IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL ARBITRATION PETITION NO.325 OF 2018

1.ECI Engineering and Construction Company Ltd.
2.Shanghai Power Transmission and Transformation Engineering & Co. ...Petitioners

Versus

1.Maharashtra State Electricity Transmission Company Ltd.
2. Axis Bank Ltd.
3. IDBI Bank Ltd.
4. Kotak Mahindra Bank Ltd. …Respondents

Mr.Mr.Sarosh Bharucha I/b. Sanjay Sinha, for the Petitioners.

Mr.Abhijit Desai I/b. Desai Legal, for Respondent No.1.

Ms.Priti S.Merchant, for Respondent No.3.

CORAM : G.S. KULKARNI, J.

DATE : 3 May 2019

JUDGMENT:

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 the following interim reliefs pending the arbitral proceedings:-

> (a) That pending the hearing and final disposal of the arbitration / execution proceedings, this Hon'ble Court be pleased to grant a temporary order and injunction staying the Respondent No.1's two letters both dated 08.12.2017 (Exhibits H and I hereto) invoking the bank guarantees (Exhibit E to E/3 hereto);

> (b) That pending the hearing and final disposal of the arbitration/execution proceedings, this Hon'ble Court be pleased to pass a temporary order and injunction restraining the Respondent Nos.2 and 4, their servants, agents and anyone claiming by, through or under them from taking any steps pursuant to the Respondent No.1's two letters both dated 08.12.2017 (Exhibits H and I hereto) invoking the bank guarantees (Exhibits E to E/3 hereto);
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> (c) That pending the hearing and final disposal of the arbitration/ execution proceedings, this Hon'ble Court be pleased to pass a temporary order and injunction restraining the Respondent No.1, its servants, agents and anyone claiming by, through or under it from invoking the bank guarantees (Exhibits E to E/11) hereto) on the same grounds as those contained in the Respondent No.1's two letters both dated 08.12.2017 (Exhibits H and I hereto)
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> (C1) That this Hon'ble Court be pleased to pass an order of status quo ante directing the Respondent No.1 to return the amount of Rs.3,36,37,268/- (rupees three crores thirty six lakhs thirty seven thousand two hundred and sixty eight only) to the Respondent No.3 forthwith, being the aggregate amount of the three bank guarantees (Exhibits E8, E10 and E11 to the Petition) wrongly invoked and encashed by the said Respondent no.1;”

2. The relevant facts needs to be noted:-

In 2008 respondent no.1 floated two tenders (SS1A and SS2A) for developing power transmission infrastructure which included construction of sub-station and transmission lines of EPC base (hand over, procuring and construction) in the State of Maharashtra. The petitioners had participated in the tender process and was awarded both the contracts by respondent no.1 on 28 July 2009.

3. As a condition of the contracts as awarded by respondent no.1 to the petitioners, performance/mobilisation guarantees were submitted by the petitioners for the different works which were required to be

executed, these guarantees pertain to different sub-stations which were classified in Group A, A-1, B and C.

4. The case of the petitioners is that under these contracts, the petitioner was handed over a road map in respect of the said project whereby the petitioners were required to lay down transmission lines. The petitioners contend that the projects however faced several issues such as non availability of right of way, as respondent no.1 was unable to get clearance from the land owners to lay transmission lines resulting in delaying the project. On the other hand the case of respondent no.1 is that the petitioners breached the performance of its obligations in respect of several sub-stations and were unable to meet the time-lines as agreed in the respective contracts and complete these several public works. Respondent no.1 accordingly in February 2012 terminated both the contracts awarded to the petitioners. Respondent no.1 also sought to invoke the bank guarantees as submitted by the petitioners. Thus disputes and differences had arisen between the parties.

5. Although the parties had agreed that the Court at Mumbai would have jurisdiction, the petitioners approached the Court of Additional Chief Judge, City Civil Court at Hyderabad in proceedings praying for an injunction on invocation of the bank guarantees by respondent no.1. An

order of temporary injunction came to be granted by the said Court on 26 June 2012. Thereafter in July,2012 respondent no.1 floated fresh tender to undertake the work left incomplete by the petitioners under the said two contracts.

The proceedings before the Hyderabad Court were disposed of as the Hyderabad Court did not have jurisdiction. The petitioners faced with termination, approached this Court in an petition filed under Section 9 of the Act (Arbitration Petition (L) No.864 of 2012) praying for interim relief that a Commissioner be appointed to visit all twenty four sites to carry out inspection and inventory of the works and the materials lying on several sites. This Court on 10 July 2012 passed the following order:-

> "1. Heard the Learned Advocates appearing for both the parties. The Learned Advocate appearing for the Respondent has, at the outset submitted that the copy of the Agreement annexed to the Petition at Exhibit D is not the correct copy and certain clauses in the same are missing. He has relied on a copy of the said Agreement and has submitted that the same is the correct copy of the Agreement. The Learned Senior Advocate appearing for the Petitioners has therefore submitted that he will be proceeding on the basis of the Agreement a copy of which is produced by the Learned Advocate for the Respondent and he is also willing to substitute Exhibit D to the Petition with the copy of the Agreement relied on by the Respondent. In view thereof, the Petitioners are allowed to substitute the present Exhibit D by copy of the Agreement produced by the Learned Advocate appearing for the Respondent. Amendment be carried out in the course of the day.
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> 2. The Learned Advocate appearing for the Petitioners to the present Petition is only seeking directions from this Court to the parties to carry out joint inspection and inventory of the work executed and completed by Joint Ventures/Petitioners at 23 sites and the material and equipment lying in stock at all the sub-station sites before the sites are handed over to any other person by the Respondent. Mrs.J.M.Wagh, Suptg. Engineer (Contract) of

Respondent who is present in Court states that the Respondent has no objection if the joint inspection as well as inventory is carried out as suggested by the Petitioners. In view thereof, the following order is passed:

i) The Institution of Engineers (India) shall appoint a qualified Engineer as Commissioner to visit all the 23 sites after giving intimation to both the sides and carry out inspection and inventory of the work, executed and completed by the Joint Ventures/Petitioners and the material, equipment lying in stock at all the said sub-station sites. The said institution shall comply with this order within a period of four weeks from today and submit its report to both the parties.

ii) The Commissioner shall be at liberty to take photographs of the material as well as the works executed and completed by the Joint Ventures/Petitioners.

iii) The cost of the Commissioner shall be initially borne by the Petitioners and thereafter determined in the Arbitration.

iv) All the rights and contentions of the parties are kept open.

v) The Respondent shall not hand over the sites to any other person for a period of six weeks from today.

vi) Arbitration Petition (Lodging) No.864/2012 is disposed of."

