

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Reserved on: March 16, 2019

Pronounced on: March 19, 2019

O.M.P.(I)(COMM) 79/2019

ATUL GUPTA & ORS.

..... Petitioner

Through: Mr. Jayant Mehta, Mr. Aaditya Vijay
Kumar, Ms. Liza M. Baruah,
Mr. Vipin Tyagi and Ms. Akshita
Katoch, Advocates.

versus

S. CHAND AND COMPANY LIMITED & ANR.

..... Respondents

Through: Mr. Arun Kathpalia, Senior Advocate
for R-1 with Briefing Counsel
Ms. Jagriti Ahuja, Mr. Amol Sharma
and Mr. Ateev Mathur, Advocates for
R-2(HDFC Bank).

JUDGMENT

SANJEEV NARULA, J

1. The present petition under Section 9 of the Arbitration and Conciliation Act (hereinafter referred to as 'the Act') seeks order of injunction restraining Respondents from encashing performance Bank Guarantee No. 003GT 011064008 dated 4th March 2016 of HDFC Bank (Respondent No. 2), furnished by the Petitioners in favour of Respondent No.1 for an amount of Rs. 10 crores.

Brief Background

2. Petitioner Nos. 1 to 3 are the share holders of Petitioner No. 4 Company (formally known as Saraswati House Pvt. Ltd). Respondent No. 1 is a publishing and educational service enterprise engaged in the business of printing books and other reading materials for primary as well as higher education. Sometime in 2014, the Petitioner and the Respondent no. 1 negotiated for the sale of the shareholding of New Saraswati House (India) Pvt. Ltd (hereinafter referred to as 'NSHPL') culminating into the Business Transfer Agreement (BTA) dated 25th April 2014. The BTA was executed between Saraswati House Private Limited (hereinafter referred to as "SHPL"); Petitioner Nos. 1 to 4 (shareholders and stakeholders of SHPL) and another newly incorporated entity New Saraswati House (India) Private Limited. Under this agreement, for a consideration of Rs. 67,00,00,000/- (Rupees Sixty Seven Crores Only), SHPL acquired all rights and titles and interest in the assets (including the titles, brand names, and related goodwill of SHPL) and assumed the liabilities of the business of NSHPL as a going concern.

3. Thereafter, NSHPL executed the Share Subscription cum Purchase Agreement (SPA) dated 8th May 2014 between the Petitioner Nos. 1 to 4 i.e. the shareholders of NSHPL (hereinafter referred to as the "Original Shareholders"); Respondent No. 1 (hereinafter referred to as "SCCPL") and Vikas Publishing House Private Limited (hereinafter cumulatively to be referred as "New Shareholders").

4. Clause 15.3 of the said SPA contains following non-compete and non-

Solicitation provision:

“15.3. The Original Shareholders shall not and shall ensure that SHPL does not, for a period of 60 (sixty) months from the Closing Date ("Non-Compete Period"), directly or indirectly/(including through their Relatives and Affiliates) whether as an owner, partner, stockholder, joint venture partner, corporate officer, director, employee, consultant, principal, trustee, lender or licensor, or in any other similar capacity whatsoever, of or for any person, firm, partnership, company or corporation (other than for the Company or any of its affiliates), undertake the following within the Non Compete Territory during the Non-Compete Period:

(a) engage in, own, manage, operate, sell, finance, control or participate in the engagement, ownership, management, operation, sales, finance or control of, or be connected in any manner with, any business which competes with the Competing Business;

(b) approach or solicit or attempt to approach or solicit in connection with a Competing Business or interfere with, take away or divert the patronage of any clients, authors, publishers, customers or suppliers of the Company or New Shareholders, which are presently existing or identified as prospective, or who have become the clients, authors, publishers, customers or suppliers of the Company (or any of its Affiliates) during the last 3 (three) months from the Subscription Closing Date. For avoidance of doubt, it is hereby clarified that the restriction stated herein shall not extend to dealing with anyclients, authors, publishers, customers or suppliers of the Company or New Shareholders in connection with a business which is not a Competing Business and/or falls under Permitted Activities; or

