petition. The bank guarantees are for an aggregate value of US \$ 15,214,160 equivalent to Rs.35.875 crores.

7. It is not in dispute that the schedule date for completion of the contractual work was extended from time to time (there were fourteen extensions) and was finally extended till 30 November 2018 as informed by the ONGC to the Consortium by its letter dated 13 March 2018.

8. The case of the petitioner is that there was substantial increase in scope of the work under the contract including strengthening of hull, replacement of all the legs, replacement of jacking cylinders and due to “in place analysis” as per modified ABS guidelines for the project, necessitating replacement of all the four legs. Petitioner contends that ONGC had accepted that the delay was not attributable to consortium and refunded the bank guarantee extension charges to the consortium. On 9 March 2015 vide amendment no.7 to the contract, ONGC extended the schedule completion dated till 20 December 2015 without

levy of liquidated damages.

9. Petitioner contends that the consortium was diligently performing the contract and admittedly completed over 95% of the project work on the date of filing of the petition despite several odds and certain force majeure event. The petitioner contends that to ease out the financial pressure on the project and to maintain cash flow, the consortium entered into a supplementary agreement with ONGC and obtained interest-bearing advance of Rs.32 crores as per Clause 3.7 of the supplementary agreement. Also in pursuance of the supplementary agreement the petitioner submitted two advance bank guarantees equivalent to 110% of the advance amount which were valid for a period covering entire repayment period upto 24 May 2017 plus six months thereafter upto 24 November 2017. The advance bank guarantees were extended till 31 May 2019 by the petitioner, being so called upon by ONGC and hence, repayment period of interest -bearing advance as per Clause (3) of supplementary agreement was mutually agreed to be 30 November 2018.

10. The petitioner has contended that presently and since February 2018, the work of SSCP has come to standstill on account of *force majeure* that occurred on board on or about 2 February 2018, due to

jacking system shock pads failure, shock pad foundation plate collapsed. The petitioner contends that there was apprehension in the mind of the consortium in respect of original vessel design and these issues were raised with ONGC in 2014 and the consortium had also proposed a change order, however it was ignored by ONGC. The petitioner contends that on the happening of the said incident of plate collapse, the consortium promptly engaged services of Aqualis Offshore Inc. to undertake a 'Root Cause Analysis' for the said incident, who submitted a report titled "Mercator Sagar Samrat Jackhouse Failure Investigation" in or about 29 May 2018, wherein it has identified several potential causes for collapse including initial vessel design flaw when the vessel was originally constructed, a design flaw under the SSCP or an execution flaw by the relevant constituent of the consortium namely the GPC. The petitioner contends that ONGC was aware of the criticality and apprehensions of the consortium in relation to the original vessel design. Nonetheless ONGC continued to pressurize the consortium to commence the balance job and on the other hand prevented the consortium from re-commencing the work by not engaging with the consortium on the original design flaws which could potentially result in a repeating of the incident.

11. The petitioner contends that ONGC withheld the relevant

documents and information as also neglected and refused to pay the consortium invoices for substantial period of time causing harm, loss and injury to the consortium. It is contended that total value of invoices wrongfully withheld by ONGC were amounting to US\$ 516312. The petitioner contends that there was discussion between the consortium and ONGC on various issues in monthly review meeting, the minutes of which were drawn. In paragraph 10 of the petition, the petitioner has averred that the ONGC used its unequal commercial bargaining power to obtain signature of the members of the consortium on such minutes. It is stated that in monthly review meeting held on 24 July 2018 ONGC abruptly declined to issue the pending change orders after having accepted and enjoyed the performance of the relevant jobs to which the change orders relate. The petitioner contends that ONGC was also well aware that the petitioner's balance scope of work would follow the substantial completion of GPC scope of work under the contract and that the balance job remaining under the contract was 2.7% of the work relating to the petitioner and MOPPL and 2.3% relating to GPC. It is contended that the petitioner had also ordered very expensive made-to-design equipments and long-lead items which can only be used in SSCP of a value of INR 925 crores and which were already installed on the vessel. It is stated that on this value, a sum of Rs.300 crores pertaining to change orders that have been wrongfully withheld by ONGC.

12. The petitioner has also asserted the case of ONGC's collusive conduct with GPC. It is contended that in or about August, 2018, the petitioner became aware that ONGC has been secretly negotiating with GPC behind its back about terminating the consortium's contract and awarding the same to GPC on standalone basis, after having enjoyed the performance of the petitioner's scope of the SSCP. It is the petitioner's case that ONGC began clearing only those invoices which has GPC's scope of work and withholding the invoices of the scope of work of the remaining member of consortium. It is contended that on or about 10 August 2018, ONGC issued a notice invoking the petitioner's parent company's bank guarantee alleging non-performance by the consortium and that this was responded by a letter of MOPPL dated 31 August 2018 refuting all charges against the contractor and itself.

13. It is contended that the collusive action on behalf of GPC and ONGC became apparent when in or about 23 August 2018 the petitioner was served with a notice from the commercial Court at Abu Dhabi, of proceedings filed by GPC against the petitioner, which was discovered by the petitioner to be proceedings in regard to the counter guarantees, wherein the GPC had secretly obtained a suspension of counter guarantees on 23 August 2018. The petitioner contends that

simultaneously the ONGC served a notice on the consortium, dated 25 September 2018 to terminate the contract however with a 14 days cure period. On the same day the ONGC by its two letters addressed to respondent no.2 -Axis bank invoked the bank guarantees in question and demanded payment.

14. The petitioner by its letter dated 26 September 2018 addressed to respondent no.2-Axis Bank, advised it to cease and desist from honouring payment under the bank guarantees as invoked by the ONGC. The petitioner in this letter recorded that invocation of the bank guarantees by ONGC for non performance of the contract was not justified . The petitioner contended that the consortium was not in breach of the contract as the consortium had time until 9 October 2018 to cure the alleged breach, as the contract was valid until 30 November 2018 and the performance date was already extended till 30 November 2018. It is contended that the consortium has not refused or declined to execute the works under the contract and the contractor was prevented from recommencing the work under SSCP by ONGC who failed and refused to pay legitimate dues and to issue and pay for the change orders. It is contended that ONGC on one hand prevented the performance of the contract and on the other hand issued notice of termination with 14 days cure period.

15. The petitioner contends that ONGC unlawfully, fraudulently and collusively invoked the bank guarantees on 25 September 2018, even though it had permitted the consortium to remedy the alleged breaches by 9 October 2018 and even though ONGC has itself prevented the contractor from performing the contract. It is contended that invocation of the bank guarantee by ONGC was illegal and unlawful for the reason that the contract was valid and subsisting and was in fact extended upto 31 November 2018. It is contended that the consortium was diligently performing the contract and all delays are excusable either attributable to ONGC or arise out of *force majeure* events. It is contended that ONGC prevented performance of the contract by withholding payment of various invoices and that ONGC itself by a notice of termination dated 25 September 2018 granted time upto 9 October 2018 to the consortium to cure the alleged breach. It is contended that the bank guarantees have not been invoked as per its terms. On the above premise the petitioner contends that invocation of the bank guarantees by ONGC being illegal and unlawful, will cause grave and irreparable injury to the petitioner inasmuch as the petitioner has borrowed over Rs.124 crores from its lenders to order the long-lead items, even its change order request for such items of a value of US\$ 45 million, which were technically approved by ONGC have not yet been issued by the

ONGC. The invocation of the bank guarantees over and above non recovery of sum of Rs.300 crores invested in long-lead items which are of use only in SSCP will, severely impair the petitioner's ability to service the said debt, take away the petitioner's ability to raise further debts, saddle the petitioner with unusable, made-to-order equipment worth Rs.120 crores which will lead to loss of the substratum in the petitioner-company and consequential liquidation of the petitioner. The petitioner has contended that the invocation of the bank guarantees by ONGC is without just cause and that the petitioner is not responsible for delay and execution of the contract as explained by the petitioner in its various communications.

16. The petitioner has contended that the ONGC in invocation of the bank guarantees has fraudulently asserted alleged non performance, two months prior to expiry of the contract and on issuance of 14 days cure notice issued by ONGC, thereby denying the opportunity of curing the alleged breach. It is contended that this was contrary to the express terms of the bank guarantees, inasmuch as the bank guarantees were invocable only on the petitioner's failure to perform the contract without sufficient cause. It is contended that the petitioner has shown sufficient cause as it is clear from its letters and representations which is not contemporaneously denied by ONGC. It is contended that ONGC is

trying to take advantage of its own wrong and laches in invoking the bank guarantees. It is further contended that ONGC is in breach of equities inasmuch as ONGC is trying to recover large sum of rupees without invocation of arbitration as provided in the arbitration clause 1.3 of the contract. Finally it is contended that ONGC has acted in abuse of authority under the contract.

17. By an amendment to the petition, paragraph 18A to 18C have been incorporated to contend that the consortium has performed the contract even when the work under the contract had constantly changed and increased substantially. It is contended that the contractor has non gratuitously undertaken the work beyond the contract, performance of which has been accepted without reservation by the ONGC, yet ONGC in apparent bad faith, had failed and neglected to issue change orders, towards such work, for the performance of which the consortium has spent almost Rs.400 crores thereby causing serious strain on the consortium finances. ONGC was advised by consortium on various occasions to place change order request before its management which were assured to be considered, but these promises appeared to be hollow and made in bad faith only to induce the consortium to invest further in the said project. This more particularly when ONGC was aware that Rs.400 crores was a substantial sum of money for a

company of the petitioner's size and would virtually cripple the petitioner if the petitioner/consortium was not paid in time. It is further contended that even as ONGC failed and/or neglected to process and pay for the change orders, an amount of Rs.400 crores, ONGC sought to deal a final body blow by invoking bank guarantee of Rs.145 crores in ex-facie fraudulent and dishonest manner, and it is against the express language of clause 6.3.2 of the contract and Amendment no.12 of the contract. The invocation of the bank guarantee, therefore, unconscionable and is required to be restrained.

18. It is contended by the petitioner that SSCP work was admittedly 95% completed and the petitioner had presented a plan on 3 October 2018 to complete the balance yard related work by 30 November 2018 to which there was no response from the ONGC. It is contended that no prejudice would be caused to the ONGC if the consortium was permitted to complete the balance work according to the remedial measures submitted to ONGC on 3 October 2018 or any other appropriate plan that ONGC and the contractor may agree. It is contended that grave and irretrievable harm, loss and injury would be caused to the consortium on ONGC being permitted to invoke the bank guarantees. It is contended that the original value of the contract was US\$ 152.141 million and the value of the performance guarantee was

US\$ 15.214 million. It is contended that the performance guarantees invoked by the ONGC admittedly for recovery of liquidated damages when Clause 6.3.2(i) of the contract provided for maximum liquidated damages of 10% of the contract value, that is upto maximum of US\$ 15.214 million. It is contended that ONGC has already recovered the liquidated damages in the sum US\$ 3.29 million. By an amendment no.12 dated 13 July 2017, ONGC had agreed to forbear from imposing or recovering liquidated damages under the contract until the vessel jacked up at WO-16 location, offshore India, after sailing away from consortium's yard. It is contended that even assuming that the agreement pertained only to US\$ 8.98 million and even if it is to be denied that, the ONGC could have levied and recovered liquidated damages from the bank guarantees, the value which ONGC could have invoked could have been the bank guarantee of US \$ 3.10 million and in fact the ONGC has invoked the bank guarantee for US \$ 15.214 million that is for Rs.35.875 crores, this to ONGC's knowledge was excessive and unauthorised. It is thus contended that there is a fraud in invocation of the bank guarantees and the petitioner is entitled to an injunction against invocation of the bank guarantees.