(emphasis supplied)

6. Thereafter, the disputes were referred for arbitration by appointing an arbitral tribunal comprising of Mr.Justice Arvind V.Savant, Presiding Arbitrator (former Chief Justice of Kerala High Court), Mr.Justice T.Ch.Surya Rao, (Former Judge of Andhra Pradesh High Court) and Mr.Justice M.G.Gaikwad, (Former Judge of Bombay High Court). During the course of arbitral proceedings, the parties decided to amicably resolve the disputes in terms of the settlement entered between the parties dated 11 October 2012. The parties agreed that the settlement/consent terms would be an arbitral award in accordance with the provisions of Section 30(3) read with Section 31(3) of the Act as also recorded by the arbitral tribunal in its order/award

dated 12 October 2012.

7. Some of the relevant clauses of the Settlement Agreement dated 11 October 2012 are required to be noted, which read thus:-

> 2. The Parties hereto state that pursuant to a proposal submitted by the Claimants herein, dated 25.09.2012, therein setting out the proposed terms and conditions of the proposed terms of settlement, the Respondent has duly considered the said proposal submitted by the Claimants, in the Respondent's Board Meeting held on 9.10.2012 to settle the matter amicably, as various power generation projects are nearing completing which necessitates evacuation of power on TOP PRIORITY for the benefit of consumers of Maharashtra and the public at large and to overcome the acute power cut suffered by the public. Accordingly, with a view to complete the projects in the interest of the beneficiaries in Maharashtra and in the interest of the Respondent and as considered suitable to both the parties, the parties have arrived at an amicable settlement of all their outstanding disputes and differences in terms and conditions more particularly set out hereinafter.
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> 3. The factual position in respect of the project work is as follows:
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> (a) There were in all 26 work orders issued under package SS1-A & SS2-A for sub-stations along with associated lines.
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> (b) Out of these 26 work orders, work orders of 1) 220 KV Nanded City (Khadakwasala) S/s 2) Sahuli S/s & 3) Kondhawa S/s along with associated lines of all these three sub stations have been already deleted from the scope of work orders.
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> (c) Out of the remaining 23 work orders, Bharsingi sub-station has already been commissioned, however the work of associated lines has remained incomplete.
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> (d) Out of remaining 22 work orders, 220 KV Kagal (Hamidwada) has been commissioned, however, the work of associated lines could not be started for want of ROW (The line passing through forest & Karnataka state).
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> In view of the above state of facts, as on date there are balance works of 21 S/s. along with associated lines, but performance of works thereof are parly done. And the Bharshingi Transmission line work as well as the minor balance work of Kagal S/s. (Hamidwada) is required to be done.

4. These balance 21 sub-stations alongwith associates lines and Bharshingi Transmission line work as well as the minor balance work of Kagal S/s. (Hamidwada) are classified in following Groups A, A1, B and C.

(A) (1) Selu
(2) Bhosari
(3) Pangri
(4) Ballarshah
(5) Butibori-III
(6) Nandagaonpeth
(7) Karajgi
(8) Deolgaon Raja
(9) Buttibori-II
……………………………

(A1) (1) Bharsingi Transmission Line
(2) Balance work of Hamidwada (Kagal)
……………………………

(B) (1) Lonand MIDC
(2) Sayne
(3) Phulambri
(4) Waghdari
……………………………

(C) (1) Jalgaon Jamod
(2) Sengaon
(3) Krishnoot
(4) Narsi
(5) Anjangaon
(6) Malegaon
(7) Moregaon-Arjuni
(8) Wadjire
…………………………………

5. As to work of Group – A & A1.

(a) **Out of above Groups A, A1, B and C of sub-stations along with associated lines, the work in Group A and A1 is in progress considerably as per performance made by the Claimants. The Claimants are sure to complete the remaining works of Group A and A1 by 15th March 2013 without fail. Pursuant to the said assurance given by the Claimants, the performance of the above work shall be reviewed by the Respondent by the end of December 2012 regarding the progress achieved till date. The time shall be the essence for the above performance of works of Group A & A1.**
…… …….

6. **As to work of Group-B.**

> (a) If the works mentioned in above Group (B) could not be completed by the Claimants within the time limit, as per Implementation Agreement, the Claimants shall hand over all the sites of works of Group B to the Respondent within 15 days from the date of Arbitral Order/Award, on recording the joint measurements (through the officials of both companies i.e. the Claimants and the Respondent) of the work done & inventory of the material of the Claimants.
> …... ….....…"

Clause 7 pertains to Group C works and Clause 8 pertains to obligations of each party which would be noted in the subsequent paragraphs.

8. It is not in dispute that in accordance with clause 8(2) of the settlement agreement the petitioners issued fresh/renewed bank guarantees in favour of respondent no.1. There are total 12 bank guarantees. The amounts under the bank guarantees was Rs.46,18,55,770/-. These bank guarantees were towards the mobilization advance. The petitioner states that these bank guarantees pertain to different sub-stations corresponding to the different work orders and forming part of the works under group A and C. Under these bank guarantees issued in favour of respondent no.1 the bank has unequivocally and unconditionally agreed to pay respondent no.1 at Mumbai the amounts under the bank guarantees. These bank guarantees / performance guarantees were renewed from time to time and were kept alive.

9. The petitioner contends that although petitioner had carried out works under Group A, A-1 and duly supplied the materials for the works under Group B in accordance with the settlement agreement, a letter dated 1 April 2014 was issued by respondent no.1 to the petitioner arbitrarily withdrawing works under Group C from the petitioner, which was kept on hold on the pretext that the petitioner had failed to complete the works under Group A and Group A1. The petitioner was also called upon by respondent no.1 to take joint measurements on or before 8 April 2014 and hand over the balance work of Group C to respondent no.1 so that the said work can be completed through any other agency at the risk and cost of the petitioners.

10. The petitioners by their letter dated 5 April 2013 replied to respondent no.1's letter dated 1 April 2013 interalia pointing out default committed by respondent no.1. The petitioners recorded that the petitioners had not only carried out work specified in the settlement agreement but also additional works and due to which petitioners faced acute cash flow crises. Petitioner accordingly requested respondent no.1 to withdraw the said letter. However, the said letter was not withdrawn nor petitioners' letter dated 5 April 2013 was replied by respondent no.1. The case of the petitioners is that there were several letters addressed by the petitioners requesting respondent no.1 to allow the

petitioners to start Group C work and that the petitioners were always willing to complete the work specified under Group C as also the remaining work in Group A and A1. Respondent no.1 had also withheld the payment of pending bills even after commissioning of Group A and Group C work. An amount of Rs.22.18 crores was payable by respondent no.1 to the petitioners towards the additional work. The petitioners contend that although several requests were made to respondent no.1 to clear the outstanding dues, however respondent no.1 never responded.