(c) recruit or solicit (i) the employees or any Person who is or was employed by the Company, at any time in the 12 (twelve) months immediately prior to the date of making such an offer to such employee and was drawing cumulative: salary of Rs.20,000/-(Indian Rupees Twenty Thousand only) per month or more; or (ii) any Person who is or was employed by Company's Affiliates, at any time in the 6 (six) months

immediately prior to the date of making such an offer to such employee and was drawing cumulative salary of Rs.20,000/- (Indian Rupees Twenty Thousand only)per month or more; or (iii) induce any such employee of the Company or its Affiliates, to terminate his or her employment with, or otherwise cease his or her relationship with the Company (or any of its Affiliates), or interfere in any manner with the contractual or employment relationship between such employee on one hand and the Company (or any of its Affiliates), on the other hand. It is hereby clarified that the restriction under this Clause 15.3(c) is not applicable to such an employee who has been terminated by the Company or any of its Affiliates.”

5. Contemporaneously, an Assignment Agreement dated 15th May 2014 was also executed between SHPL and NSHPL whereby parties recorded terms and conditions of assignment of assigned titles, brand names and related goodwill of SHPL.

6. In the meantime, SHPL changed its name to Orange Associates PrivateLimited (Petitioner no. 4).

7. After a period of 2 years, parties entered into an Amendment Agreement dated 1st March 2016 modifying certain terms of SPA. In the said Amendment Agreement, purchase conditions precedent, that were required to be fulfilled by the Original Shareholders, were laid down. Clause 6.1 (iv) of the same provides for the furnishing of a bank guarantee in favour of Respondent No. 1 and NSHPL. The said clause reads as under:-

“6.1 (iv) the Original Shareholders shall have furnished to the New Shareholders and the Company a copy of the duly executed and stamped bank guarantee of Rs. 10,00,00,000/-

(Rupees Ten Crores), to guarantee the compliance and observance of the Non Compete Undertaking by the Original Shareholders and Orange Associates Private Limited ("Bank Guarantee"), in a form and manner acceptable to the New Shareholders and the Company;”

8. The non-compete and non-solicitation obligations of the Petitioner Nos. 1 to 4 and NSHPL under the Amendment Agreement are contained in Clause No. 10, which for the sake of ready reference is reproduced herein below:

“10. NON COMPETE AND NON SOLICITATION OBLIGATIONS

10.1 Non Compete Obligations of Shareholders and Orange Associates Private Limited

(i) The Original Shareholders undertake and warrant that they shall, and shall cause Orange Associates Private Limited to execute and to, at all times, comply with the provisions of the Non-Compete Undertaking.

(ii) In the event of any breach of the Non-Compete Undertaking by the Original Shareholders and/or Orange Associates Private Limited, SCCPL, shall issue a notice of same to the Original Shareholders and Orange Associates Private Limited.

(iit) The Original Shareholders agree and acknowledge that in case of breach of the Non Compete Undertaking, SCCPL, shall in addition to the rights available to it under this Amendment Agreement, the Subscription cum Purchase Agreement, Law and/or the Non Compete Undertaking, be entitled to invoke and encash the Bank Guarantee in full, in accordance with the procedure detailed under the Bank Guarantee.”

9. Petitioner No. 1 to 5 also executed a Non-Compete Undertaking dated 1st March 2016 (NCU). Under this Non-Compete Undertaking, Petitioner Nos. 1 to 5 jointly and severally undertook to be bound by and adhere to non-compete obligations which are necessary to be noted for deciding the present petition. The said clause reads as under:-

“I. Covenants and Undertakings

1.1 Each Covenantor, jointly and severally, irrevocably undertakes, agrees, covenants and confirms that he shall not and cause his Affiliates (present or future) and Relatives, to not directly and/or indirectly (including through their Relatives and Affiliates (present or future) whether as an owner, partner, stockholder, joint venture partner, corporate officer, director, employee, consultant, principal, trustee, lender or licensor, or in any other similar capacity whatsoever, of or for any person, firm, partnership, company or corporation (other than for the Company or any of its Affiliates (present or future))), undertake the following during the Non Compete Period: .

(a) engage **in, own**, sell, finance, control or participate in the engagement, ownership, management, operation, sales, finance or control of, or be connected in any manner with, any business which competes with the Competing Business; or

(b) Engage, associate, participate or be connected in any capacity whatsoever, directly and or indirectly (either through Affiliate (Present or future) or through any agent, client, author, publisher customer, consultant, agent, supplier or any other intermediary) with any Person who is engaged in any business which competes with the Competing Business so as to derive or obtain or attempt to derive or obtain, directly and or indirectly, and advantage or benefit (economic or otherwise).