ONGC's Replies

19. There are three reply affidavits filed on behalf of ONGC. The first

reply affidavit is of Prasanna Kumar Gangisetty dated 28 September 2018 filed to oppose ad-interim reliefs. In this affidavit, ONGC has contended that the bank guarantees furnished by the petitioner in favour of ONGC are unconditional in nature. It is contended that a perusal of the terms of the bank guarantees as well as the contract dated 15 December 2011 between the petitioner and ONGC, makes it abundantly clear that the ONGC is fully entitled to exercise its rights in regard to the bank guarantees in the event the petitioner is unable to perform its duty under the contract. It is thus contended that the bank guarantees being completely unconditional in nature, not subject to any verification to be conducted by the bank prior to honouring them, ONGC becomes entitled to the amount under the bank guarantees on its invocation. It is contended that the law on this is clear that no injunction can be granted on invocation of unconditional bank guarantee unless (i) it is shown that the bank guarantee is obtained by playing fraud on the aggrieved party; and (ii) it is shown that if an injunction is not granted against the bank guarantee, irretrievable injury would be caused to the petitioner making it impossible for it to reimburse himself if it ultimately succeeds. It is contended that the petitioner has neither pleaded any such case falling into either of the said category nor it was able to show that it falls within the well-recognised exceptions to the general rule against invocation of

unconditional bank guarantee. It is contended that there are no pleadings in the petition claiming that ONGC has played fraud against the petitioner, let alone fraud of such flagrant nature that justify grant of injunction against invocation of the bank guarantees in question. It is submitted that it is now established that if a party seeks to make out a case of fraud, the party must incorporate specific pleadings to that effect detailing the material of alleged fraud. No such pleading are made in the petition, the petitioner is thus not entitled to argue a case of fraud. It is further contended that the petitioner has raised several frivolous issues regarding performance of the ONGC's obligation not supported by documents. It is further contended that the petitioner has also failed to make out any case of irretrievable injury. It is contended that ONGC is one of the largest public undertaking of India and is amongst the top 10 companies in India by marking capitalization, and that it cannot be said that even if the petitioner is successful in its claim against ONGC, it will not be able to seek restitution from it. In fact the petitioner itself is contending that the petitioner is facing financial problems and this would thus entitle the ONGC to invoke the bank guarantees in its favour for the purpose of recovering liquidated damages, to which it is entitled under the terms of the contract dated 15 December 2011. It is next contended that no case is made out by the petitioner of any special equities and that on the contrary it is clear

from perusal of the documents on record, that the liability of the petitioner has been caused solely due to its own failure to adhere to the terms of the contract dated 15 December 2011. It is contended by ONGC that the bank guarantees which are subject matter of the petition have been invoked strictly in terms of their specific provisions and that ONGC was fully entitled to invoke the bank guarantees for non performance of the contractual obligation by the petitioner. To support this contention, it is contended that a perusal of the documents annexed to the petition itself would show that ONGC while extending the time given to the petitioner to perform its obligations under the contract dated 15 December 2011, has expressly reserved its rights to seek liquidated damages on account of petitioner's performance. It is contended that out of six bank guarantees mentioned in paragraph 7 of the petition, the first two bank guarantees are against advance of Rs.32 crores issued by ONGC to the petitioner. It is contended that inspite of extending full co-operation to the petitioner for execution of the contract, the petitioner/consortium has failed to complete the work within time which entitled the ONGC to justifiably invoke the bank guarantees on account of non performance of its obligation by the petitioner. It is next contended that the contract of bank guarantee is an independent contract and must be construed only in terms of its own terms and conditions.

20. In dealing with the contention of the petitioner that allowing ONGC to encash the bank guarantees in its favour would amount to unjust enrichment on its part, it is contended that ONGC was fully entitled to terminate the contract dated 15 December 2011 with the petitioner as the consortium had committed numerous breaches of the terms and conditions of the said contract thereby causing losses to ONGC. It is contended that the grounds upon which the ONGC terminated the contract have been clearly set out in the notice of termination sent by ONGC to the consortium/petitioner dated 25 September 2018, and thus, there is no unjust enrichment on the part of ONGC in invoking the bank guarantees provided by the petitioner to secure its performance.

21 ONGC has contended that the petitioner is attempting to make out a case that since ONGC has provided a defect curing period of 14 days in its notice dated 25 September 2018, the petitioner is entitled to protection until these 14 days are completed. It is, however, contended that this is not the correct position in law. Even otherwise, it is stated that ONGC is entitled to recover the liquidated damages on account of numerous breaches made by the petitioner in completing his contractual obligations under the contract. It is contended that the

present case is where inter se disputes have arisen between the members of consortium. Due to the *inter se* disputes that have arisen between the petitioner and consortium's partner, ONGC lost faith in the petitioner's ability to comply with its obligations under the said contract and on this ground also the contract deserved to be terminated by ONGC. It is contended that non-performance of the contract by the petitioner will severely affect the business operations of the ONGC and will have negative impact on the national economy.

22. There is another detailed reply affidavit filed on behalf of ONGC of Mr. Prasanna Kuarm Gangisetty dated 17 October 2018. In paragraph 3 of this reply, facts which have transpired after filing of the petition, have been pleaded to contend that on 3 October 2018 the petitioner responded to the ONGC's notice of termination dated 25 September 2018 and presented a purported remedial action plan. By letter dated 10 October 2018, the ONGC expressed its dissatisfaction to the purported remedial action plan and noted that the same is not only impractical but also fails to take into account the scope of work required to be done and did not at all deal with various deficiencies of the petitioner. It is contended that as the petitioner was unable to comply with the terms of clause 6.3.2 of the contract, ONGC had no choice but to terminate it under the cover of letter dated 10 October 2018. This

affidavit thereafter has dealt with parawise reply to the petition inter alia denying the case of the petitioner as also contesting the petitioners' case in the rejoinder affidavit filed on behalf of the petitioner. In nutshell the case of ONGC is that the entire case of the petitioner is wholly untenable for any reliefs to be granted in the present petition.

23. On behalf of the petitioner, a rejoinder affidavit of one Amita Chitnis dated 26 October 2018 came to be filed denying the case of ONGC inter alia contending that the action of ONGC both, before and after filing of the petition suffers from the vice of a premeditated course of action driven by prejudice and designed to cause grave and irreparable harm, loss and injury to the petitioner. It is contended that ONGC simply wanted the petitioner not to perform the contract and through its machinations engineered a situation where ONGC sought to present the petitioner with a *fate accompli* and that simply cannot be right. The petitioner has alleged malafides on the part of ONGC in paragraphs 2(a) to 2(d) *inter alia* stating that issuance of 14 days cure notice under clause 6.3.2 clearly shows that ONGC has already taken a position that the contract should be terminated, and the cure notice was merely an empty formality, as also it is clear from the proceedings before this Court. It is the case of the petitioner that ONGC has

committed fraud on the consortium as also fraud on the bank by invoking bank guarantees and ultimately has attempted to play fraud on this Court by not making complete disclosure of its conduct but rather placing the blame on the petitioner for termination of the contract, as if ONGC gave an opportunity to the petitioner to perform the contract yet the petitioner failed to do so. It is contended that on receipt of 14 days cure notice, the petitioner continued to perform the contract as set out in letter dated 10 October 2018 to the respondent and also submitted a remedial measures plan on or about 3 October 2018 as the contract entitled the petitioner to do so, however, ONGC maintained studied silence on the plan until the expiry of 14 days cure period till 9 October 2018 as also by rejecting remedial measures on untenable grounds by ONGC's letter dated 10 October 2018. It is contended that this fact clearly demonstrates that ONGC had no intention whatsoever to allow the petitioner to remedy the alleged breaches and ONGC had already decided to terminate the contract, come what it may. It is contended that this demonstrated gross abuse by ONGC and dishonest and malafide intention to cause loss to the petitioner. The petitioner accordingly in its letter dated 10 October 2018 addressed to the ONGC recorded that it has rejected the purported termination of the contract and considered the contract being on its legs and called upon ONGC to perform it. It is contended that this conduct of ONGC was further clear

from the fact that it had secret negotiations with one of the consortium partner-GPC and that ONGC had permitted GPC to retain the possession of the vessel. It is contended that ONGC could not have promised GPC for balance work to be awarded. It is contended that ONGC has already recovered US\$ 3.289 million as liquidated damages under the contract prior to June,2017, from out of US\$ 15.214 million cap and had agreed to forebear from recovering liquidated damages of further sum of US\$ 8.98 million until the vessel was jacked up at the WO-16 location (offshore, India) under Amendment No.12 to the contract till July,2017, the ONGC has proceeded to recover an amount of US\$ 20 million under various bank guarantees for the alleged failure of the petitioner to perform the contract and this case of the petitioner is not dealt with by ONGC in its reply. It is contended that ONGC's case that as the contract stands terminated and the petitioner has remedy to claim damages, is not acceptable to the petitioner, as the termination itself is not accepted by the petitioner. It is contended that the petitioner has already taken this position in its letter dated 10 October 2018 addressed to ONGC. It is contended that this is a clear case that the parties are in unequal bargaining power and the very imbalance in the parties bargaining power creates special equities, and as such any unreasonable action on the part of the party with disproportionate bargaining power must *ipso facto* amount to irretrievable injury and injustice. It is contended that

the nefarious design of ONGC was to cause irretrievable injury and injustice to the petitioner, even it amounts to denying arbitration to the petitioner on the ground that OEC process has not been undertaken. Even in the advance payment bank guarantees, the petitioner is now beginning to understand the fraud played by ONGC. It is contended that the petitioner was entitled to an interest-bearing advance against the bank guarantee under Clause 3.7 of the contract with simple interest of 12% per annum. It is contended that the petitioner did not avail of this advance when it was performing the contract, as the original scope of the contract did not appear to challenge the petitioner's ability to commence work without an advance. It is contended that over the course of performance of the contract, however, not only did the scope of the work expand manifolds, the consortium also encountered substantial amount of extra work for which it was legitimately entitled to Change Orders and payments under the said Change Orders. It is contended that from time to time the contractor requested for Change Orders, however, only some were issued. It is contended that by 2017 these factors caused a building-up of a financial strain on the consortium and the consortium requested that an advance be paid to it in the sum of Rs.32 crores well within the 10% cap under Clause 3.7 of the contract. It is contended that ONGC being aware of the precarious financial condition of the consortium and

the parties' unequal bargaining power, put illegitimate conditions on the petitioner. The ONGC gave to itself disproportionate rights in respect of the advance to which it was not entitled to under the contract, including an interest on the advance at monthly compounding and the right to call on the advance payment bank guarantees for alleged non-performance of the contract, even though almost 95% of the work had already been completed by them. It is contended that ONGC used its unequal and disproportionate bargaining power to make even the advance payment bank guarantees in the nature of performance bank guarantees and in fact that it now purports to use to justify the invocation of the advance payment bank guarantees.

24. There is a third affidavit dated 26 November 2018 filed on behalf of the petitioner. In paragraph 2 of this affidavit, the petitioner contends that while the project is 95.96% completed and was to be on the verge of completion by the schedule date i.e. 30 November 2018, ONGC and the petitioner's consortium's partner - GPC colluded to oust the petitioner and the MOPPL from the project and award the remaining work on the project on a standalone basis to GPC. It is stated that this is also evident from paragraphs 12 and 14 of the petition and paragraph 2(c) of the second affidavit in rejoinder. It is contended that ONGC had denied on oath in the reply affidavit dated 17 October 2017

stating that there have been no secret negotiations and collusion between GPC and ONGC. It is contended that the petitioner has now obtained evidence which would go to show that ONGC had shown no qualms about making false statements on oath inasmuch as ONGC has in fact awarded the balance work on the project to GPC with the completion date of 15 February 2019, which is clear from letter dated 29 October 2018 of Mr.G.Prasanna Kumar, DGM(E)-PC of ONGC addressed to Mr.Jeethu of M/s.Power Hydraulics. It is contended that the petitioner verily believes that in furtherance of this scheme, monies to be obtained on encashment of the impugned bank guarantees, extended by the petitioner would be utilised to complete the remaining works of the project by GPC under its fresh contract dated 25 October 2018, leaving no recourse to the petitioner with respect to GPC's counter -guarantees submitted to the petitioner in terms of Article 7 of the Consortium Agreement. It is thus contended that encashment of the impugned bank guarantees is in furtherance of the scheme and a fraud not only on the petitioner but also on respondent no.2-bank. It is contended that the petitioner by its letter dated 23 October 2018 has appraised respondent no.2-bank of this fraudulent scheme between ONGC and GPC and that respondent no.2 was thus aware of the same prior to any remittance being made to ONGC. It is further contended that ONGC's fraud on respondent no.2-bank is also evident from its

letter dated 25 September 2018 addressed to respondent no.2 invoking the performance bank guarantee and advance bank guarantees, this for the reason that ONGC was aware that there has neither been a non performance under the contract nor was there any requirement of repayment of advance dues and that ONGC has misrepresented the same to respondent no.2 keeping it in dark about the scheme between ONGC and GPC. It is contended that perusal of the invocation letters shows that ONGC not only defrauded respondent no.2-bank, in invoking performance bank guarantees and advance bank guarantees, but has also deceived this Court with regard to the reasons of invocation of bank guarantees, when in paragraphs 9, 10 and 12 of the limited reply affidavit filed on behalf of ONGC dated 28 September 2018, the ONGC alluded that the bank guarantees were invoked to recover the liquidated damages suffered by it for breach of the contract. It is contended that perusal of the invocation letter however confirms that the bank guarantees were not invoked for this purpose. It is submitted that it is a false statement made by ONGC on oath. It is contended that in paragraph (35) of the second reply, ONGC has alleged that the project had achieved 1.17% of progress in the last two and half years, is solely attributable to the petitioner's inability to complete the project, however, this is contrary to ONGC's own update to Government of India on the project notes otherwise. It is contended

that ONGC's own update to the Government of India shows that the primary reasons for delay were inter alia increase in scope of the work post-award of the contract. It is contended that some of the delays were solely attributable to ONGC or *force majeure* or unforeseen circumstances. It is contended that some delays as set out, however, were completely attributable to GPC and not solely attributable to the petitioner as alleged by ONGC. It is thus contended that the reliefs as prayed by the petitioner be granted.