11. The petitioners contend that after withdrawing the Group C work from the petitioners respondent no.1 invited tenders on three occasions, however no bidders participated in the tender. Thereafter in the year 2016 another tender came to be floated by respondent no.1 with relaxed eligibility criteria to attract bids and ultimately in the month of February 2016, the contract was awarded to a third party agency for completion of the Group C work. It is contended by the petitioners that the action of respondent no.1 to withdraw Group C work from the petitioner was arbitrary and capricious as also contrary to settlement terms. Respondent No.1 with malafide intention and ulterior motives did not clear the petitioners' outstanding payments which were approximately Rs.152 crores as set out in paragraph 23 of the petition.

12. The petitioners contend that on the above backdrop the petitioners were shocked to learn that respondent no.1 by two letters dated 8 July 2017 addressed to respondent no.2 bank has sought to invoked four bank guarantees amounting to Rs.801,65,432/- on a false basis purportedly in view of clause 4 of the order passed in Arbitration Petition (L) no.864 of 2012, that respondent no.1 incurred any additional cost in executing Group C work through its nominated agency and that the same was recoverable from the petitioners. The bank guarantees were sought to be invoked by respondent no.1 on the basis that Group C works were carried out by respondent No.1 at the risk and cost of the petitioners.

13. The petitioners immediately addressed two letters dated 12 December 2017 to respondent no.1 interalia recording that respondent no.1 had unilaterally taken over Group C work and awarded the same to another agency and had failed to make payment to the petitioners for Group C work which had been done prior to the settlement agreement.

14. Respondent no.1 by its letter dated 13 December 2017 refuted the contentions of the petitioners as asserted in the petitioners letter dated 12 December 2017 addressed to respondent no.1 and has also called upon the petitioners to deposit an amount of Rs.16,61,66,883/- by 16

December 2017 failing which respondent no.1 would encash all the bank guarantees available with them.

15. The petitioners contend that as per clause 7 of the settlement agreement the works forming part of Group C was kept on hold by respondent no.1 till 31 March 2013 and that after considering the progress of the work done by petitioners in Group A and A1, respondent no.1 had reserved its right to commence any portion of Group C work through the petitioners or through any other agency. Petitioners contend that respondent no.1 had not asked the petitioner to undertake Group C work under Clause 7. It is contended that this was clear from respondent no.1's letter dated 13 April 2013. The petitioners therefore contend that having awarded the Group C work to another agency the question of carrying out the same at the cost and risk of the petitioners did not arise. It is contended that respondent no.1 had therefore completely misconstrued the terms of the settlement agreement. It is contended that as recorded in clause 9 of the settlement agreement neither party had any outstanding claim or dispute of any nature whatsoever monetary or otherwise.

16. The petitioner accordingly moved this petition under Section 9 of the Act praying for interim measures in the nature of an injunction on invocation of the bank guarantee by respondent no.1 by the said two

letters dated 8 July 2017 addressed to respondent nos.2 and 4.

17. This Court (S.J.Kathawalla, J.) by an order dated 19 December 2017 heard the parties and directed the banks not to act on the said letters of invocation dated 8 July 2017. This order is required to be noted as the same has continued to remain in operation till date, which reads thus:

> "1. The learned Advocate for the Respondents undertakes to file Vakalatnama within a period of one week from today. The undertaking is accepted.
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> 2. According to the Petitioners, the Respondents are fraudulently trying to invoke the bank guarantees issued by the Petitioners in favour of the Respondents. In support thereof, they are relying on the letter of invocation dated 08-12-2017, wherein they have relied on one of the paragraphs of the order passed by this Court in Arbitration Petition (L) No.864 of 2012.
>
> 3. The Respondents refute that any fraud has been perpetrated by them. The Respondents shall therefore, file their Affidavit in Reply to the above Petition on or before 4th January, 2018.
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> 4. In the meantime, the Bank shall not act on the letters of invocation dated 08-12-2017 (Exhibit H and I to the Petition, pages 128 to 131). This order is passed subject to the Petitioners extending the bank guarantees, which shall expire on 28th December, 2017 and 30th December, 2017, for a further period of three months. The learned Advocate for the Respondents on instructions, states that in the event of the Respondents being desirous of invoking any other bank guarantees as regards which letter/s of invocation is/are not addressed to the Bank, they shall give two working days clear notice to the Petitioners and/or their Advocates before submitting the letter of invocation to the Bank.
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> 5. Place the Arbitration Petition for hearing and final disposal, subject to numbering, on 12th January, 2018.
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> 5. Liberty to apply." (emphasis supplied)

18. During the pendency of this petition, the petitioners have amended the petition to incorporate paragraph 26(a) to paragraph 26(m) as also para 28(a) to 28(e) and 30(d) as also prayer clause (C-1).

19. The case of the petitioners by this amendment interalia is that the Group C work was fraudulently withdrawn by respondent no.1 from the petitioners by letter dated 1 April 2013 which was initially kept on hold, and that the petitioners had fraudulently sought to invoke the bank guarantees. The action on the part of respondent no.1 was fraudulent to the knowledge of respondent no.1 being contrary to express terms of settlement agreement. It is contended that element of fraud was clear from a perusal of respondent no.1's letter dated 8 December 2017 invoking the bank guarantees, as this letter referred to a judgment passed by this Court in Arbitration Petition (L) No.864 of 2012 and purported to quote clause 4 of the said judgment. The petitioners contend that a perusal of the said judgment shows that neither it contends clause or paragraph bearing No.4 nor does it contend the extract purportedly quoted in the said invocation letters. The bank was accordingly misled to believe that the invocation of the bank guarantee was supported by an order passed by this Court. The invocation letter also referred to only the works forming part of Group C under the settlement agreement. The element of fraud is further established by the fact that two out of the four bank guarantees invoked by respondent no.1 were advance bank guarantees which had been provided in respect of specific works other than works in respect of which the said bank

guarantees were invoked. The letters of invocation referred to failure on the part of the petitioners to complete the work at Anjanagaon and at Jalgaon Jamod, which fall within group C under the settlement agreement. The petitioners contend that however the bank guarantee bearing no.00300100000210 (Exhibit E) was in respect of the work under work order forming part of the works under Group A and the bank guarantee 00300100000209 (Exhibit-E-1) was in respect of the work carried out at Malegaon under Group C. It is thus contended by the petitioners that these two bank guarantees could not have been invoked by respondent no.1 in respect of work at Anjanagaon and Jalgaon Jamod and the same further established the fraudulent conduct of respondent no.1. It is then contended that if the bank guarantees are allowed to be encashed it would cause irreparable harm, injustice and hardship to petitioner no.1 and petitioner no.1 will not be able to continue to execute works under the existing contracts and with other parties in different States all over the country. The petitioners stand in the risk of facing claims and litigation by such other parties. The network of the petitioners would be eroded and the business will come to a stand-still. Thus there are special equities in favour of an injunction being granted in favour of the petitioners.