1.2 The parties agree that nothing contained in contained in Clause 1.1 of this Undertaking shall apply to the carrying out of the Permitted Activities (as detailed in Clause 15.4 of the Share Subscription cum Purchase Agreement read with the Amendment Agreement) by the Covenantors and their Affiliates.

1.3 Each Covenantor, jointly and severally, hereby irrevocably undertakes, agrees, covenant and confirm that it shall cause each Former Affiliate and Affiliates (Present or future) of Former Affiliate, to not directly and/or indirectly (including through their Affiliates (present or future))) whether as owner, partner, Stockholder, joint venture partner, corporate officer, director, employee, consultant, principal, trustee, lender or licensor, or in any other similar capacity whatsoever, of or for

any person, firm, partnership, company or corporation (other than/or the Company or any of its Affiliates (Present of Future)), undertake the following during the Non Compete Period:

(a) Engage in, own, manage, operate, sell, finance, control or participate in the engagement, ownership, management, operation, sales, finance or control of, or be connected in any manner with, any business or activity involving the Former Affiliate Competing Business;

a. The Parties agree that the Original Shareholders shall execute the Bank Guarantee in favour of SCCPL as a security for the fulfillment of Covenantors' obligations under this Undertaking, and SCCPL shall have the right to invoke and encash the Bank Guarantee in accordance with the provisions of the relevant Transaction Documents in the event of breach of the provisions of this Undertaking by the Covenantors without any demur or protest from the Covenantors. The Parties acknowledge and agree that the rights of SCCPL under Clause 1.5 of this Undertaking is without prejudice to any other rights that SCCPL is entitled to under Law and the Transaction Documents.”

10. In accordance with the above noted provision, Petitioner Nos. 1 to 5 furnished an unconditional performance bank guarantee in favour of S. Chand and Co. (Respondent no. 1), which is the subject matter of dispute in the present petition. Petitioners received the notice dated 13th February 2019 from Respondent No. 1 alleging violation of non-compete obligations by Petitioner Nos. 1 to 5. In the notice, Respondent No. 1 alleged that the Petitioners had breached the covenant of NCU by indulging in competing business by incorporating the company under the name of NEXCEN which entity is stated to be engaged in distribution and publishing of books i.e. competing business. Several other allegations were also made by Respondent No. 1. This notice was responded to by the Petitioners vide

reply dated 15th February 2019.

11. The Respondent then issued another notice dated 11th March 2019, highlighting further breaches of the agreement and undertakings. The Petitioner refuted the allegations vide reply dated 15th March 2019. Respondent No. 1 has since invoked the bank guarantee vide notice dated 14th March 2019 and called upon Respondent No. 2 to release the entire guarantee amount, as the Petitioners (Principal Obligors) have failed to fulfill their obligations under the agreement. Aggrieved with this invocation and anticipating Arbitral proceedings, Petitioner seeks protection under section 9 of the Act.

SUBMISSIONS OF THE PARTIES

12. The Court has heard Mr. Jayant Mehta, learned counsel for the Petitioner and Mr. Arun Kathpalia, learned Senior counsel on behalf of Respondent No. 2 at considerable length. Mr. Jayant Mehta has referred to several terms and conditions contained in the SPA as well as the Amendment Agreement and NCU. The main plank of his argument is that there is no breach of non-compete obligations under the NCU or any of the terms in the SPA or the Amendment Agreement. He submitted that the grounds set up in the notice alleging violations of the NCU are frivolous and a figment of Respondent no. 1's imagination. The grounds raised therein are non-existent and the notice has been issued with the sole intent to somehow justify the invocation of the performance bank guarantee which could not have been otherwise invoked. He submits that the alleged breach of the covenant is erroneous and the allegations cannot be substantiated. NEXCEN has never directly

engaged in the distribution and publishing of books i.e. the competing business and the said company was incorporated on 26th April 2018 with the sole objective of selling of an immovable property bearing No. 113-114, Toy City, Ecotech III, Greater Noida owned by the Original Shareholders to a third party. Due to certain extenuating circumstances, the sale of the immovable property did not materialize and therefore the purpose for which NEXCEN was incorporated ceased to exist. The Original Shareholders have applied for striking off of the name of NEXCEN from the record of the Registrar of Companies. The said request is presently pending and would be permitted only after one year of incorporation of NEXCEN. The Company is defunct since April 2018 and is unconnected with any printing business. He, therefore, submits that the allegation of breach is misplaced.