Submissions

25. On the backdrop of the above pleadings, I have heard the learned Counsel for the parties. Mr. Dwarkadas, learned Senior Counsel for the petitioner has made the following submissions:-

That this is a clear case of fraud, inasmuch as ONGC which is a State instrumentality has spelt out in its letter dated 25 September 2018 representing to the petitioner that remedial measures ought to be taken and for which the petitioner was willing to execute the remedial measures and complete the contract before the extended deadline of 30 November 2018. It is submitted that, however, the representations made out in letter dated 25 September 2018 were hollow and it was a per-meditated design by ONGC to terminate the contract, which was ultimately terminated on 10 October 2018 as the facts demonstrate. It

is submitted that the petitioner entirely proceeded on a representation as set out in the letter of the ONGC dated 25 September 2018, that there is time of 14 days available to complete the contractual work. The ONGC invoking the bank guarantees on the same day that is on 25 September 2018 when the ONGC was not entitled to the benefit of the bank guarantees, itself is a fraud. It is thus submitted that this is a case of clear fraudulent invocation and the fraud is writ large and not expected from the instrumentality of a State. It is submitted that this is also a clear case of unjust enrichment inasmuch as the ONGC had already appropriated liquidated damages in the year 2017 and in the facts and circumstances of the case and considering that the scope of the original work was entirely changed, there was no justification to invoke the bank guarantees in question. It is submitted that the petitioner had furnished bank guarantees in faithful performance of the contract and the entire action of the ONGC was exploiting its monopolistic position and knowing well that the parties are not in equal bargaining position. It is submitted that this is also a clear case where there would be irretrievable injustice to the petitioner if the bank guarantees are permitted to be encashed. This for the reason that the bank guarantees being encashed are furnished by the petitioner who is one of the consortium's member. As regards the other consortium's member-GPC, it is submitted that now it is clearly borne out by the

record that GPC was well secured and that the whole design was to award the balance 5% contract to GPC and that the funds which would be made available by invocation of the bank guarantees would be ultimately utilized for the purpose of payment to another consortium partner. It is thus submitted that this was a complete dishonesty on the part of ONGC. It is next submitted that the dispute between the members of the consortium could never have been the foundation to terminate the contract awarded to consortium and thereafter single out one of the parties namely the petitioner who had provided for substantial bank guarantees under the contract. It is thus submitted that the whole intention of the ONGC was to make the petitioner litigate and recover the amounts.

26. It is submitted that fraud is evident and written on the face of invocation. It is submitted that it cannot be coincidence that ONGC is awarding the contract for remaining work to GPC-another consortium partner. It is only to enable to grant contract to the GPC, the remedial plans which were submitted by the petitioner to be complied within the contract period, were rejected by ONGC. It is submitted that in fact the conduct of ONGC is completely in breach of Clause 1.3.6 of the contract which provides for consequences of termination. This inasmuch as if the ONGC had found fault in the consortium then the provisions

contemplated under clause 1.3.6 of the Contract, providing for the consequences of termination, ought to have been followed. It is submitted that however, on one hand ONGC holds the consortium guilty for non-performance of the contract and on the other hand the contract has been awarded to GPC. It is thus submitted that malafides on the part of ONGC are writ large.

27. Mr. Dwarkadas in explaining as to what is the case of the petitioner on fraud, would also submit that it is the petitioner's case that the fraud on one hand is that a representation is made to the petitioner of granting 14 days extension to complete the contractual work vide notice dated 25 September 2018, which is clearly not the termination of the contract and on the other hand ONGC invoking the bank guarantees and then on 28 September 2018 filing an affidavit in this Court of Mr. Prasanna Kumar Gangisetty who has stated in paragraph 11 of the said affidavit that the contract is terminated, when it is thereafter terminated on 10 October 2018.

28. Referring to the definition of 'fraud' as defined under Section 17 of the Contract Act, 1872, it is submitted that the action of ONGC thus clearly falls under sub-clause (1) of Section 17 of the Contract Act, for the reason that firstly ONGC was neither honest to the bank nor to the petitioner, as both the representations, one made to the bank and the

other made to the petitioner, cannot stand together. Secondly, there is active concealment of a fact to the bank that the contract is being terminated, and thus such concealment is another factor as falling under Section 17(2) of the Contract Act. Thirdly, it is submitted that even Section 17(3) of the Contract Act is attracted inasmuch as the petitioner was never informed that the contract awarded to the consortium would be terminated and in fact the petitioner was required to address a letter to the bank dated 23 October 2018 pointing out the correct facts and the petitioner's contention has been accepted by the bank in not honouring the encashment being of a fraudulent nature. It is submitted that the expectation of the petitioner is that the funds should not be misused and should not be permitted to be encashed in a fraudulent manner.

29. It is submitted that there are two main events which are required to be borne in mind which clearly would depict fraud on the part of ONGC, that is termination of the contract of consortium on 10 October 2018 and award of the contract to GPC on 25 October 2018 for the remaining 5% work. It is submitted that this cannot be a coincidence. This was nothing but the fraudulent attempt to oust the petitioner and award a contract to GPC. In support of this submission, learned Senior Counsel for the petitioner has placed reliance on the following

judgments:-

- (i) *Hindustan Steel Works Constructions Ltd. Vs. Tarapore & Co.*¹
- (ii) *U.P.Co-operative Federation Ltd. Vs. Singh Consultants & Engineers (P) Ltd.*²
- (iii) *United Trading Corporation S.A. Vs. Allied Arab Bank Ltd.*³
- (iv) *Federal Bank Ltd. Vs. V.M.Jog Engineering Ltd. & Ors.*⁴
- (v) *KSL & Industries Ltd. Vs. National Textiles Corporation Ltd.*⁵

Submissions on behalf of ONGC.

30. On the other hand Mr. Nankani, learned Senior Counsel for ONGC would submit that no case has been made out by the petitioner for grant of any relief as prayed in the petition. It is submitted that the bank guarantees admittedly are unconditional bank guarantees. Mr.Nankani would submit that in case of unconditional bank guarantees, the Court can injunct encashment of bank guarantees, when a clear case of egregious fraud to the knowledge of the bank was to be made out by the petitioner. To support this contention, Mr.Nankani referred to paragraph 16 of the petition to submit that this paragraph is the only case of the petitioner to allege fraud which are

1 (1996)5 SCC 34

2 (1988)1 SCC 174

3 (1985)2 Lloyd's Law Report 554

4 (2001)1 SCC 663

5 2012 SCC Online Del 4189

nothing but general allegations. It is submitted that the averments as incorporated by incorporating paragraphs 18A to 18C the petitioner also do not make out any case of fraud. It is submitted that there is nothing fraudulent in ONGC invoking the bank guarantees and as permissible under the terms and conditions of the bank guarantees. In dealing with the contentions of the petitioner that there is fraud in terminating the contract dated 15 December 2011, it is submitted that the termination of the contract is independent of the bank guarantees and that the petitioner cannot in any manner correlate the termination with the invocation of the bank guarantees. It is submitted that if this argument of the petitioner is accepted, it would amount to introduction of a condition in the bank guarantee which is not provided for. In dealing with the averments of the petitioner in paragraph 19 of the petition, where the petitioner contends that invocation of the bank guarantees by ONGC is ex-facie collusive, illegal and arbitrary and would cause irreparable harm, loss and injury to the petitioner, it is submitted that these are wholly incorrect contentions of the petitioner. It is submitted that in making such averments, there is a pre-supposition on the part of the petitioner that the petitioner would not be in a position to recover the amounts from ONGC, which is without any basis. Mr.Nankani has referred to clause 3.3 and 3.3.1 of the contractual conditions. It is submitted that the completion date as

initially granted by ONGC was impossible to be achieved and in fact when finally the completion date was extended up to 30 November 2108 the petitioner never asked for extension. It was impossible for the petitioner to achieve that it could sail before 30 November 2018 by which the contract was required to be completed, considering the distance between Abu Dhabi to Mumbai and then to undertake and complete the contract by 30 November 2018. Mr.Nankani has referred to Clause 3.3 of the contract which pertains to Performance Guarantee and more particularly Clause 3.3.5 which entitles ONGC to invoke the bank guarantee in the event of completion of the project being delayed beyond the completion date or the extended date, and that without prejudice to other rights and remedies as available to the ONGC under the contract the bank guarantees could be invoked, to recover liquidated damages leviable as per clause 6.3.2 and 6.3.3 of the contract. It is submitted that after several extensions, the last extension which was granted by ONGC was on 15 March 2018 till 30 November 2018 for completion of the contractual work and despite a clear record that with effect from 21 December 2018 the delay was wholly attributable to the petitioner's account. In supporting this contention Mr.Nankani has referred to the minutes of 25th Management Review Meeting (MRM) dated 16 April 2018 where the consortium informed that after shock pads damage assessment, repair shall be completed in

approximate three months time i.e. by 31 July 2018. It is submitted that in paragraph (3) as recorded in minutes of the said meeting, the following was clearly agreed between the parties:-

Sl no.	Description	Action By
1	...	...
2	...	...
3	Following are the major principles on all parties agreed to achieve a cash neutral situation to complete the balance work- a) Both Consortium members, confirmed that they have resolved payment related issues between them and MOGL shall release the withheld payments of GPC soon to achieve a cash neutral situation b) Consortium partners agreed and assured to work together to complete the work within the contractual amount. ONGC made it clear that no additional payments beyond contract shall be made. Regarding Change Orders, refer clause 3(h) c) ONGC reiterated that proof of payments shall be submitted by the consortium for release of next invoice payment as agreed earlier. Consortium agreed for the same. d) Consortium agreed that the MOPU will be ready to sail away by 15.09.2018. All relevant applications seeking approvals from MWS shall also be made well in time in order to ensure sail away by the aforesaid date. However, actual sail away shall be subject to approval from MWS and weather conditions. Further, Consortium shall ensure project completion and handing over of the MOPU at WO-16 by 31st December,2018. However, all efforts shall be made by the Consortium to expedite project completion earlier. e) Consortium shall submit a list of vendors with their tentative fund requirements along with tentative deployment timelines to achieve the sail away date.	All parties

	f) Consortium will submit a detailed schedule in a week time vendor wise/activity wise of balance work for monitoring the progress weekly by the senior management of all parties. ONGC informed that no further delay in any of these activities is acceptable to ONGC and this schedule shall be monitored by senior management of consortium to ensure compliance above. g) Consortium reiterated that they are facing cash flow problems and to ease the cash flow situation following were requested. I. Waiver of LD & issue of refund of Withheld amount on account of Liquidated Damages (LD) by ONGC and reimbursement of GST/GST. II. Against the request of Consortium, ONGC agreed to review milestones weightage (upto sail away) for further progressive payment within the contractual payments. h) Consortium informed that they have submitted certain change order claims. Consortium will prioritize the Change Order Proposals for ONGC to evaluate the high priority claims in the near term. All other change order proposals will be parked and reviewed once the project is completed. ONGC agreed to reexamine their claims and proposed a meeting in first week of May to discuss their claims.	
4	a) All parties agreed that the work shall be expedited for the activities on critical path to achieve sail away by 15.09.2018. Consortium partners also assured that all activities shall be monitored at the highest level. Further there will be meetings at the senior management level regularly to review the progress. b) All parties agreed to hold a meeting with senior representatives of ONGC and Consortium once a month. Meetings will be held via video or face to face in India or UAE. c) All issues discussed above shall be followed up expeditiously.	All parties.

31. Mr.Nankani has also referred to 18th Management Review

Meeting held on 26 April 2016 when on the request of consortium, it was agreed as under:-

“On request of consortium, the completion date of the contract was provisionally extended to 20.04.2016 with following key dates.

.	Undocking	: 01.02.2016
.	Sail away	: 07.03.2016
.	Completion & Hand Over	: 20.04.2016

In the meanwhile, serious differences within Consortium partner on cash flow issues were reported by GPC in proceeding with further execution of project and one of the main sub-contractors i.e. M/s.Seven Seas engaged by GPC, who were doing LQ and architectural works, stopped work on 24.12.2015 to non-payment.”

It is thus submitted that there is no question of fraud on invocation of bank guarantees, as contended by the petitioner. It is submitted that the progress of the work was only 1.17% for last two and half years before termination and since March,2018 the progress had come to 0.08% till the date of invocation. It is submitted that it was clear that there were serious disputes between the petitioner and its consortium partner-GPC inasmuch as the consortium partner filed legal proceedings before the Court of Abu Dhabi against the petitioner and sought an injunction on the counter guarantees. It is submitted that though on 15 March 2018 further extension was granted till 30 November 2018 to complete the contractual work, the consortium/petitioner did not make an application for extension of time. It is submitted that in every extension the completion date was relevant and that all extensions were granted

subject to liquidated damages. It is submitted that the notice of termination of contract dated 25 September 2018 *in extenso* has set out all these details which are sufficient to indicate lapses on the part of the petitioner, while giving time of 14 days to initiate on or before 9 October 2018 remedial action acceptable to ONGC towards completion of the said project, failing which the contract was to stand terminated in terms of general conditions of the contract-clause 6.3.2 without any further notice. It is submitted that there is no question of any collusion as seen from the termination notice. Mr.Nankani would draw the attention of the Court to the invocation letter dated 10 August 2018 of the ONGC through its Advocate whereby the petitioner was called upon to provide schedule alongwith resource commitment to complete the balance work at yard and positively achieve sail away by 15 September 2018 and hand over at WO-16 by 31 December 2018 as agreed in the 25th MRM held on 16 April 2018 and also to honour the undertaking given in the deed of guarantee dated 26 July 2011. It is submitted that this letter was replied by the advocates for the petitioner by their letter dated 31 August 2018 in which various justifications were given with only an assurance that the petitioner is preparing work schedule alongwith the resource commitment to complete the balance work at yard and hand over of the vessel and it was requested that the notice of the ONGC be dropped.