20. The petitioners in paragraph 28E as inserted by amendment has

contended that respondent no.1 breached the order dated 17 December 2017, 19 December 2018 and 22 December 2018 which had the effect of stay on the invocation of bank guarantees by not issuing a 48 hours notice and thereby receiving an amount of Rs.33637268/- under the three bank guarantees and Exhibit E8 , E10 and E11 and accordingly had also made a prayer for return of the said amounts.

21. Respondent has placed on record two reply affidavits, the first reply affidavit is dated 7 February 2019 of Mr.Rajendra Lal Appa Gaikwad and the second reply affidavit is reply to the amended petition dated 15 February 2019 also of Mr.Rajendra Lal Appa Gaikwad.

22. In the first reply affidavit the case of respondent no.1 is that in the year 2008 respondent no.1 floated two tenders for works of developing the power transmission infrastructure on EPC basis in the State of Maharashtra. Two tenders SS1A and SS2A pertain to different areas of the State. The petitioners were awarded the work under the said tenders, who failed to execute the work. Consequently respondent no.1 was to encash the bank guarantees for the petitioners' failure to undertake and complete the work as per the tender conditions, when, the petitioners filed a petition before the Additional Chief Judge, Civil Civil Court at Hyderabad praying that respondent no.1 be restrained

from encashing the bank guarantee. A temporary injunction was granted in favour of the petitioners by the said Court which was subsequently vacated on the ground that the Courts at Mumbai will have jurisdiction. The respondent no.1 consequently again floated tenders in June-July 2012 for completing the incomplete work under the tenders as awarded to the petitioners. It is stated that the petitioners this time filed arbitration petition before this Court praying for joint inspection and inventory of the work executed by the petitioner. It is stated that this Court passed an order 10 July 2012 directing the institution of Engineers India to appoint a qualified engineers to visit all 23 cites and carry out inspection and inventory of the work executed and completed by the joint venture /petitioners and the material equipment lying in stock at all the said sub-station sites. Respondent No.1 has contended that the disputes between the parties were referred for arbitration, as the petitioners had invoked the arbitration agreement. An arbitral tribunal was constituted for adjudication of disputes between the parties.

23. Respondent no.1 has contended that to amicably resolve the disputes, the petitioner had submitted a proposal dated 25 September 2012 to respondent no.1 and the said proposal was accepted by respondent no.1 and a settlement agreement (“Agreed Terms of

Settlement dated 11 October 2012”) was executed between the petitioners and respondent no.1. The arbitral tribunal passed an award dated 12 October 2012 in terms of the said settlement agreement by consent of the parties.

24. Respondent no.1 contends that considering clause 7 (a),(b),(c) of the said settlement agreement/arbitral award, the parties had clearly agreed that considering the work in progress of the petitioners in regard to the sub-stations and associated lines in Group A and Group A1, respondent no.1 had reserved its right to commence the work of any number of sub-stations and associated lines as mentioned in Group C through the petitioners or through any other agency for completion of work. It is contended by respondent no.1 renewed the work in progress of the petitioners in December 2012 under Group A and Group A1. It is contended that the Group A and Group A1 was to be completed by the petitioners by 31 March 2013. Respondent no.1 found that petitioners had failed to complete the work and hence, respondent no.1 had issued a letter dated 1 April 2013 to the petitioners informing that the petitioners had failed to complete the work as per the arbitral award dated 12 October 2012 and by the said letter withdrew from the petitioners the work under Group C as the work under Group A and A1 was not abided by the petitioners. It is contended that clause 7(C) of the

arbitral award was clear to the effect that if the petitioners were to fail in adhering to the terms of the settlement, respondent no.1 was entitled to complete the balance work of Group C at the risk and cost of the petitioners after measurement of the work done and inventory of the materials at the site recorded by the Chief Engineers (Contracts and Monetary) of respondent no.1 by calling representatives of petitioners by giving 7 days notice. Respondent no.1 had rightly issued letter dated 1 April 2013 withdrawing the Group C work from the petitioners for the said reasons and hand over the balance work of the project to be completed by another agency at the risk and cost of the petitioners. It is contended that accordingly the invoices were raised by the other agencies for the work which was to be completed by the petitioners. Respondent no.1 contends that petitioners were very much aware and were in the know-how of the facts that respondent no.1 has proposed to give the balance amount of Group C work to the third party agency from 1 April 2013 as the petitioners did not complete Group A and Group A1 works assigned to them. It is submitted that it was on these terms and conditions as contained in the settlement agreement/arbitral award as per clause 8 the petitioners had submitted amended bank guarantees for the works under Group A, A1 and C which was a security for completing the work. It is stated that the petitioners accordingly issued the bank guarantees for performance of the work, however failed to adhere to the time-lines mentioned in the arbitral award dated 12 October 2012 to complete the work under Group A and Group A1 by 31 March 2013 and accordingly Group C work was withdrawn from the petitioners by respondent no.1. The respondent no.1 accordingly strictly abided by an arbitral award dated 12 October 2012 and invoked the bank guarantees.

25. Respondent no.1 has contended that in respondent no.1 's letter dated 8 December 2017 addressed to the bank invoking the bank guarantees, respondent no.1 had inadvertently had made a reference to an order passed in arbitration petition (L) no.864 of 2012 and reference was made to clause 4 of the order. It is contended that thus the petitioners' contention that respondent no.1 had perpetrated a fraud upon the petitioners in invoking the bank guarantees by making a reference to said order is without any merit. It is denied that any fraud as alleged by the petitioners is played upon by the respondent no.1 in invoking the bank guarantees by quoting the reference of arbitration petition. It is submitted that the rights of respondent no.1 to invoke the bank guarantees stood crystallized and culminated from the arbitral award, dated 12 October 2012 and more particularly clause 7 of the said settlement agreement/arbitral award, arrived between the parties. Thus in any case the argument of misquoting the arbitration petition (L) no.864 of 2012 is of no consequence and is conveniently used a

camouflage in order to evade liability to pay the respondent no.1 the expenses of third party losses.

26. Respondent no.1 has contended that the petitioners' case as set out in paragraph 24 of the petition is false, frivolous and misleading for the reason that the petitioners failed to adhere to the time-lines and the other conditions as contained in the arbitral award and thus respondent no.1 was left with no alternative but to recover the same by encashing the bank guarantees by the letters dated 8 December 2017 addressed to respondent nos.2 and 4 banks. The petitioners were liable to pay legitimate dues for works under Group C completed by various agencies by floating tenders at field level, however, respondent no.1 also addressed a letter dated 13 December 2017 to the petitioners demanding the dues payable by the petitioners to respondent no.1 interalia recording that in case the dues are not paid, respondent no.1 will encash the bank guarantees. Thus an option was given by respondent no.1 to the petitioners to pay the dues by 16 December 2017, which were never paid by the petitioners. Therefore, there was nothing wrong in respondent no.1 invoking the bank guarantees.