13. The learned counsel for the Petitioner argues that in absence of any breach of the terms of NCU, the invocation of the bank guarantee being without any reasonable cause is a fraudulent attempt. Learned counsel further argued that in response to the first notice dated 13th February 2019, Petitioner had given valid explanation to each and every allegations made therein vide reply dated 15th February 2019. However, Respondent gave scant regard to the same and with a pre-conceived intent to invoke the bank guarantee, issued another notice dated 11th March 2019. Respondent did not care to verify the information and explanation offered by the Petitioner, but instead issued yet another notice reiterating the earlier allegations and also leveled further unsubstantiated allegations. The second notice, according to the learned counsel, is an improvisation of the first one, where allegations have been made on the basis of "reason to believe". He further submits both

in the first and second notice, no particulars of breach have been given; the allegations are vague and unspecific. Merely alleging breach does not justify the invocation of the bank guarantee. The learned Counsel has relied on the cases in *Union of India v Raman Iron Foundry (1974) 2 SCC 231*, *Gangotri Enterprises Limited v Union of India and Ors.*

14. Butressing the above submission, the learned counsel further submitted that the allegation qua non-compliance of the status of the premises mentioned in Part C of Schedule 4 of NCU is wholly misplaced and misconceived. He submits that when this allegation was leveled, in the first notice dated 13th February 2019, the Petitioner explained its position as under:

“Firstly, there is no requirement to make the undersigned provide a compliance report of the lease status of the premises as mentioned in Part C of Schedule N. Since there is no allegation of a violation in respect of the properties mentioned in Part C of the Schedule IV, there arises no requirement of providing any such lease status. The enquiry is not warranted and seems to be a roving and fishing enquiry.

In any case, there is no breach in respect of Part C of Schedule IV of the Undertaking. A compliance report for the lease status of the premises as mentioned in Part C of Schedule IV of the undertaking is as under:

- All the premises are occupied till date except that SCCPL has vacated one premises at D-177 & 178, Sector-63, NOIDA and we, the undersigned, are operating from this premises;
- We have transferred an unexpired lease period of FMPL from D-45&46 to D-177 & 178 since we had sold out our property at D -45&46 , Sector 63 at NOIDA;
- We have sold out our property at 4583115 & 4584115 at Daryaganj Delhi.”

15. He submits that in view of the above, the Respondents cannot contend that there is any breach of the terms of the NCU. He, therefore, submits that all the above indicates that the Respondents were creating grounds for invoking the bank guarantee. Respondent No. 1 is a dishonest beneficiary and the invocation is a fraudulent attempt. Additionally, he submitted that both the first and the second notice give an option to the Petitioner to cure the alleged breach. This cure provision according to him is also built in clause of 1.5 of the NCU which is reproduced hereunder:-

“1.5. The Parties agree that the Original Shareholders shall execute the Bank Guarantee in favour of SCCPL as a security for the fulfillment of Covenantors’ obligations under this Undertaking and SCCPL shall have the right to invoke and encash the Bank Guarantee in accordance with the provisions of the relevant Transaction Documents in the event of breach of the provisions of this Undertaking by the Covenantors without any demur or protest from the Covenantors. The parties acknowledge and agree that the rights of SCCPL under Clause 1.5 of this Undertaking is without prejudice to any other rights that SCCPL is entitled to under Law and the Transaction Documents.”

16. He submits that the invocation of the bank guarantee prior to the expiry of the cure period is thus contrary to the terms of the Contract.

17. Mr. Mehta also urged that the invocation of the Bank guarantee is also liable be stayed on the ground of special equities. He submitted that the invocation of the bank guarantee would cause severe financial hardship for the Petitioner as invocation of a bank guarantee would injure the financial credibility of the Petitioners with their bankers resulting in causing them embarrassment and diminishing future prospects for availing financial

facilities from banks and financial institutions.

18. Lastly, Mr. Mehta submitted that the NCU is unenforceable in law, being violative of Section 27 of the Indian Contract Act. He submitted that the non-compete condition is an unreasonable restriction on the Petitioner Company to carry on its business. The agreement thus being in teeth of the Section 27 of the Indian Contract Act cannot be relied upon by the Respondents for the purpose of invoking the bank guarantee. In support of this submission, the learned counsel relied upon the judgment of the Supreme Court in *Gujarat Bottling Co. Ltd v. Coca Cola Co. 1995 5 SCC 545* and *Le Passage to India Tours and Travels v Deepak Bhatnagar, (2014) 209 DLT 554*.