32. Mr.Nankani would submit that the bank does not say that there is any fraud and thus the bank guarantees which are independent of the contract are rightly invoked by ONGC and the ONGC is entitled to payment under the bank guarantees. It is submitted that non payment to the sub-contractor agencies etc. is none of the concern of ONGC and these are internal disputes between the consortium members. It is submitted that the petitioner never committed and remained silent on the new date of sail away. It is submitted that the bar chart which was submitted on behalf of the petitioner was also meaningless.

33. It is submitted that the arguments on behalf of the petitioner that there is collusion between ONGC and GPC is totally unfounded. To support this contention Mr.Nankani has referred to the notice dated 10 October 2018 terminating the contract of the petitioner and it is submitted that this notice is crystal clear of the nature of the dispute between the petitioner and its consortium member-GPC.

34. In so far as the petitioner's contention that the award of the contract for the balance work to GPC is a fraud, it is submitted that these are baseless allegations of the petitioner. It is submitted that the interest of ONGC is to complete the public works and that it is clearly a

commercial decision on the part of ONGC and there is no impediment on the part of ONGC to award the contract to GPC and when the rig was lying in incomplete condition for a substantial time.

35. It is thus submitted that the remedial plans are no answer to the problems of the respondents as there are serious disputes between the members of the consortium on core issues touching the execution of the contract. Mr.Nankani has thereafter referred to the minutes of 26th MRM to submit that in view of the disputes between the consortium members, the ONGC was suffering. It is contended that the minutes clearly recorded that the consortium had explained to the ONGC that the consortium is still under financial constraints and was not able to deploy any more funds into the project. It is submitted that the consortium also informed the ONGC that the consortium was not able to make payment due to vendors/OEM and therefore, the per-commissioning and commissioning works are being held up. It is thus submitted that there are historical disputes between the members of the consortium as clearly seen from the record. It is submitted that ONGC had admittedly paid an amount of about US\$ 178 crores million to the consortium qua the contractual work.

36. Again in dealing the allegation of the petitioner on a fraud in

invoking the bank guarantees it is submitted by Mr. Nankani that there is no fraud involved either in issuance of the bank guarantees or in invocation thereof and the bank guarantees have been furnished in performance of the said contract, and on account of breach of the said contract, ONGC is entitled to invoke the bank guarantees. It is submitted that there are no pleadings to make out a case of fraud, and the petitioner's allegations of fraud that the ONGC has connived with GPC, behind the petitioner's back, is false and baseless, as due to non-payment by petitioner to GPC, on account of financial difficulties of the petitioner, disputes arose between the consortium members, with which ONGC has nothing to do. It is submitted that as the rig was lying in GPC's yard in a dismantled condition, which made the movement out of yard impossible, and thus ONGC had no option but to consider awarding GPC the balance contractual work. It is submitted that the bank guarantees are unconditional, and payable on demand, the Court in considering the settled principles of law ought not to grant an injunction restraining the bank from payment thereunder and this is more so when the petitioner is in breach of the said contract. It is submitted that ad-interim order dated 25 September, 2018 passed by this Court (S.J.Kathawala, J.) ought to be vacated.

37. In support of his submissions, Mr.Nankani has relied on the

following decisions:-

- (i) *M/s.ABG Ports Ltd. Vs. M/s.PSA International PTE Ltd. & Ors.*⁶
(ii) *Felguera Gruas India Pvt. Ltd. Vs. Tuticorin Coal Terminal Pvt.Ltd. & Ors.*⁷ (iii) *Larsen and Toubro Ltd. V. Shree Ahuja Properties & Realtors Pvt.Ltd.*⁸ (iv) *Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works (P) Ltd. & Anr.*⁹ (v) *M/s.Adani Agri Fresh Ltd. Vs. Mahaboob Sharif & Ors.*¹⁰; (vi) *Ideal Energy Projects Ltd. Vs. Maharashtra State Power Generation Company*¹¹

Rejoinder submissions on behalf of the Petitioner

38. In rejoinder Mr.Dwarkadas, learned Senior Counsel for the petitioner submits that the submissions as urged on behalf of ONGC cannot be accepted. It is submitted that the case in regard to extension of the date of 'sail away' is nowhere borne out in the invocation letter and there is no single clause about sail away date. Referring to the minutes of the meeting of 25th Management Review Meeting dated 16 April 2018 and referring to clause 3(d) it is submitted that the actual sail away date subject to approval from MWS and weather conditions, was 31 December 2018 and this has been conspicuously avoided to be

6 NM(L) O.2890/12 In Suit (L) no.2544/12 Judgment dt.5.10.2012

7 2018 SCC Online Bom 33

8 (2017)2 Bom CR 227

9 (1997)6 SCC 450

10 Civil Appeal No.14015/15 arising out of SLP(C) NO.9506/14 Judgment dt.2.12.2015

11 Commercial Appeal(L) no.573/18, Order dt.21/12/2018, DB Bombay High Court.

set out in invocation notice dated 25 September 2018. It is submitted that the invocation does not proceed on repudiatory breach or any anticipatory breach. It is submitted that on one hand ONGC agreed to wait and extended the compliance upto 31 December 2018 and then terminated the contract on 10 October 2018 as also invoked the bank guarantees without following the procedure as agreed in the general conditions of the contract. It is submitted that in fact there is deferment in the levy of liquidated damages till the rig is jacked up as cleared from ONGC's letter dated 13 July 2017 addressed to the consortium and therefore, there can be no reason for ONGC to invoke the bank guarantees till 31 October 2017 to claim liquidated damages.

Respondent no.2-Axis Bank's case

39. Respondent no.2-Axis Bank has filed a reply dated 5 December 2019 titled as "Written Statement" in which it has set out details of the bank guarantees as issued in favour of ONGC as also admitted the fact that ONGC by its two letters dated 25 September 2018 addressed to the bank had invoked the bank guarantees and further in pursuance of an ad-interim order passed by this Court (S.J.Kathawala, J.) dated 25 September 2018, the bank has withheld in making payment under the said bank guarantees to ONGC. It is not the case of the bank that it has any knowledge of fraud as played by the ONGC in the invocation of the

bank guarantees or any fraud to the knowledge of the bank in issuance of the bank guarantees.

Discussion and Conclusion

40. I have heard the learned counsel for the parties and with their assistance I have perused the record.

41. At the outset, it needs to be observed that arguments are primarily advanced on the prayers as made in regard to the bank guarantees as furnished by the petitioner in favour of the ONGC under the contract dated 12th December, 2011, entered between the ONGC and the Consortium.

42. The question which arises for determination is whether, "the petitioner would be entitled for an injunction on the invocation of the bank guarantees?"

43. Some admitted facts are required to be noted. It is not in dispute that the petitioner along with M.O.P.P.L and G.P.C. formed a Consortium, who participated in the tender issued by the ONGC for the SSCP project. Being the successful bidder the ONGC entered into a contract with the Consortium to undertake the said offshore project of SSCP. As per General Conditions of the Contract and the arrangement between the Consortium members, the petitioner furnished six bank guarantees totalling to Rs.37,39,64,160/-.

44. The scheduled completion date under the contract was 31 May, 2013. However, admittedly there were extensions granted by the O.N.G.C., which were for variety of reasons. Some relevant extensions can be noted. The Consortium by its letter dated 30th November, 2015 had requested for extension. ONGC by its letter dated 14th December, 2015 had granted extension upto 29.04.2016 in the following terms :-

"Dear Sirs,

1.0 You failed to complete the entire work within the contract completion period. In your letter under reference, you have asked for extension of time for completion. In view of the circumstances stated in your above referred letter, the time for overall completion of the project is further extended from 20.12.2015 to 20.04.2016, reserving ONGC's right to levy liquidated damages from you for delay in the completion of work after the expiry of the original contract completion period as mentioned in clause 6.3.2 read with clause 6.3.3 for the complete extended period, notwithstanding the grant of this extension.

2. The above extension of completion date shall also be subject to the right of ONGC to claim a reduction in prices on account of reduction in statutory duties/ taxes etc. which has taken/may take place during the extended period of completion. However, increase in prices during total extended completion period on account of increase in statutory duties/taxes etc. admissible under Change in Law clause of this work order/contract shall be granted, only if extension is due to delay on the part of ONGC"

(emphasis supplied)

45. Thereafter further extension was requested by the Consortium and extension upto 15.12.2016 was granted by the ONGC by letter dated 18th April, 2016. As pertinently seen, in these letters granting extension ONGC has categorically recorded that the Consortium had

failed to complete the entire work within the contract completion period. Further in granting extension on the request of the Consortium, ONGC had reserved its right to claim liquidated damages from the Consortium, for the delay in completion of the work after expiry of the original contract completion period as mentioned in clause 6.3.2 read with clause 6.3.3, for the complete extended period, notwithstanding the grant of the extension. It was also recorded that the extension which was granted was subject to the rights of the ONGC also to claim a reduction in prices on account of reduction in statutory duties/taxes etc. which has taken place and which may take place during the extended period of completion. This is true, qua all the extensions.

46. The last extension for Consortium to complete the contractual work was of 15th March, 2018 under which the contractual work was to be completed by the Consortium by 30 November 2018. The letter dated 13th March, 2018, issued by the ONGC to the Consortium of the petitioner accepting the request for extension of the Consortium of the contract completion date till 30th November, 2018 is required to be noted which reads thus :-

"Oil and Natural Gas Corporation Limited
Mumbai Region, Engineering Services (Offshore)
Materials Management Section
4th floor, 11 High Building, Bandra-Sion Link Road, Mumbai-17
(Telephone No.2408 8414, Telefax No.022 24088500)

Ref.MR/OW/MM/SSCP/10/2011 date: 13.03.2018

From : Office of GM (MM), ES, 4th floor, Il High Mumbai -17

To,
Consortium of M/s Mercator Oil & Gas Ltd., Mumbai,
M/s Mercator Offshore (P) Pte.Ltd., Singapore and M/s Gulf Piping Co.
W.L.L. Abu Dhani, UAE.

Attn: Mr. Adip Mittal, Director/ Mr. M . P. Singh, Project Director (SSCP)

Sub: Amendment No.14 to Contract No. MR/OW/MM/SSCP/10/2011 dated 15.12.2011 for Sagar Samrat Conversion Project.

Ref :1. Amendment No.1 dated 29.05.2013 for extension of project completion date from 31.05.2013 to 31.07.2013 with ONGC reserving right to levy LD.

2. Amendment No.2 dated 31.7.2013 for extension of project completion date from 31.08.2013 to 31.08.2013 with ONGC reserving right to levy LD.

3. Amendment No.3 dated 30.08.2013 for extension of project completion date from 30.09.2013 to 31.08.2013 with ONGC reserving right to levy LD.

4. Amendment No.4 dated 27.09.2013 for extension of project completion date from 31.05.2013 to 31.10.2013 with ONGC reserving right to levy LD.

5. Amendment No.5 dated 23.10.2013 for extension of project completion date from 30.11.2013 to 31.08.2013 with ONGC reserving right to levy LD.

6. ONGC letter No.MR/OW/MM/SSCP/10/2011 dated 26.10.2013 for extension of project completion date from 31.05.2013 to 15.6.2014 without levy of LD.

7. Amendment No.6 dated 10.06.2014 for extension of project completion date from 15.06.2014 to 31.03.2015 with ONGC reserving right to levy LD.

8. Amendment No.7 dated 09.03.2015 for extension of project completion date from 15.06.2014 to 20.12.2015 without levy of LD.

9. Amendment No.8 dated 14.12.2015 for extension of project completion date from 20.12.2015 to 20.04.2016 with ONGC reserving right to levy LD.

10. Amendment No.9 dated 18.04.2016 for extension of project completion date from 20.04.2016 to 15.12.2016 with ONGC reserving right to levy LD.

11. Amendment No.10 dated 14.12.2016 for extension of project completion date from 15.12.2016 to 24.05.2017 with ONGC reserving right to levy LD.

12. Amendment No.11 dated 23.05.2017 for extension of project completion date from 24.05.2017 to 15.10.2017 with ONGC reserving right to levy LD.

13. Amendment No.12 dated 13.07.2017 for deferment of LD deductions, allowing raising of two or more invoices per month and payment methodology.