27. Respondent no.1 has contended that the case of the petitioners that the petitioners had unilaterally taken over the Group C work is also

false as respondent no.1 has acted clearly as per the terms and conditions of the arbitral award. It is thus contended that third party expenditure in regard to Malegaon, Anjanagaon and Jalgaon Jamond as set out in "Exhibit A" totalling to Rs.1,20,20,69,414/- was incurred by respondent no.1 and the amount under the bank guarantee which was available was about Rs.7,69,77,339/- for the said three works.

28. In the second reply affidavit dealing with the amended petition, respondent no.1 has denied the case of the petitioners of any fraud being played by respondent no.1 in invoking the bank guarantees. Respondent no.1 has also tried to justify that respondent no.1 has complied with the order dated 19 December 2017 passed by this Court by giving a 48 hours notice which was by the letter dated 26 September 2018 to the petitioners for encashment of bank guarantee Nos.120133 IB GA 0074 amounting to Rs.4,62,39,190/- which was against recovery of balance mobilization advance of Rs.3,95,00,332/- which was for work of Buttibori – II, Group A project. It is stated that the said letter was also e-mailed to the petitioners. It is stated that similarly notices dated 2 July 2018 and 26 September 2018 were issued by respondent no.1 as per the directions of the Court in the order dated 19 December 2017 in regard to invocation of bank guarantees no.120133BIGA00171, 120133BIGA00169, 11120133BIGA00168 totaling to Rs.3,36,37,278/-

which was sent by ordinary post and that receipt of the said letter is deliberately denied by the petitioners. Respondent no.1 has further stated that on 1 December 2018 letter no.SE/EHV/CCA/ACC/2304 was issued to respondent no.3 by respondent no.1 for encashment of the advance bank guarantees for recovery of mobilization advance as given by respondent no.1 against Group C works for which the petitioners had failed to complete work as per arbitration award clause no.5(a) dated 12 October 2012. It is stated that respondent no.1 thereafter sent a reminder letter dated 11 December 2018 to Respondent no.3 informing that this petition was dismissed on 5 December 2018 and encashment of three bank guarantees be undertaken as there was no stay order on 11 December 2018. Respondent no.1 has contended that Group C project work at Anajanagaon, Malegaon, Jalgaon Jamond was completed at the risk and cost of the petitioners and as there was no sufficient amount of pending bills, retention amounts of the petitioners against the said works the advance bank guarantees were therefore available.

29. It is on the above rival contentions the learned Counsel for the parties have made their respective submissions.

30. Mr.Bharucha, learned Counsel for the petitioners has extensively pointed out the facts of the case to contend that there was no

justification whatsoever for respondent no.1 to invoke the guarantees in question. It is submitted that the terms of the settlement agreement/arbitral award were ex facie clear inasmuch as the works pertaining to Group C as agreed in clause 7 was to be kept on hold upto 31 March 2013 and only considering the progress of the petitioners in regard to the work of sub-stations and associated lines in the works pertaining to Group A and Group A1, respondent no.1 reserved its right to commence the work of any number of sub-stations and associated lines under the Group C works which could be done either through the claimants or through other agency. It is his contention that as the Group C work was never awarded to the petitioners as per the settlement terms, and that third party contractor was appointed to undertake the said work, respondent no.1 had no right to invoke the guarantees in question by the invocation letter dated 8 December 2017 addressed to the banks. Learned Counsel for the petitioners would contend that for this reason the invocation of the bank guarantees by respondent no.1 was fraudulent.

31. Learned Counsel for the petitioners would next contend that fraud in invocation of the bank guarantees is also clear from the contents of the invocation letter dated 8 December 2017 when it refers to the order passed by this Court in Arbitration Petition (L) no.864 of 2012 and the

respondent referring to Clause 4 of the said order. It is submitted that the said order has nothing to do with the encashment of the bank guarantees as also the said order did not have any clause 4. It is his submission an impression was sought to be created on the bank that the invocation of the bank guarantees is under the orders of the Court. It is further submitted that the bank guarantees in question were issued for specific sub-stations and the invocation letters clearly demonstrate that the bank guarantees was not invoked in regard to any work on the said sub-station. Thus the invocation would be required to be held to be illegal even on that count. It is next submitted that for all these reasons as set out in the petition, the petitioner's case is that there was special equities in favour of the petitioners as irreparable prejudice, hardship and loss would be caused to the petitioners if the bank guarantees are permitted to be encashed. In support of his submissions Mr.Bharucha has relied on the decision of Supreme Court in "***Adani Agri Fresh Ltd. Vs. Mehboob Sharif & Ors.***[1]"

32. On the other hand Mr.Desai, learned Counsel for the respondents in opposing the petition would submit that considering the settlement agreement dated 12 October 2012. respondent no.1 was justified in invoking the bank guarantees inasmuch as the petitioners admittedly had not complied with their categorical obligations under the settlement

1 (2016)14 SCC 517

terms. It is submitted that the Group C work was required to be undertaken by respondent no.1 from third parties in view of the default of the petitioners in undertaking Group A and A-1 works and consequently the petitioners were also not willing to undertake to complete Group C work for which mobilization advance was already paid to the petitioners. It is submitted that clause 7 (a) to (d) of the consent terms were clear which would entitle respondent no.1 to invoke the bank guarantees in the situation which was clearly brought about by the said clauses. It is submitted that the petitioners' case on fraud and irreparable injustice and/or special equities is wholly untenable. There is no case of a fraud to knowledge of a bank in issuance of the bank guarantees so as to entitle the petitioners to any injunction or invocation of the bank guarantees. It is submitted that the bank guarantees are admittedly unconditional and unequivocal, and thus considering the clear terms of the bank guarantees no injunction can be granted in view of the settled position of law as laid down in catena of decisions.

33. It is next submitted that the contents of the invocation letters in which inadvertently and by mistake a reference has been made to the orders passed by the Court in Arbitration Petition (l) no.864 of 2012, can in no manner be said to be any fraud in invocation of the bank

guarantees and more particularly considering the order passed by the Court in the said proceedings. Referring to the letter dated 5 April 2013 of the petitioners, it is submitted that a perusal of this letter would clearly indicate that the petitioners had clearly accepted that they had defaulted in executing the Group C work and had requested respondent no.1 to permit to complete the Group C project.

34. Learned Counsel for respondent no.1 has referred to the documents placed on record as also to the case of respondent no.1 as pleaded in both the reply affidavits. In support of these submissions, learned Counsel for respondent no.1 has placed reliance on the decisions of the Supreme Court in "***U.P.State Sugar Corporation Vs. Sumac International Ltd.***"[2]; (ii) ***U.P.Co-operative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd.***;[3]; (iii) ***General Electric Technical Services Company Inc. Vs. M/s.Punj Sons (P) Ltd***.[4].