19. *Per contra*, learned senior counsel for the Respondent argued that the Petitioner has not made full disclosure of the facts. The Petitioners have approached the Court with tainted hands. The expression, “polluting the pure stream of justice or touching the pure fountain of justice with tainted hands”, used by the Supreme Court in *Dalip Singh v State of UP(2010) 2 SCC 114* is squarely applicable. He submitted that after acquiring the subscription shares and the OCRDs, the new shareholders found the Petitioners to be directly and indirectly engaging in competing business and therefore a need was felt to re-negotiate the obligations and in these circumstances the Amendment Agreement of 2016 and the NCU came to be executed. This redefined the contours of the non-complete obligations to be performed by the Petitioners. In support of this argument, the learned senior counsel filed before this Court the communications exchanged with Full

Marks Private Limited (FMPL) defined as an “Affiliate” in the SPA. Learned senior counsel explained that these communications clearly established that Petitioners were not honest in their dealings and several infringements were pointed out. One such communication is dated 4th March 2015 written by Himanshu Gupta (S. Chand Private Limited) to Mr. Atul Gupta (Petitioner No. 1) wherein *inter alia* it is averred as under:-

“But immediately after the first tranche transaction and handover of management, new facts and issues started appearing which were never disclosed and represented to us at any stage. A few of them are very important and against the basis understanding of the transaction. These issues have been highlighted to you from time to time our transaction and operational teams. For the sake of brevity, I am just highlighting few issues which are very important.

a. Misrepresentation regarding the titles assigned to us. A few of them had already been assigned to one _____affiliate company M/s full Marks.

b. Consistent breach of intellectual property rights by the original shareholders and their affiliates company_____Full Marks and Langers.

c. Direct and indirect funding and support of business of affiliates by the original shareholders thereby breaching non-compete obligations viz, leasing out the premises to affiliates, transferring your shareholdings on a very low price.”

20. Mr. Kathpalia submitted that the circumstances evident from the said communications show the intent behind the Amendment Agreement and the NCU. This according to him was to ensure that Petitioners do not indulge in competing business. Mr. Kathpalia argued that the conditions imposed in the NCU did not deter the Petitioner and subsequently it came to the knowledge of the Respondents that the Petitioner assurances were eyewash.

They have incorporated a company with the sole objective of carrying on a competing business. Learned Counsel then pointed out that the objects of the Company in AOA, as evident from Form No. IN-33. The said clause reads as under:

“To carry on the business of printers, stationers, lithographers, type founders, stereo typers, electro typers, photographic printers, photolithographers, chromolithographers, engravers, die sinkers, book binders, designers, draughtsman, booksellers and publishers. To print, act as franchise, agent or otherwise to carry on the business of establishment of printing press of all types.”

21. Further, Clause 3.3 (b) provides for ancillary objects, in furtherance of the objects specified in Clause 3 (a). He submits that there is no other main object of the company and the incorporation of the Company is in clear conflict with the undertaking given in the NCU and thus the invocation is valid. The bank guarantee in question is clearly an unconditional one and the terms of the Contract only require an issuance of the default notice and nothing more. This has been done and therefore the invocation is in terms of the Contract. There was good and sufficient cause for invoking the bank guarantee, as is evident from the two notices dated 13th February 2019 and 11th March 2019. He also argued that there is no cure period defined in the agreement and the Petitioner's submissions are misleading. He explained that originally, the clause 3 of the bank guarantee dealing with invocation provided for a three days default notice, however, subsequently the said clause was amended and pursuant thereto, there is no stipulation for giving a default notice for curing the breach. The amended clause of the Bank guarantee is hereunder:-

“3.1 The Principal Obligors shall comply with their obligations as contained in the Undertaking. In case of breach of the obligations contained in the Undertaking, the Beneficiary shall have the right to invoke and/or draw upon this Bank Guarantee for the whole of the Guaranteed Amount by providing written notice to the Bank, with a copy to the Principal Obligors, in the format set forth in Schedule II ("Invocation Notice"). The parties hereto agree that the presents contained herein are absolute and unequivocal and any such demand made by the Beneficiary shall be conclusive and binding on the Bank, notwithstanding any dispute(s) pending before any court, tribunal, arbitrator, conciliator or any other authority having or acquiring jurisdiction in the matter.”