14. Amendment No.13 dated 12.10.2017 for extension of project completion date from 15.10.2017 to 15.03.2018 with ONGC reserving right to levy LD.

15. Your letter No.2018/MOGL/ONGC/004/1646 dated 06.03.2018 requesting for extension of contract completion date till 31.12.2018.

Dear Sir,

1. You failed to complete the entire work within the contract completion period. In your letter under reference, you have asked for extension of time for completion. In view of the circumstances dated in your above referred letter, the time for overall completion of the project is further extended from 15.03.2018 to 30.11.2018, reserving ONGC's right to levy liquidated damages from you for delay in the completion of work after the expiry of the original contract completion period as mentioned in clause 6.3.2 read with clause 6.3.3 for the complete extended period, notwithstanding the grant of this extension.
2. The above extension of completion date shall also be subject to the right of ONGC to claim a reduction in prices on account of reduction in statutory duties/ taxes etc. which has taken/may take place during the extended period of completion (after 20.12.2015). However, increase in prices during total extended completion period on account of increase in statutory duties/taxes etc. admissible under Change in Law clause of this work order/contract shall be granted, only if extension is due to delay on the part of ONGC.
3. Please note that the above extension of Scheduled Completion date of the contract reserving ONGC's right to levy liquidated damages is subject to extension of the validity of Performance bond and Insurance policy as per requirement of the above contract.

Sd/-13.03.2018
(A. K. Gupta)
Deputy General Manager (MM)-ES
Off. I/c MM"

(emphasis Supplied)

A perusal of the above letter and more particularly from the 'references' as incorporated in the said letter, it is clear that about 14 extensions were granted by the ONGC to complete the contractual work. This shows that there is quite some history to the extensions which were sought by the Consortium for completion of the contractual work. It is clear that the extensions were granted right from May, 2013. There is no dispute on the nature of these extensions, which itself would say so much that there were serious issues on the performance of the contractual work by the consortium.

47. It appears that after the last extension dated 30th March, 2018, there was hardly any progress made by the Consortium and consequent thereto the ONGC addressed a letter dated 25th September, 2018 to the Consortium inter alia setting out the entire background of the progress contractual work and the extensions which were granted from time to time. The ONGC's case is of the consortium having acted in breach of its contractual obligations. It is the ONGC's case that the Consortium, in its letter dated 9th March, 2015 had submitted unconditional

commitment for successful completion and delivery of the project by 20th December, 2015 and had also confirmed, that the Consortium shall not raise new issues as to the reasons for further delay, till completion of the said project. That the Consortium, however, had failed to honour it's commitment. ONGC has referred in detail in the said letter the various breaches on the part of the Consortium to state that in each of the review meetings the importance and critical nature of the said project was emphasized to the Consortium and the Consortium was advised to implement daily plan, keeping in view the rate of progress that was needed to be achieved so as to catch up the scheduled sail date. That all these persuasions as made to the Consortium were of no avail and that the Consortium had failed to achieve the desired progress to complete the contractual works. ONGC says that it was also noted in the 18th Management Review Meeting that there was a stalemate between the petitioner group and the GPC and that it was the responsibility of the Consortium to resolve internal disputes of the Consortium which were hampering the progress of the project. Also that ONGC had provided an interest bearing advance of Rs.32 crores against the Bank Guarantee and it was disbursed in two installments and despite disbursement of such advance amount, the Consortium had failed to achieve the progress as per the plan. That the ONGC had time and again expressed it's concern on the lack in progress, slippages from

the schedules/ catch-up plan and requested the Consortium to adopt measures to arrest the delay and slippages and that several letters were issued to the Consortium expressing concern over the slow progress and requesting the Consortium to deploy more resources to complete the project work as planned. That post 21st Management Review Meeting held on 04 June 2017, the ONGC had also released payment of USD 4.11 million towards change order of leg attachments and change order Part -B and Part-A, milestones were made progressive as also the levy of liquidated damages was deferred till jack up at WO-16 without submission of bank guarantee and deferred recovery of interest bearing advance, a special dispensation was approved for processing two or more invoices in a month without waiting for 21 days. ONGC has contended that despite full co-operation and support from the ONGC, the Consortium was not been able to complete the work. ONGC has also commented that the Consortium had failed to release the past dues to their vendors which had resulted in the virtual stoppage of pre-commissioning work of process systems. The ONGC has contended that it was further burdened with a liability of USD 13.79 Million (estimated) on account of GST/GST implications, and pending recovery of USD 11.93 Million on account of liquidated damages, in addition to production losses/monetization of the investment made. The Consortium had submitted numerous catch up plans, but none of these

plans turned into reality and remained only paper commitments. Further the Consortium failed to complete the sail away by 15.09.2018, ultimately, on the request of the Consortium, an extension was granted for completion of the project upto 30th November, 2018. Also the Consortium was put on notice of 14 days to initiate on or before 09.10.2018, remedial actions acceptable to ONGC towards completion of the said project, failing which the contract in question shall stand terminated in terms of GCC clause 6.3.2. of the contract, without any further notice and without prejudice to any other and further remedies and rights as may be available to the ONGC under the said contract.

48. On this background on 26th September, 2018 ONGC, by its two letters of the same date addressed to the respondent No.2-Axis Bank, invoked the bank guarantees, inter alia recording that the competent authority has approved the invocation of the referred bank guarantees with immediate effect with respect to repayment of advance paid by ONGC which was given for speedy completion of the project, as the contract is being terminated for non performance and non fulfillment. The other two bank guarantees were invoked on the ground that as the contract is being terminated for non performance of the contractual obligations by the Consortium.

49. The bank guarantees in question are unconditional bank guarantees. The wordings in the bank guarantees are similar. Illustratively the wording of one of the bank guarantee dated 30th November, 2011 as furnished by the petitioner on behalf of Consortium is required to be noted which would show that the bank had committed itself to pay the ONGC without any demur, reservation, contest or protest and/or without any reference to the Consortium the amount payable under the Bank Guarantee. The relevant extract of the bank guarantee is as under :-

"2. We, AXIS BANK LTD registered under the laws of the Company's Act, 1956 of India, having registered office at having registered office at "Trishul" 3rd floor, opp. Samartheshwar Temple, near law Garden, Ahmedabad - 380 006 having branch at Universal Bldg, Sir P.M Road, Fort, Mumbai (hereinafter referred to as "The Bank" which expression shall, unless repugnant to the context or meaning thereof include all its successors, administrators, executors and permitted assigns) do hereby guarantee and undertake to pay immediately on first demand in writing and any/all moneys to the extent of US\$ 7,607,080 (Seven Million Six Hundred Seven Thousand and Eighty only), without any demur, reservation, contest or protest and/or without any reference to the Contractor. Any such demand made by Company on the bank by serving a written notice shall be conclusive and binding, without any proof, on the bank as regards the amount due and payable, notwithstanding any dispute(s) pending before any Court, Tribunal, Arbitrator or any other authority and/or any other matter or things whatsoever, as liability under these presents being absolute and unequivocal. We agree that the guarantee herein contained shall be irrevocable. This guarantee shall not be determined, discharged or affected by the liquidation, winding up, dissolution or insolvency of the Contractor and shall remain valid, binding and operative against the Bank.

Company shall have the unqualified option to operate this Bank Guarantee to recover Liquidated Damages as per leviable under the Contract.

3. The Bank also agree that Company at its option shall be entitled to enforce this Guarantee against the Bank as a principal debtor, in the first instance, **without proceeding against the Contractor and notwithstanding any security or other guarantee that Company may have in relation to the Contractor's liabilities.**

4. The Bank further agree that Company shall have the fullest liberty without our consent and without affecting in any manner our obligations hereunder to vary any of the terms and conditions of the said Contractor or to extend time of performance by the said Contractor(s) from time to time or to postpone for any time or from time to time exercise of any of the powers vested in Company against the said Contractor(s) and to forebear or enforce any of the terms and conditions relating to the said agreement and we shall not be relieved from our liability by reason of any such variation, or extension being granted to the said Contractor(s) or for any forbearance act or omission on the part of the Company or any indulgence by Company to the said Contractor(s) or any such matter or thing whatsoever which under the law relating to sureties would, but for this provision have effect of so relieving us.

5. The Bank further agree that the Guarantee herein contained shall remain in full force during the period that is taken for the performance of the Contract and all dues of Company under or by virtue of this Contract have been fully paid and its claim satisfied or discharged or till Company discharges this guarantee in writing whichever is earlier or until the date of expiry of the claim period specified in para 9 of this Bank Guarantee whichever shall first occur.

6. This Guarantee shall not be discharged by any change in our constitution, in the constitution of Company or that of the Contractor.

7. The Bank confirms that this guarantee has been issued with observance of appropriate laws of the country of issue.

8. The Bank also agree that this guarantee shall be governed and construed in accordance with Indian Laws and subject to the inclusive jurisdiction of Indian Courts of the place from where tenders have been invited.

9. Notwithstanding anything contained herein above, our liability under this Guarantee is limited to US\$ 7,607,080 (Seven Million Six Hundred Seven Thousand and Eighty only) and our guarantee shall remain in force until 31st July 2014.

Any claim under this Guarantee must be received by us before the expiry of this Bank Guarantee. If no such claim has been received by us by the said date, the rights of Company under this Guarantee

will cease. However, if such a claim has been received by us within the said date, all the rights of company under this Guarantee shall be valid and shall not cease until we have satisfied that claim".

(emphasis supplied)

50. It is well settled that bank guarantee is an independent contract between the bank and the party in whose favour bank guarantee is issued. The terms and conditions of the bank guarantees become relevant when the court is called upon to consider grant of any injunction on the invocation and encashment of the bank guarantee, of course subject to the facts of the case. In case, the bank guarantee is unconditional and irrevocable, the bank can be restrained by the Court from making payment to the beneficiary, on limited grounds. Firstly, if there is a clear case of fraud of an egregiousness nature and which would vitiate the very foundation of the bank guarantee. Secondly, when there is case of irretrievable injury and when a party seeking injunction prays for special equities resulting in irretrievable injury and injustice. There are catenna of the decisions of the Hon'ble Supreme Court, in this regard as referred on behalf of the parties.

51. The question to be decided is whether adverting to the facts of the case and applying these well settled principles of law can the bank be restrained from making payment under the bank guarantee to the

ONGC. I propose to categorize the discussion under the following necessary heads as under:-

i) Whether a case of fraud has been made out by the petitioner?

To answer this question firstly the averments in the petition/pleadings of the petitioner are required to be noted.

52. In paragraph No.16 of the petition, the petitioner has averred as under :-

"16. The petitioner denies that the Contractor is in breach of the Contract. Even, if which is denied, the Contractor is in breach, the Contractor has time until 09 October 2018 to cure the alleged breach. The Contract is valid until 30 November 2018 and the completion date has been extended upto 30 November 2018. The Contractor has not refused or declined to perform the Contract. The Contractor has been prevented from recommencing works under the SSCP by the Respondent NO.1's failure and/or refusal to pay the Petitioner's legitimate dues and to issue and pay for the Change Orders. The respondent No.1 has, on the one hand, prevented the performance of the Contract, and on the other hand issued a notice of termination with a 14 day cure period. The respondent No.1 has unlawfully and fraudulently and collusively invoked the Bgs on 25 September 2018, even as if permitted the Contractor to remedy the alleged breaches by 09 October 2018 and even though the respondent No.1 has itself prevented the Contractor from performing the Contract.

In paragraph 18(c), the petitioner has averred as under :-

"18(c) The Original value of the contract is US\$ 152.141 million. The value of the Performance Bank Guarantees is US\$ 15.214 million. The Performance Bank Guarantees have been invoked by the respondent No.1, admittedly, for the recovery of liquidated damages, clause 6.3.2(i) of the Contract provides for a maximum Liquidated Damages of 10% of the Contract Value, i.e. upto a maximum of US\$ 15.214 million. The respondent No.1 has already recovered Liquidated Damages in the sum of US\$ 3,29 million. By Amendment No.12 dated 13 July 2017, the respondent No.1 agreed to forbear from imposing or recovering Liquidated Damages under the Contract until the vessel jacked up

at the WO--16 location, offshore India after sailing away from the Contractor's yard. Even assuming that his agreement pertained to only US\$ 8.98 million, and even if, which is denied, the respondent No.1 could have levied and recovered liquidated damages from the BGs, the only value for which the respondent No.1 could have invoked the BGs would have been US\$ 3.10 million, whereas the respondent NO.1 has invoked the BGs for US\$ 15.214 million and INR 38.875 crores, which, to the respondent No.1's knowledge is excessive and unauthorized. There is, thus a fraud in the invocation of the BGs and the petitioner is entitled to an injunction against the invocation of the said BGs.

In paragraph No.20(b), the petitioner has stated as under :-

"20(b) Fraudulent, inasmuch as the Bank Guarantee has been invoked for alleged non performance 4 months prior to the expiry of the extended term of the Contract, and immediately on the issuances of the 14 days cure notice by the respondent No.1 thereby effectively denying the very opportunity of curing the alleged breach".