Reasons and Conclusion:-

35. Having heard the learned Counsel for the parties and having perused the record, it is quite clear that there were contractual relations between the parties as the petitioners were beneficiaries of the contract(s) in question titled as "SS1A and SS2A" being awarded to the

2 (1997)1 SCC 568
3 (1988)1 SCC 174
4 AIR 1991 SC 1994;

petitioners in July-August,2009 for execution of works relating to engineering, planning and design, supply of all equipments and materials (including spares), execution of civil work including foundation, installation and erection, testing and commissioning for the establishment of sub-stations and associate transmission lines with end base and training to the staff of respondent no.1 for different regions in the State of Maharashtra as contained in the award letters. It is also not in dispute that the petitioners had submitted the required bank guarantees to respondent no.1 under the terms and conditions of the award for the purposes of the mobilization advance and performance of the contractual works. The petitioners also had started executing the contractual works till in the year 2012 disputes and differences arose between the parties. The case of respondent no.1 at the relevant time being that the petitioners are in breach of the obligations under the contracts in question. The petitioners on the other hand contended that respondent no.1 was in breach of its obligation as respondent no.1 could not obtain clearance in respect of the right of way from the land owners. In February 2012 respondent no.1 terminated both the contracts awarded to the petitioners. Respondent no.1 also sought to invoke the bank guarantees as submitted by the petitioners. Petitioners being aggrieved by invocation of the bank guarantees approached the Court of Additional Judge, City Civil Court at Hyderabad, praying for injunction on the invocation of the bank guarantee. Initially an injunction was granted by an order dated 26 June 2012 passed by the said Court. Respondent no.1 also floated fresh tenders. The proceedings before the City Civil Court at Hyderabad was ultimately disposed of as the Court has no jurisdiction. The parties having agreed under the contract that the Court at Mumbai would have jurisdiction.

36. The petitioners approached this Court in a petition under Section 9 of the Arbitration and Conciliation Act,1996 (Arbitration Petition (lodg) No.864 of 2012) praying for interim reliefs when this Court directed Institution of Engineers (India) to appoint a qualified engineer as commissioner to visit all 23 sites, after giving intimation to both the sides and carry out inspection and inventory of the work, executed and completed by the petitioners and the material equipments lying in stock at all the said sub-stations site. Further the parties also referred the disputes to an arbitral tribunal. Before the arbitral tribunal the parties entered into a settlement agreement dated 12 October 2012 and in terms of the said settlement the arbitral tribunal made an award in accordance with the provisions of Section 30(3) read with Section 31(3) of the Act.

37. A perusal of the settlement agreement in terms of which the

arbitral award has been made clearly records that respondent no.1 had agreed that the petitioners as per the terms and conditions of the settlement agreement would execute the A and A1 works. In clause 7 of the settlement agreement it was agreed between the parties that the remaining sub-stations and associated lines thereof on Group C which are 8 in number would be kept on hold till 31 March 2013. However, with the conditions which were set out in clauses (a) to (d) of Clause 7 of the Settlement terms. Further the obligations of each party were also set out in clause 8. It would be necessary to extract Clause 7 and 8 so as to appreciate as to what was actually agreed by the parties in regard to the incomplete works under the contracts in question. Clause 7 and 8 read thus:-

> 7. As to works of Group – C.
>
> The remaining sub-stations and associated lines thereof, of Group C, are 8 (eight) in number. Those will be kept on hold till 31^{st} March, 2013 by the Respondent, with the following stipulations.
>
> (a) <u>Considering the work progress of the Claimants about the work of the sub-stations and associated lines mentioned in the above Groups A and A1, the Respondent reserve its right to commence the work of any number of sub-stations and associated lines, as mentioned in Group-C, through the Claimants or through any other Agency for the completion of the work.</u>
>
> (b) This work if given to the Claimants, the same shall be completed by the Claimants within a period of 6 (six) months (excluding Months of July to September) from he date of commencement order by the Respondent.
>
> (c) In the event the Claimants fail to complete the above works of sub-stations along with associates lines, those shall be given out of the Group C, within the time limit as mentioned above, it would result in handing over of all the sites of such works to the Respondent.

> (d) In the above situation, the measurement of works done and inventory of the material at site will be recorded by the Chief Engineer (Contracts and Monitoring) of the Respondent, by calling the representatives of the Claimants by giving 7 (seven) days notice. <u>The Respondent shall complete the balance works of Group C at the risk and cost of the Claimants as per the procedure to be followed for Group B.</u>
>
> 8. Obligations of each party-
> (1) ……. …..
> (2) The Claimants shall submit fresh/amended Bank Guarantees for the above mentioned works disclosed in Group A, A1 and C for its security (5% of Total Work Order Value) within 10 (ten) days from the date of Arbitral Award and for performance (5% of Total Work Order value) as per Implementation Agreement within 10 (ten) days from handing over of the complete commissioned Project
> …. … … …
> 8(5) The Respondent will communicate to the concerned bankers about giving up the rights over old Bank Guarantees, which are not encashed, after the claimants giving the fresh/amended Bank Guarantees for the works mentioned at Group A, A1 and C.
> …. … ….
> 8(7) Respondent shall recover the balance mobilization advance from the dues payable to the Claimants with respect to the work of Group B. However with respect to the remaining works of Group A, A1 and C, recovery shall be made as per the Implementation Agreement. For the mobilization advance as to Group A, A1 & C. Claimants shall give a fresh/Amended Bank Guarantees to the Respondent within 10 days from the date of Arbitral Award.
>
> 8(8) The payment of pending bills will be made within 30 days from the satisfactory commencement of works mentioned at Group A, A1 and 60 days in case of works of Group C, subject to dependency clause and compliance with Clause No.8(7) of above.
>
> (emphasis supplied)

38. It is thus clear that considering the work progress of the claimants in regard to the work of the sub-stations and the associated lines in Group A and A1, respondent no.1 reserved its right to commence the work of “any number “ of sub-stations and associated lines as mentioned in Group C, either through the petitioners or through any other agency

for the completion of the work. In clause 7(b) it was agreed that if the work pertaining to Group C was to be completed by the petitioners then the same shall be completed within six months from the date of the commencement order. In clause (d) it was agreed that in the event of failure of the petitioners to complete the work, a measurement of the works done would be taken and inventory of the material at the site would be recorded by the Chief Engineer. It was further agreed that the respondent no.1 however shall complete the balance work of Group C at the risk and cost of the petitioners as per the procedure to be followed for Group B.