(emphasis added)

53. Apart from the above averments in the memo of the petition, after the first affidavit dated 28 September 2018 was filed, on behalf of ONGC, opposing the reliefs, the petitioner in its rejoinder affidavit tried to explain in paragraph No.2 as to what is the petitioner's case on fraud. The petitioner has contended that although the contract was extended from time to time and the last extension was granted on 13 March 2018 (by Amendment No.14) till 30 November 2018 a termination notice dated 25 September 2018, was issued by the ONGC to the Consortium granting the Consortium 14 days to cure the alleged breaches and if the breaches were not to be cured, the Consortium was face termination of the contract as sated by the ONGC to be in accordance with 6.3.2. of the contract. It was contended that admittedly 14 days period had not expired and was to expire only on 9th October,

2018 and thus the contract was valid and subsisting till the said date. The petitioner contends that despite these clear facts to the knowledge of ONGC, the ONGC in its reply affidavit dated 28 September 2018, stated that the contract stood terminated, when in fact there was no termination of the contract. Also it could not have been recorded to the bank on 25 September 2018 in the invocation letter, *interalia* that the contract was being terminated for non performance and non fulfillment, in encashing the bank guarantees.

54. Mr. Dwarkadas learned senior counsel for the petitioner would urge that above assertions on the part of the ONGC, clearly bring about malafides on the part of ONGC's and the ONGC's willful misrepresentation of the true and correct facts justifying its wrongful actions would amount to an egregious fraud not only under the contract and the bank guarantees in question, but also on this Court, which simply cannot be countenanced and thus this Court should restrain ONGC from fraudulently invoking the bank guarantees. The case of the petitioner is that, when admittedly 14 days cure period was given to the petitioner under the Notice of termination issued by the ONGC dated 25 September 2018, and the benefit of which was denied to the petitioner by not only the invocation of the bank guarantee but in pre-deciding on termination. This also amounted to a breach of the contract by the ONGC and also a fraud. The 14 days cure notice was hence an empty formality and thus special equities are created in favour of the

petitioner, more particularly when ONGC was fully aware that the contract was at the stage of near completion, as clearly seen from the record and more particularly minutes of the minutes of the meeting 24th MRM. Mr. Dwarkadas, learned Senior Counsel, for the petitioner has argued that all these facts also clearly make out a case of fraud on all counts as defined under Section 17 of the Contract Act.

55. I am not persuaded to accept the above submissions as urged by Mr. Dwarkadas, learned Senior Counsel for the petitioner, to be any case of a fraud as played by the ONGC in encashment of the bank guarantees. Further, even assuming that such case is to be accepted, as a case of a fraud against ONGC, it is surely not of a nature in relation to the bank guarantees or having any bearing on the invocation of the bank guarantees, much less of a fraud to the knowledge of the bank. Prima facie the ONGC appears to be justified in invoking the bank guarantees, as despite several extensions to the contract, as granted by ONGC, the Consortium could not in any manner achieve completion of the contractual work. In fact as urged on behalf of ONGC, the progress of the contractual work was only 1.17% during the two and half years period, prior to the termination and 0.08% from March, 2018 till the invocation of the bank guarantee. If this was to be the contractual position in which the parties stood and it was to the knowledge of the

Consortium that it was unable to complete the contractual work, within the extended time upto 30th November, 2018, then certainly, it cannot be said that ONGC putting the petitioner to notice of termination (notice dated 25th September, 2018), and more particularly considering the wordings of the last paragraph of the said notice, that a case of any fraud as played by ONGC is made out. The last paragraph of the letter dated 25 September 2018 is required to be noted, which reads thus:-

"In view of the above, Contractor is hereby put on notice of 14 days to initiate on or before 09.10.2018, remedial actions acceptable to ONGC towards completion of the said project, failing which the said contract i.e. contract NO.MR/OW/MM/SSCP/10/2011 dated 15.12.2011 for Sagar Samrat Conversion Project shall stand terminated in terms of GCC clause 6.3.2. of the Contract, without any further notice and without prejudice to any other and further remedies and rights as may be available to the Company under the said Contract and in law. You shall be fully responsible for safe custody and care of MOPU and related materials lying under your custody and care till the same are handed over to the company".

56. In any case, the petitioner has not brought any material on record, which in some manner would indicate that substantial steps were taken by the Consortium to complete the contractual work and that a situation was brought about that the invocation of the bank guarantee is not necessary although this may not be *stricto sensu* relevant for the Court to injunct the invocation of the bank guarantees, considering that the bank guarantee is an independent contract between the bank and the beneficiary of the guarantee. The petitioner

merely saying that the notice of ONGC dated 25th September, 2018 offered an opportunity to the Consortium to complete contractual work within 14 days and therefore, the bank guarantee could not have been invoked without deciding the post 25th September 2018 actions of the Consortium, before invocation of the bank guarantees, is surely not a valid argument to restrain the bank to honour its commitment under the bank guarantees. There was nothing wrong on the part of the ONGC to inform the bank and/or take a decision that the Consortium had failed to perform its obligations under the contract and/or in other words there was non performance and non fulfillment of the terms and conditions of the contract.

57. In the present proceedings which are primarily concerned with the invocation of the bank guarantees, there is no need of an inquiry on circuitous issues as urged on behalf of the petitioner on performance of the contract, suffice it to observe, that the record prima facie indicates that the ONGC had taken all the measures to permit the consortium to complete the contractual work and when nonetheless it remained unfulfilled, despite the last extension granted in March 2018, the ONGC issued the said notice dated 25th September, 2018 to the consortium that the contract will stand terminated if the performance is not achieved and further terminated the contract on 10th October,

2018, as the balance contractual work was not completed in the fourteen days. This certainly entitled the ONGC to invoke the bank guarantees in question. Even assuming that the ONGC was not to issue to the Consortium the said notice dated 25 September 2018, still there was no impediment on the ONGC to invoke the bank guarantees taking an estimate of the progress achieved by the Consortium to achieve the completion.

58. The Court also cannot be oblivious to the background facts that the non fulfillment of the contractual work by the Consortium, appears to be also on account of disputes which had arisen between the petitioner, its associate company being the Consortium members on one hand and the GPC on the other. As noted in the foregoing paragraphs, these disputes between the Consortium members adversely affecting the contractual work, was part of the discussion in various meetings between the parties. It is not in dispute that GPC had instituted proceedings against the petitioner before the Court at Abu Dhabi and had sought injunction against the petitioner on the counter guarantees. This fact amplifies the case of the ONGC that a situation of a stalemate had arisen between these two parties to the Consortium. Thus a clear situation existed that the Consortium members were not in a position to comply with their respective

obligations as *inter se* agreed between them.

59. Another aspect which is required to be noted is that Consortium was in severe financial difficulties during the execution of the contractual work and the ONGC had extended interim financial aid to enable the Consortium to complete the contractual work. Further there is clear material on record that financial difficulties of the Consortium had reached to such an extent that the Consortium had not paid its several vendors, resultantly these vendors had refused to execute their respective works on the project and to undertake any work for the Consortium in relation to the project. Certainly it cannot be said that all these are situations for which ONGC can prima facie be said to be at blame, for the project remaining incomplete for such substantial time.

60. The petitioner along with Consortium members are experts in the field, who had appropriately assessed the contractual work as also changes which were required in the contractual work and had willingly executed the contractual work, till it achieved the stage of completion of about 95% and only 5% of the work remaining to be executed. It is at this stage disputes between the Consortium appear to have aggravated. It is also not a case that ONGC has not made payments to the Consortium, in fact substantial payments are made to the

Consortium and as argued by learned counsel for the parties, the Consortium so far has received total payment of US\$ 178 million and the Consortium's claim amount of US 197 million when the original contract value was 152 US\$. Even considering this backdrop the case of the petitioner is that there is apparent fraud in invocation of the bank guarantee at the hands of the ONGC is totally untenable.

61. In so far as the arguments of Mr. Dwarkadas that ONGC's fraud on the bank, the petitioner and this court, is writ large from the reading of the first affidavit as filed on behalf of the ONGC dated 28 September 2018, wherein the deponent before the formal termination of the contract, stated before this court that the contract in question stood terminated would demonstrate that notice dated 25 September 2018, was an eye wash and a decision was already taken to terminate the contract. Further according to Mr. Dwarkadas this position stood compounded from the wordings of the ONGC's letters invoking bank guarantees when again the ONGC has commented about the non-fulfillment of the contractual obligations before the period of fourteen days as granted by the ONGC in the said notice could come to end and before the contractual period would expire, whereby time was available to complete the contractual work. Mr. Dwarkadas would urge both these factors, coupled with the ONGC taking a decision to award

the contract to the petitioner's consortium partner GPC, makes out a clear case of a fraud on invocation of the bank guarantees. It is urged that also the money as may be received under the bank guarantees would be utilised by the ONGC to make payment to the GPC for the balance work. This is also an argument made in asserting, case of special equities.

62 I am not persuaded to accept these submissions of Mr. Dwarkadas to make out any case of a fraud on invocation of the bank guarantees. Mere statement as made in the first affidavit as filed on behalf of the ONGC that the contract is terminated cannot amount to actual termination when the petitioner very well has accepted that the termination was effected on 10 October 2018. It also cannot be accepted that on the day the bank guarantees were invoked (i.e. on 25 September 2018) the consortium had not completed its contractual obligations and in fact there was hardly any progress in performance of the balance contractual work from the time the last extension was granted on 15 March 2018. Hence there was nothing wrong in the wordings in the invocation letter. In fact what was stated by the ONGC was the correct factual position. As regards the award of the contract for the balance work to the GPC, the same was a commercial decision of the ONGC required to be taken to meet the exigencies. There was no

embargo in the peculiarity of the facts of the case, for the ONGC to take the best commercial decision in the interest of the project. Such steps and efforts taken in the larger interest of the project cannot be regarded as a fraud on the petitioner or the bank . It is too far-fetched for the petitioner to so contend, even relying on the decision of the Supreme Court in the case of Hindustan Steel Works Construction Ltd -vs- Tarapore & Co. and another¹². This decision is discussed little later in the next context.

(ii) Whether any case of irretrievable injustice or of special equities has been made out by the petitioner ?

63. I am afraid that any case of an irretrievable injustice or special equities is made out by the petitioner so as to entitle petitioner to grant any relief on the invocation of the bank guarantee. The argument on special equities is being made again on the ground that the notice dated 25th September, 2018 granting cure period of 14 days to the Consortium to comply the contractual obligations being an empty formality and an eye wash. This inasmuch as according to the petitioner the decision to terminate the contract was already taken by the ONGC, as reflected not only from the first affidavit as filed on

12 (1996) 5 SCC 34

behalf of the ONGC but also from the caveat application as filed, and this court was mislead to believe that there is non performance of the contractual obligations by the Consortium before 14 days period would be over, and thus, making payment under the bank guarantees would cause irretrievable loss to the Consortium, which was already in financial difficulties.

64. In my considered opinion these arguments as urged on behalf of the petitioner in the facts and circumstances of the case cannot be accepted to be a case of any special equities which result into any irretrievable injustice to grant any relief to the petitioner on the invocation of the bank guarantees. The contention is a total misconception of the principle of special equities. As facts as noted above speak volume on the failure of the Consortium to complete 5% contractual obligations even after about 14 extensions. This argument on behalf of the petitioner is made relying on the observations of the Apex Court in the case of **Hindustan Steel Works Construction Ltd (supra)** when in paragraph No.18 Court observed thus:-

"18. What Mukherji, J. has stated in paragraph 34 of his judgment, namely, that "It is only in exceptional cases that is to say in case of fraud or in case irretrievable injustice be done the courts should interfere" is really the ratio of the decision of this Court in V.P. Cooperative Federation Ltd. (supra). Therefore, fraud cannot be said to be the only exception. In a case where the party approaching the court is able to establish that in view of special equities in his favour

if injunction as requested is not granted then he would suffer irretrievable injustice, the court can and would interfere. It may be pointed out that fraud which is recognised as an exception is the fraud by one of the parties to the underlying contract and which has the effect of vitiating the entire underlying transaction. A demand by the beneficiary under the bank guarantee may become fraudulent not because of any fraud committed by the beneficiary while executing the underlying contract but it may become so because of subsequent events or circumstances. We see no good reason why the courts should not restrain a person making such a fraudulent demand from enforcing a bank guarantee.

65. In my opinion, the petitioner's reliance on this judgment of the Supreme Court is not well founded. This was a case where dispute was pending before the arbitrator and during the pendency of the dispute by mutual agreement the contract was reduced. The reduced contract work could not be completed by the respondent contractor within extended time. The appellant Hindustan Steel Works terminated the contract and demanded encashment of the bank guarantee on the ground of breach of the contract committed by the respondent. Respondent filed petition under Section 41(b) of the Arbitration Act, 1940 read with Schedule II of the said Act, in the Court seeking injunction, restraining Hindustan from encashing the bank guarantee. The Court considering that the bank guarantees were unconditional, refused to grant injunction and dismissed the petition. But the High Court reversed the trial Court's order in Revision, taking note

that fraud was not played and went on to examine whether there was special equities or special circumstances justifying the grant of injunction. The High Court took a view that under the terms of bank guarantee, Hindustan was the sole Judge on the question of breach of contract and the extent of loss or damage was invalid and that no amount could be said to be due till an injunction in that behalf was made either by the Court or arbitrator as the case may be. High Court rejected the contention of Hindustan that it was the sole judge on the breach of the contract. The Supreme Court set aside the decision of the High Court observing that the High Court committed grave error in restraining Hindustan from invoking the bank guarantees on the ground that in India only a reasonable amount can be awarded by way of damages, while observing the High Court overlooked the correct position in law that the bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction and the primary contract between the person at whose instance the bank guarantee is given. It is in this context, the Supreme Court referred to the observations as made by **Mukherji, J**, in case of **U. P. Co-op Federation Ltd -vs- Singh Consultants and Engineers (P) Ltd**¹³ . The Supreme Court in

13 (1988) 1 SCC 174

paragraph 19 of the decision, however, clarified the position that what was overlooked, was that the Court only in exceptional cases that is to say in case of fraud or in cases of irretrievable injustice, Court should interfere in the matters of bank guarantee as what was held in the decision in **U.P. Co-op Federation Ltd** (supra). The Court, in paragraph Nos. 19, 21 and 22 observed thus :-

"19. The learned Counsel for the appellant also drew our attention to a 3-Judge bench decision of this Court in General Electric Technical Services Company Inc. to which Shetty, J. was also a party. The learned Counsel submitted that after referring to the observations of Mukherji, J. in paragraph 28 and that of Shetty, J. in paragraph 53 of the judgment in U.P. Cooperative Federation Ltd. (supra) this Court in para 9 of that judgment has observed that what is stated therein is the settled position of law. What is overlooked by the learned Counsel is that in that very paragraph the opinion of Mukherji, J. that "It is only in exceptional cases that is to say in face of fraud or in case irretrievable injustice be done the courts should interfere" is also quoted. (Emphasis supplied) Moreover, while dealing with the facts of the case this Court in paragraph 10 of the judgment has stated that "The bank cannot be interdicted by the court at the instance of Respondent 1 in the absence of fraud or special equities in the form of irretrievable injustice between the parties". (Emphasis supplied) This observation would clearly go to show that the 3-Judge Bench has approved the view that fraud and other exceptional circumstances leading to irretrievable injustice are exceptions to the rule.

21. In that case the question which fell for consideration was whether the High Court was right in taking the view that while deciding an application for interim relief against enforcement of a bank guarantee general principles of injunction on lenders should be applicable and not the principles of injunction in relation to bank guarantee. This Court was not called upon to decide whether apart from the case of fraud there can be any other exceptional case wherein the court can interfere in the matter of encashment of a bank guarantee. It is also significant to note that the said observation in paragraph 60 has been made after quoting the following observation made by Mukherji, J. in paragraph 21 of his judgment in U.P. Cooperative Federation

Ltd. (supra):

An irrevocable commitment either in the form of confirmed bank guarantee or irrevocable letter of credit cannot be interfered with except if a case of fraud or a case of a question of apprehension of irretrievable injustice has been made out. This is the well-settled principle of law in England. This is also the well-settled principle of law in India.....

..... No fraud and no question of irretrievable injustice was involved in the case.

22. Therefore, we cannot attach much importance to the Use of the word "and" in the observation that "it cannot be interfered with unless there is fraud and irretrievable injustice involved in the case ". It is also significant to note that in that case this Court referred to the decision of Court of Appeal in England in the case of *Elia and Rabbath v. Matsas and Matsas* and distinguished it by stating that the facts of that case were peculiar but did not state that the view taken in that case is not correct. The decision in *Handerson v. Candian Imperial Bank of Commerce and Peat Marwick Ltd.*, was also referred to and distinguished on the ground that the facts of that case were peculiar but with respect to the decision in that case also it has not been stated that it does not represent the correct position of law. That was not a case of that type of fraud which has been recognised as an exception to the rule though the request by the beneficiary for payment was considered fraudulent in the circumstances because there was no right to payment. This Court also referred to the case of *Itek Corporation. v. The First National Bank of Boston*, 566 Fed Supp 1210. In that case the underlying contract had become impossible of performance, because of 'force majeure'. It was an event subsequent to the execution of the contract. Yet injunction was granted by the court on the ground that the plaintiff had no adequate remedy at law and the allegations of irreparable harm were not speculative but genuine and immediate and the plaintiff would have suffered irreparable harm if the request for relief was not granted. Though this Court observed that "this judgment is based on peculiar facts" has not disapproved the view taken in that case.

The Supreme Court while setting aside the order of High Court, in paragraph 23 observed as under :

23. We are, therefore, of the opinion that the correct position of law is that commitment of banks must be honoured free from

interference by the courts and it is only in exceptional cases, that is to say, in case of fraud or in a case where irretrievable injustice would be done if bank guarantee is allowed to be encashed, the court should interfere. In this case fraud has not been pleaded and the relief for injunction was sought by the contractor/Respondent No. 1 on the ground that special equities or the special circumstances of the case required it. The special circumstances and/or special equities which have been pleaded in this case are that there is a serious dispute on the question as to who has committed breach of the contract, that the contractor has a counter claim against the appellant, that the disputes between the parties have been referred to the arbitrators and that no amount can be said to be due and payable by the contractor to the appellant till the arbitrators declare their award. In our opinion, these factors are not sufficient to make this case an exceptional case justifying interference by restraining the appellant from enforcing the bank guarantees. The High Court was, therefore, not right in restraining the appellant from enforcing the bank guarantees.

66. I am also not persuaded to accept the submission as urged on behalf of the petitioner relying on the decision of the Court of Appeals in **United Trading Corporation S.A. and Marcy Ltd -vs- Alliad Arab Ltd and ors (1985 2 LLOYD's Reports, 554)**, and **Federal Bank Ltd. Vs. V.M.Jog Engineering Ltd.& Ors.**¹⁴ that the demand of the ONGC in encashing the bank guarantees need not be honoured by the bank. The Court of Appeal referring to the observations of this Lord Denning in **Edward Owen Engineering Ltd -vs- Barclays Bank International Ltd (1978) 1 Lloyd's Q. B. 159**, wherein Lord Denning referring to the decision in the case of **Sztejn v. J. Hency Schroder Banking Corporation (1941) 31 N.Y.S.**, and in quoting Justice Shientag had observed that the case showed that there is an exception

¹⁴ (2001)1 SCC 663

to the strict rule obliging the bank to pay upon presentation of document and to ignore any dispute which stood between buyer and seller arising out of contract under sale. The following observations as made in the said decision are relied to support this submission :-

"Lord Denning, M.R. at pp. 171 and 169 quoted from the judgment of Judge Shientag and then stated that the case showed that there is an exception to the strict rule obliging the bank ignore any dispute which exists between the buyer and the seller arising out of the contract of the sale. He said :

The bank ought not to pay under the credit if it knows that the documents are forged or that the request for payment is made fraudulently in circumstances when there is no right to payment.

He then considered the nature of performance bonds and said (at PP. 171-172 and 170-171)

.... these performance guarantees are virtually promissory notes payable on demand. So long as the Libyan customers make an honest demand, the banks are bound to pay; ad the banks will rarely, if ever, be in a position to know whether the demand is honest or not. At any rate they will not be able to prove it to be dishonest. So they will have to pay.

All this leads to the conclusion that the performance guarantee stands on a similar footing to a letter of credit. A bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand, if so stipulated, without proof or conditions. The only exception is when there is a clear fraud of which the bank has notice.

Lord Denning, M.R., then referred to the subsequently oft-cited observation of Mr. Justice Kerr (as he then was) in R.D. Harbottle (Mercantile) Ltd vs National Westminster Bank Ltd (1978) Q.B. 146 at p.155G, that the machinery of the irrevocable obligations assumed by banks is the life-blood of international commerce."

All members of the court referred to the case of Howe

Richardson scale co Ltd vs Policemexcekop and National Westminster Bank Ltd, then unreported but now to be found in (1978)I Lloyd's Rep. 161. In that case Lord Justice Roskill (as he then was) said at p.165).

Whether the obligation arises under a letter of credit or under a guarantee, the obligation of the bank is to perform by that particular contract, and that obligation does not in the ordinary way depend on the correct resolution of a dispute as to the sufficiency of performance by the seller to the buyer or by the buyer to the seller as the case may be under the sale and purchase contract; the bank here is simply concerned to see whether the event has happened upon which its obligation to pay has arisen.

Lord Justice Geoffrey Lane (as he then was) in commenting on the particular facts of the case under appeal, said) at pg.174 and 176):

It may be harsh in the result, but the sellers must have been aware of the dangers involved or if they were not, they should have declined to accept the terms of the performance bond or else they should have allowed for the possibility of the present situation arising by making some adjustment in the price.

Mr Justice Kerr in Harbottle's case had expressed his surprise at the unqualified terms of the performance bonds with which he was dealing but commented (at p.150 of (1978) I Q.B.)

... I am told that they are by no means unusual, particularly in transactions with customers in the Middle East. In effect, the sellers rely on the probity and reputation of their buyers and on their good relations with them. But this trust is inevitably sometimes abused, and I understand that such guarantees are sometimes drawn upon, partly or wholly without any or any apparent justification almost as though they represented a discount in favour of the buyers. In such cases the sellers are then left merely with claims for breaches of contract against their buyers and the difficulty of establishing and enforcing such claims.

Since Owen's case little has been added to the learning on the subject in this country. In the unreported case of the State trading Corporation of India Ltd v E.D.& F. Man (Sugar) and the State Bank of India Lrtd Denning M.R. noted that the only term to be implied in the sale contract in regard to the performance bond was-

... that the buyer when giving notice of default must honestly believe that there has been a default on the part of the seller. Honest belief is enough. If there is no honest belief, it may be evidence of fraud. If there is sufficient evidence of fraud, the court might intervene and grant an injunction. But otherwise not. So long as the buyer honestly believes there is default on the part of the seller, that is sufficient ground for a notice of default to be given."

67. The very foundation of the above observations is that there should be sufficient evidence of fraud to the knowledge of the bank, in which case the bank can take a position that it would not honour the demand of payment under the bank guarantee. Surely the bank has not asserted such a position in the present case as also clearly seen from its reply affidavit. Thus although the proposition as laid down in the above decision cannot be doubted , it has no application to the facts of the present case.

68. Thus no case of any special equities, irretrievable injury and of any injustice has been made out, by the petitioner on invocation of the bank guarantees. There is no material to accept the argument as urged on behalf of the petitioner that this entitles to injunction in invocation of bank guarantee. This is for the reason that the Consortium in the first place was not in position to achieve to complete the work within the notice period of 14 days, in fact the work

at the hands of the consortium was at a stand still. What is significant is that the Consortium never made application for any further extension which is as good as accepting the situation that the Consortium was unable to fulfill the balance contractual obligations as undertaken in requesting for extension in March, 2018. Not only the petitioner but the Consortium was fully aware of the work which was required to be completed under the contract in question. It was also aware that it was an accepted position that the Consortium was in financial difficulties and advances were accepted for that purpose from the ONGC. The petitioner was also aware that serious disputes had arisen between the petitioner and GPC in performance of the contract and that it had gone completely beyond the means of the petitioner to get any work done from GPC. The petitioner did not initiate any proceeding so that GPC would comply with its contractual obligations under the consortium agreement. Rather the petitioner chose to accept the position it had taken purporting to comply with the contractual obligations as a lead partner of the consortium and complete contractual work, coupled with this petitioner was also facing proceedings filed by GPC before Abu Dhabi Court in relation to the present contract. All this has happened when the contract was on the verge of completion and only 5% work was remaining. Thus, it cannot be said by any stretch of imagination that the circumstances point out

any irretrievable injury to the petitioner, in the absence of any material that the ONGC would not be in a financial position to compensate the petitioner in case the petitioner succeeds in its case that the termination of the contract was illegal. If the petitioner is right in its contention, the petitioner has remedy to seek damages against ONGC and/or its Consortium partners in appropriate proceedings. Accepting such contentions as urged on behalf of the petitioner would amount to incorporating new conditions in the bank guarantees.

69. In the award of the contract to the GPC for the balance contractual work, Mr. Dwarkadas, learned Senior Counsel for the petitioner has urged that not only the termination was premeditated, but it was a collusive action between ONGC and GPC, keeping the petitioner in dark the ONGC had initiated secret negotiations with the GPC for completion of the balance contractual work. It is submitted that this also for the reason that contractual obligations as contained in clause 1.3.6 contemplated an enquiry against contractor when contract is terminated.