39. Clause 5, 6 and 7 as noted above were required to be read alongwith clause 8 which pertain to obligations of each party. One of the obligations being that the petitioners shall submit fresh amended bank guarantees for the works in Group A, A1 and C for its security at 5% of the total work order value within 10 days from the date of the arbitral award and for performance 5% of total work order value as per implementation agreement within 10 days from handing over of complete commissioned project. In sub-clause (5) of clause 8, respondent no.1 was to communicate to the concerned bankers about giving up rights over old bank guarantees which were not encashed, after the petitioners giving the fresh / amended bank guarantees for the

works under Group A, A1 and C. In sub-clause (7) of clause 8 it was agreed that respondent no.1 shall recover the balance mobilization advance from the dues payable to the petitioners with respect to the works of Group B and however, with respect to the remain works of Group A, A1 and C recovery shall be made as per the implementation agreement. It was agreed that for mobilization advance as to Group A, A1 and C, petitioners shall give fresh/amended bank guarantees to respondent no.1 within 10 days of the arbitral award. In sub-clause (8) of clause 8 it was agreed that payments of bills will be made within 30 days from the satisfactory commencement of the work mentioned in Group A, A1 and sixty days in case of works of Group C subject to dependency clause and compliance with clause 8(7).

40. It is thus quite clear that all the works under Group A, A1 and Group C were being executed by the petitioners when the disputes arose. Respondent no.1 being of the opinion that the petitioners were in breach of the contractual terms and were not meeting the timelines, in fact terminated the contract in February 2012 and invoked the bank guarantees for utilizing the amounts thereunder for the purpose for which the bank guarantees were issued. The fact that the petitioners was undertaking Group A , Group A1 and Group C works which are total 23 sites also is not in dispute as clearly seen from the order dated 10 July

2012 passed by the learned Single Judge of this Court (S.J.Kathawalla, J.) in the Section 9 petition filed by the petitioners, in which the Court directed that the qualified engineers appointed by Institute of Engineers (India) shall visit all 23 sites to carry out inspection and inventory of the work and material equipments lying in stock at all the said sub-stations' sites which includes the Group C sub-stations also. On this background in Clause 7 the parties agreed that part of the eight Group C work of the remaining sub-stations and associated lines would be kept on hold till 31 March 2013 and would be permitted to be undertaken by the petitioners as per clause (a), (b) and (c) of Clause (7) which was only after respondent no.1 considers the work progress in Group A and Group A1. In Clause 7(a) respondent no.1 reserved its right to commence the work of any number of sub-stations and associated lines in Group C either through the claimants or through any other agency for the completion of work. Further in Clause 7(d) the parties agreed that respondent shall complete the balance work of Group C at the risk and cost of the petitioners.

41. It is thus quite clear that the Group A, A1 and Group C work which was originally awarded could not be completed by the petitioners within the time limits. Further even Group A and A1 works could not be completed by the petitioners as per the timelines under the settlement

agreement that is by 15 March 2013. Further Group C work which was originally awarded and another opportunity of completing the same under the settlement terms also could not be availed by the petitioners resulting into a consequence that respondent no.1 was required to get the same completed by appointing third party contractors and making substantial payments to them as per the clear reading of Clause 7(a) and 7(d) of the Settlement Agreement. However, as per the clear terms of clause 7(d), respondent no.1 was to get the works executed from the third parties at the costs of the petitioners.

42. Thus a cumulative reading of the clauses 5 to 8 of the settlement agreement would clearly indicate the intention of the parties under the settlement agreement/arbitral award was that the petitioners would get a fresh opportunity to complete the works even under Group C which had remained incomplete and unfulfilled alongwith the other works and for which the petitioners also renewed the bank guarantees as noted above. The petitioner however could not complete the works and consequently, in accordance with the terms and conditions of the settlement agreement, it can be certainly said that respondent no.1 was entitled to invoke the bank guarantees in question for the works remaining incomplete and unfulfilled at the hands of the petitioners. It cannot be said that if the invocation is for such reason, it

would be in any manner illegal.

43. It however needs to be observed that the above discussion is in regard to the submissions on the merits of the contractual terms as argued on behalf of the parties. However, when it comes to an injunction to be granted by the Court on invocation of the bank guarantees, these disputes on merits may not be of absolute relevance. This for the reason that the principles of law in regard to an injunction on invocation/encashment of the bank guarantee are well settled. A bank guarantee is an independent contract between the bank and the beneficiary of the bank guarantee. The terms and conditions of the bank guarantee are of extreme relevance when a party seeks an injunction on the encashment. In the present case admittedly the banks have agreed to make payment "unequivocally and unconditionally" to respondent no.1 on the invocation of the bank guarantees. In a situation of this nature the Court can restrain the bank in not discharging its obligations under the bank guarantees principally only when there is a clear case of an egregious fraud which is to the notice and knowledge of the bank and secondly when a case of special equities which would result in irreparable injury, prejudice and injustice would be meted out to the party furnishing the bank guarantee. In **U.P.State Sugar Corporation** (supra) the Supreme Court has held that the Courts are required to be

slow in granting an injunction to restrain the realization of a bank guarantee. It was held that the bank would be required to honour the guarantee as per its terms irrespective of any dispute raised by the customer, failing which the very purpose of giving such bank guarantee would stand defeated. It was held that the Courts have carved out only two exceptions for injunction to be granted, firstly that there has to be a fraud in connection with a bank guarantee which would vitiate the very foundation of such bank guarantee, and secondly where allowing the encashment of an unconditional bank guarantee would result into an irreparable harm and injustice to one of the parties concerned. The Court also considered its earlier decision in the ***UP Co-operative Federation Ltd.*** (supra), and the principles as laid down in the said decision were discussed in para 12 of the decision, in paragraphs 15 and 16 the Supreme Court held as under:-

> 15. Our attention was invited to a number of decisions on this issue- among them, to Larsen & Toubro Ltd vs Maharashtra Seb 5 and Hindustan Steel Workers Construction Ltd Ltd vs G.S.Atwal & Co (Engineers) (P) Ltd 6 as also to National Thermal Power Corpn Ltd vs Flowmore (P)Ltd. The latest decision is in the case of State of Maharashtra vs National Construction Co where this Court has summed up the position by stating (SCC p.741 para 13).
>
> " The rule is well established that a bank issuing a guarantee is not concerned with the underlying contract between the parties to the contract. The duty of the bank under a performance guarantee is created by the document itself. Once the documents are in order the bank giving the guarantee must honour the same and make payment ordinarily unless there is an allegation of fraud or the like. The courts will not interfere directly or indirectly to withhold payment, otherwise trust in commerce internal and international would be irreparably damaged. But that does not mean that the parties to the underlying contract cannot settle the disputes with respect to allegations of breach by resorting to litigation or arbitration as stipulated in the contract. The remedy arising

ex contractu is not barred and the cause of action for the same is independent of enforcement of the guarantee."