70. I am not persuaded to accept these submission as urged on behalf of the petitioner. ONGC is a public sector company. It is difficult to believe that it can take any decision secretly. No doubt in the

commercial exigencies, the ONGC would be within its rights to award a contract by private negotiations without going for a public tender. This cannot mean to be award of a contract by secret negotiations. Mr. Nankani, learned Senior Counsel for the respondent would be right in his contention that ONGC is a Public Sector Undertaking the benefit of the contractual work is a matter of public concern and the Consortium being awarded contract in the year 2011 and till 2018, benefits of such public works were being deprived. Mr. Nankani would be correct to submit that the ONGC was within its right taking a commercial view of the matter to consider the suitability of the person to complete the balance contractual work and accordingly award the contract.

71. Both the parties have cited number of decisions in support of their respective contentions. Having noted the settled principles of law in regard to invocation of the bank guarantee, I do not intend to burden this judgment in discussing all these decisions.

72. In the circumstances the contentions as advanced on behalf of the petitioner, in my considered opinion, do not make out any case for grant of injunctive reliefs, as prayed in the petition namely to restrain the bank from making payment under the bank guarantees .

73. Before parting with, I may observe that the observations as made are prima facie in nature. All the contentions of the parties on merits of the contractual dispute are expressly kept open.

74. As a sequel to the above discussion, I find no merit in the present petition. It is accordingly rejected. No costs.

75. At this stage Mr.Dwarkadas, learned Senior Counsel for the petitioner has prayed for continuation of the ad-interim orders passed by this Court (S.J.Kathawala, J.), for a period of two weeks. Mr.Nankarni, learned Senior Counsel for ONGC has opposed this request made by Mr.Dwarkadas. It is submitted by Mr.Nankani that extension ought not to be granted considering the clear position in law as also taking into consideration the fact that ONGC would always be good on its money.

76. In principle I am not inclined to accept the request of Mr.Dwarkadas, however, considering that the ad-interim orders are operating for some time, the same are continued for a period of one week from the date a copy of this order is uploaded.

ARBITRATION PETITION (L) No.1162 of 2018

77. This petition is also filed under section 9 of the Act by the petitioner against the ONGC, the petitioner's Consortium partner, GPC and the Abu Dhabi Commercial Bank, which had furnished counter-bank guarantee at the instance of the GPC to the petitioners.

78. This petition is based on an arbitration agreement between the ONGC and consortium of the petitioner and the GPC, as contained in clause 1.3.1 and 1.3.2 of the GCC and the arbitration agreement, between the members of the consortium as contained in Article 13 of the Consortium Agreement. The principal reliefs as sought by the petitioners, in the present petition are as under :

- “a. an injunction restraining the first respondent from breaching and/or continuing to breach the contract.*
- b. an injunction restraining the first respondent from giving effect to the termination of the contract in pursuance of its termination of contract letter dated 10 October 2018.*
- c. an injunction restraining the first respondent to cease and desist from restraining the petitioners from performing the contract.*
- d. an injunction restraining the first respondent from creating any third party rights/allotting a contract to carry out any construction and/or any development with respect to the subject matter, wholly or partially, of the contract.*

d.1. an injunction restraining the first respondent from acting upon the award for contract for Balance works dated 25 October 2018.

e. an injunction restraining the second respondent from breaching and/or continuing to breach its performance obligations under the Consortium Agreement.

e.1. an injunction restraining the second respondent from acting upon the award for Contract for Balance Works;

e.2. an injunction restraining the second respondent from acting upon the Consortium Termination letter.

e.3. an injunction restraining the second respondent from restraining the petitioners from performing the Consortium Agreement.

f. an injunction restraining the second respondent from continuing to breach Article 7 of the Consortium Agreement.

g. an anti/suit injunction in the following terms:

i. restraining the second respondent (whether by its officers, servants, agents or any of them or otherwise howsoever) from taking any steps in reliance on the ruling in Order No.6109/2018 before the Urgent Matters Judge before the Hon'ble Abu Dhabi Court of First instance in Urgent Petition No.6109/2018.

ii. restraining the second respondent from pursuing the proceedings initiated under the Urgent Petition and Civil Case N.2233 of 2018 before the Hon'ble Abu Dhabi Court of First Instance.

iii. restraining the second respondent (whether by its officers, servants, agents or any of them or otherwise howsoever) from commencing any fresh proceedings against the Claimant in respect of issues and disputes comprised in the impugned proceedings.

iv. restraining the second respondent from litigating all disputes falling within the arbitration agreement at Article 13 of the Consortium Agreement, in the Courts of law world-wide, and

h. an injunction restraining the third respondent from acting on any instruction issued or to be issued by the second respondent in reliance of in reliance on the ruling in Order No.6109/2018. “

79. The case of the petitioners in this petition is, principally on the petitioners being aggrieved by the termination of the contract of the consortium by the ONGC, as also on the the allegations that the termination was a collusive effort of the ONGC along with GPC which according to the petitioners, would entitle the petitioners for an interim injunction as prayed.

80. The foundational facts in seeking the reliefs are similar to the facts which are pressed into service in the first petition. It is the case of the petitioners that a *prima facie* case has been made out, as also balance of convenience is in favour of the petitioners for grant of such reliefs, failing which an irreparable injury would be caused to the petitioners as set out in detail in the petition.

81. Mr.Dwarkadas learned senior for the petitioners has submitted that the whole design of the ONGC along with GPC was to oust the petitioners out of the consortium, and award the balance contract work to GPC on a stand-alone basis and use the monies wrongfully obtained from the petitioners to complete the remaining works. This according to Mr.Dwarkadas learned senior counsel for the petitioners, was evident

inter alia from the fact that on 28 August 2018 GPC in breach of the arbitration agreement, under the consortium agreement, GPC initiated proceedings before the Abu Dhabi Court at the First Instance and obtained a secret ex-parte suspension of the counter bank guarantees furnished by the GPC to the petitioner under the consortium agreement. It is submitted that thereafter, on 25 September 2018 ONGC wrongfully attempted to en-cash the bank guarantees provided by the first petitioners on behalf of the consortium and after this on 10 October 2018 the ONGC wrongfully terminated the contract, which was followed by the GPC wrongfully terminating the consortium agreement on 24th October 2018. Mr.Dwarkadas learned senior counsel for the petitioners submitted that all these actions were followed by ONGC on 25 October 2018 awarding the balance work of the project to the GPC on a stand-alone basis.

82. Mr.Dwarkadas learned senior counsel would submit that the invocation of the bank guarantees on the part of the ONGC was thus, fraudulent and in so submitting, Mr.Dwarkadas would also, in this petition, rely on the decision in ***Hindusthan SteelWorks Construction Ltd vs.Tarapore and Co.supra*** and the decision in ***Federal Bank Ltd vs V.M.Jog Engineering Ltd (2001) 1 SCC 663*** to contend that the bank had sufficient knowledge that the attempt made by ONGC to en-

cash the bank guarantees was fraudulent, before the actual payment was made. It is thus, contended that there was a fraud played as noticed before the actual payment was being made. Mr.Dwarkadas submits that Mr.Prasanna Kumar Gangisetty the deponent of the affidavit filed on behalf of the ONGC, had made contradictory statements in the affidavit so filed. Mr.Dwarkadas has referred to the following statements in the affidavit of Mr.Gangisetty as under :

“ It is denied that the Respondent no.1 has, at any point of time, been secretly negotiating with GPC behind the petitioner is (sic) back, as alleged or otherwise. It is denied that the Respondent no.1 had any secret arrangement with GPC as is sought to be alleged.”

83. It is submitted that subsequently, the petitioners obtained letters from its sub-contractors written by the ONGC where it is confirmed that on 25 October 2018, the ONGC had in fact awarded the contract, for balance work to GPC. It is thus, submitted that the averments of Mr.Gangisetty as made in para 4 (xii) pf the affidavit dated 17 October 2018 were proven false, when Mr. Gangisetty had stated the following:

“ Pursuant to the termination of principal agreement and after evaluating all the possible options, this respondent awarded the contract for completion of the balance work to GPC out of commercial and technical necessity.”

Further, in para 41 Mr.Kumar stated:

“ As has already been stated above, the Respondent no.1 in its commercial and technical prudence entrusted the balance work of the project to GPC.”

84. Mr.Dwarkadas learned senior counsel would therefore, submit that Mr.Prasanna Kumar Gangisetty on oath, has back-tracked on the lack of any secret negotiations between the ONGC and GPC and this was done once the petitioners had established that the entire scheme of ONGC and GPC was to oust the petitioners and award the remaining work to GPC and had materialized and placed the documentary evidence in this regard, on record. It is thus, submitted that the reliefs which are prayed by the petitioners not only against arbitration but also against GPC are required to be granted.

85. Mr.Nankani learned senior counsel for the ONGC in opposing this petition, would reiterate his submissions as made in the first petition (supra) to submit that the termination notice dated 25 September 2018 was justified as also the ONGC had rejected the remedial plans submitted by the petitioner on 3 October 2018, as the same were conditional without any firm commitment to complete the work by a definite date, which was also proper and a justified course of action in the facts and circumstances. Mr.Nankani would submit that accordingly, the contract for the balance work was awarded by the ONGC to GPC on 25 October 2018 and that there was no case of any

secret negotiations, also there was no bar whatsoever on ONGC making an endeavour to complete the balance work even by appointing GPC. It is submitted that appointing GPC to complete the balance work, in no manner, can be said to be fraudulent on the part of ONGC in the clear facts of the case. It is submitted that after award of the contract to GPC on 25 October 2018 substantial work has been completed and amounts have been paid by the ONGC to GPC, as well as to other contractors. It is submitted that the petitioner is obstructing the balance work by either ensuring or threatening third party contractors from not co-operating. It is submitted that the petitioners shall be held responsible for the delay caused in completion of the balance work.

86. Learned counsel for respondent no.3-Abu Dhabi Commercial Bank would submit that the disputes between the petitioners and her clients in regard to counter bank-guarantees are already pending before the Abu Dhabi Court. In support of her contentions, she has referred to the decision of the Supreme Court in *Surya Vadanana vs State of Tamil Nadu & ors*¹⁵ to contend that it has been held that the principle of comity of courts, is essentially a principle of self-restraint, applicable when a foreign Court is seized of the issue. It is thus, submitted that no relief ought to be granted in respect of the prayers as

¹⁵(2015) 5 Supreme Court Cases 450

made against respondent no.3.

87. Mr.Dwarkadas learned senior counsel for the petitioners, in opposing the submissions of the bank, would submit that the decision in ***Surya Vadanan*** (supra) as relied on behalf of the respondent no.3, is not applicable in the facts of the present case as this is a case where the GPC has played a fraud on the petitioners. It is contended that powers of Courts, as conferred under section 9 of the Act are very wide.

88. Having considered the submissions, as made on behalf of the learned counsel for the parties, and having perused the record, in my considered opinion, the petitioners will not be entitled to any reliefs in this petition. This, for the reason that as *prima facie* observed in deciding the connected Arbitration petition filed by the petitioners, I have rejected the contentions of the petitioners that there is any fraud played by ONGC or by GPC in relation either to the invocation of the bank guarantee or in awarding of the contract of balance work to GPC. There is no need to reiterate the said reasons.

89. It is also noted in *extenso* that there are serious disputes between the petitioners and GPC and the disputes in regard to the counter-bank guarantee, are already subject matter of proceedings before the Court at

Abu Dhabi and the relief was granted by the Court at Abu Dhabi on 28 August '2018, which was an ex-parte ad interim relief. It was always open for the petitioners to appear before the Court at Abu Dhabi and seek vacating of the ex-parte orders.

90. In any event, as per Article 13 of the Consortium agreement, all disputes among the parties arising out of or in connection with the consortium agreement shall be amicably resolved in a spirit of mutual good will, failing which they shall be finally settled according to the “Rules of Arbitration of the Singapore International Arbitration Centre (SIAC Rules)” by the panel of three arbitrators appointed in accordance with the said Rules.

91. Considering the facts of the case, to grant reliefs to the petitioners is as good as undertaking a mini trial on all these issues of disputes, for which a section 9 remedy cannot be considered to be an appropriate remedy, as in adjudicating a section 9 petition, the Court would be guided by the three basic principles of a *prima facie* case, balance of convenience, and irretrievable injustice which, in my opinion, are not made out by the petitioners for the grant of reliefs as prayed in this petition and as discussed in the judgment on the first petition. It is open to the petitioners to agitate their grievances in

arbitration proceedings and seek appropriate reliefs. Thus, the respondent no.3-Abu Dhabi Commercial Bank would be correct in its contention that the disputes are already pending before the Abu Dhabi Court as filed by GPC on the counter guarantees, and thus proceedings against respondent no.3 also cannot be entertained.

92. In view of the above discussion, I see no merit in the present petition. It is accordingly dismissed. No costs. All contentions of parties including on merits of the disputes are expressly kept open.

93. In view of disposal of the petition, pending Chamber Summons (lodg) No.1712 of 2018 in Arbitration Petition (lodg) No.1162 of 2018 does not survive. It is accordingly disposed of.

(G.S.Kulkarni, J.)