The other recent decision is in *Hindustan Steel works Construction Ltd vs Tarapore & Co.9.*

16. Clearly, therefore, the existence of any dispute between the parties to the contract is not a ground for issuing an injunction to restrain the enforcement of bank guarantees. There must be a fraud in connection with the bank guarantee. In the present case, we fail to see any such fraud. The High Court seems to have come to the conclusion that the termination of the contract by the appellant and his claim that time was of the essence of the contract, are not based on the terms of the contract and therefore, there is a fraud in the invocation of the bank guarantee. This is an erroneous view. The disputes between the parties relating to the termination of the contract cannot make invocation of the bank guarantees fraudulent. The High Court has also referred to the conduct of the appellant in invoking the bank guarantees on an earlier occasion on 12.4.1992 and subsequently withdrawing such invocation. The court has used this circumstance in aid of its view that the time was not of the essence of the contract. We fail to see how an earlier invocation of the bank guarantees and subsequent withdrawal of this invocation make the bank guarantees or their invocation tainted with fraud in any manner. Under the terms of the contract it is stipulated that the respondent is required to give unconditional bank guarantees against advance payment as also a similar bank guarantee for due delivery of the contract plaint within the stipulated period. In the absence of any fraud the appellant is entitled to realise the bank guarantees."

A similar view was taken by a Three Judge Bench of the Supreme Court in the decision in ***General Electric Technical Services Company Inc.****(supra)*. In para 10 of this decision the Supreme Court made the following observations:-

10. The High Court has observed that failure on the part of GETSCO to make a reference to mobilisation advance in the letter seeking encashment of the bank guarantee would be tantamount to suppression of material facts, in the sense that the mobilisation advance was under the contract to be recovered from the running bills. It was further observed that disclosure of such facts would have put the bank to further inquiry as to what was the amount covered by those bills and what was the corresponding amount of the mobilisation advance and to what extent the amount covered by the Bank guarantee remained payable. In any event, the High Court said that GETSCO could not demand full amount of the Bank guarantee on 17th April 1989. It seems to us that the High

> Court has misconstrued the terms of the bank guarantee and the nature of the inter se rights of the parties under the contract. The mobilisation advance is required to be recovered by GETSCO from the running bills submitted by the respondent. If the full mobilisation advance has not been recovered, it would be to the advantage of the respondent. Secondly, the Bank is not concerned with the outstanding amount payable by the GETSCO under the running bills. The right to recover the amount under the running bills has no relevance to the liability of the Bank under the guarantee. The liability of the Bank remained intact irrespective of the recovery of mobilisation advance or the non-payment under the running bills. The failure on the part of GETSCO to specify the remaining mobilisation advance in the letter for encashment of bank guarantee is of little consequence to the liability of the Bank under the guarantee. The demand by GETSCO is under the Bank guarantee and as per the terms thereof. The Bank has to pay and the Bank was willing to pay as per the undertaking. 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 preventing irretrievable injustice between the parties. The High Court in the absence of prima facie case on such matters has committed an error in restraining the Bank from honouring its commitment under the Bank guarantee."

44. The decision in ***Adani Agri Fresh Ltd*** (supra) as relied on behalf of the petitioners also reiterates the above principles.

45. Applying the above well settled principles of law to the facts in hand, at the outset it needs to be noted that when the petitioners initially approached this Court (S.J.Kathawalla, J.) on 19 December 2017, the petitioners had contended that respondents are fraudulently trying to invoke the bank guarantees and it is on this basis sought an ad-interim injunction. The Court had passed an order on 19 December 2017 (supra) which was the first hearing of this petition when the Advocate for respondents appeared and undertook to file vakalatnama.

46. A perusal of the petition as originally filed does not disclose any case of fraud to the knowledge of the bank or of such a nature that the above principles of law could be applied by the Court to restrain the bank from issuing payment under the bank guarantees. The petitioners however in the subsequent hearing and that too after almost one year became wiser and incorporated averments in paragraph 26B and 28A to 28D purporting to make out a case of a fraud and of special equities. A perusal of these averments also clearly show that these are only bald averments inserted completely as an afterthought. There are no averments of any fraud in connection with the bank guarantees as held by the Supreme Court which would be relevant in such context, which would require due consideration by the Court. This apart, a reading of these amended paragraphs by which the petitioners intend to contend that there is fraud as played by respondent no.1 clearly indicate that these are contentions of the petitioners on the merits of the settlement agreement. I have thus no manner of hesitation to conclude that the petitioners have miserably failed to make out any case much less a prima facie case for an injunction to be granted on invocation of the bank guarantees when tested on the principles of law as noted above.

47. In so far as the case of special equities as urged by the learned Counsel for the petitioners, except the bare mention of these words in

paragraph 28D there is no foundation whatsoever to this case. Thus, even this contention of the petitioners cannot be accepted and is liable to be rejected.

48. In so far as the contention of the petitioner referring to the order passed by this Court in Arbitration Petition (L) No.864 of 2012 and clause 4 of the said order in the invocation letter that such a reference would amount to a fraud, also cannot be accepted. This is clear not only from the plain reading of the said order dated 10 July 2012 passed by the Court which does not bear any clause 4 as also the said order by no stretch of imagination had any relevance in regard to the bank guarantees in question. There appears to be some carelessness and/or a mistake on the part of the concerned officer of respondent no.1 in making a reference to the said order passed by the Court. In any event the bank has not come forward to say that the bank was guided by such reference or it is a fraud. Further what would be relevant are the basic terms and conditions of the bank guarantees namely that it is unconditional and unequivocal. Such a reference in the invocation letter cannot be termed as a fraud in connection with the bank guarantees so as to accept the contention as urged on behalf the petitioner that the invocation letters amount to a fraud.

49. In the light of the above discussion it is quite clear that the petitioners have raised pure contractual disputes against respondent no.1 which are required to be agitated in appropriate proceedings, in praying for an injunction on encashment of the bank guarantees. Thus, I am of the considered opinion that no case whatsoever is made out by the petitioners for grant of any relief in this petition.

50. Having so observed that the petitioners would not be entitled for any relief, it however needs to be noted that the present petition has remained pending for quite some time. The petition was also dismissed for non-prosecution on 5 December 2018, however, the same came to be restored by an order passed on 19 December 2018. In the intervening period the respondent no.1 had received an amount of Rs.3,36,37,268/- under the bank guarantees from respondent no.3-IDBI Bank Ltd. There is a prayer as made in the petition that the said amount be returned by respondent no.1 to respondent no.3-IDBI Bank, as the said amounts are received by respondent no.1 in breach of the orders dated 17 December 2018 read with 19 December 2018. As respondent no.1 was entitled to invoke the bank guarantees and received the amount, it would be required to be held that respondent no.1 was entitled to the said amounts. The said amount is now deposited in this Court by respondent no.1 on its own volition in the

proceedings of *suo motu* Contempt Petition no.44 of 2019. The return of the amount, therefore, shall be subject to the orders which would be passed in the contempt proceedings.

51. Resultantly, the petition is without any merit. It is accordingly rejected. Interim orders stand vacated. No costs.

52. At this stage Mr.Bharucha, learned Counsel for the petitioners seeks continuation of the ad-interim orders. The request is opposed by Mr.Desai, learned Counsel for Respondent no.1. However, as the ad-interim orders have continued to operate for quite some time, they shall continue to operate for a period of six weeks from today.

[G.S. KULKARNI, J.)