In contrast, the unamended clause 3.1 reads as under:

“3.1 The Principal Obligors shall comply with their obligations as contained in the Undertaking.

In case of breach of the obligations contained in the Undertaking and a period of 3 days from the date of the Default Notice having expired without cure of the relevant breach. The Beneficiary shall have the right to invoke and/or draw upon this Bank Guarantee for the whole of the Guaranteed Amount by providing written notice to the Bank, with a copy to the Principal Obligors; in the format set forth in Schedule II ("Invocation Notice"). The parties hereto agree that the presents contained herein are absolute and unequivocal and any such demand made by the Beneficiary shall be conclusive and binding on the Bank, notwithstanding any dispute(s) pending before any court, tribunal, arbitrator, conciliator or any other authority having or acquiring jurisdiction in the matter.”

22. Mr. Kathpalia further pointed out that FMPL which was a former affiliate presently continues to be in possession of one of the properties mentioned in Part C of the Schedule 4 to the NCU. In terms of Clause 2.1 of NCU, Original Shareholders were required to seek permission of the New

Shareholders for extending/renewing lease to the former affiliates or to entities engaged in a competing business. FMPL was earlier a tenant in property No. D-45/46, Sector 63, Noida in an unregistered lease arrangement and the said entity has now been permitted to move to D-177/178, Sector 63, Noida and this amounts to extension of the lease which is in contravention to Clause 2.1 of the NCU.

23. Lastly, Mr. Kathpalia distinguished the judgments relied upon by the Petitioner *vis a vis* Section 27 of the Contract Act and argued that the said decisions are not applicable to the facts of the case.

REASONING AND ANALYSIS

24. Before discussing the rival contentions of the parties, it is essential to record that the case in hand relates to invocation of bank guarantee. The law on this issue is now no longer *res integra*. The views of the Supreme Court and also of this Court have been consistent. There are several judgments and amongst those, learned counsel for the Respondent has cited few such as *U.P. Coop. Federation Ltd. V. Singh Consultants and Engineers (P) Ltd* (1988) 1 SCC 174, *U.P. State Sugar Corpn. V. Sumac International Ltd.*, (1997) 1 SCC 568, *I.T.C. Ltd. V. Debts Recovery Appellate Tribunal*, (1998) 2 SCC 70, *Vinitec Electronics Private Ltd. v HCL Infosystems Ltd.* (2008) 1 SCC 544 and *Himadri Chemicals Industries Ltd. V. Coal Tar refining Co.*, (2007) 8 SCC 110. The principles for grant or refusal to grant an injunction to restrain enforcement of a bank guarantee have been succinctly defined in *Himadri Chemical Industry (supra)* as under:

“(i) While dealing with an application for injunction in the

course of commercial dealings, and when an unconditional Bank Guarantee or letter of credit is given or accepted, the beneficiary is entitled to realise such a Bank Guarantee or a letter of credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.

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

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

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

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

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

25. The above decisions thus define the scope of the jurisdiction of this Court. I will now proceed to deal with the submissions of the parties keeping in mind and applying the afore-noted principles. First and foremost, it is imperative to note the nature of the bank guarantee. A perusal of the same leaves no room of doubt that it is an absolute unconditional bank guarantee. As noted above, the exposition of law on the subject being clear in view of the several judgments noted above, the injunction against the invocation of such a guarantee cannot be granted except in situations of egregious fraud or irretrievable injuries to one of the parties. The question whether there is indeed a breach of Contract justifying an invocation of the bank guarantee,

in view of the clear and unambiguous terms of the bank guarantee, cannot be considered under section 9 of the Act. The ground of invocation has to be examined irrespective of the rival contentions and the disputes relating to the terms of Contract. Mr. Mehta's contention that since there is no breach of contract and therefore an invocation of a bank guarantee would fall in the category of "fraud" is without merit. This submission is completely contrary to the terms of the bank guarantee. I am afraid, this court cannot accept the same to be a ground to grant or refuse an injunction against the invocation between the bank and the Respondent No. 1. The condition as incorporated in the bank guarantee only requires the Petitioner to issue an invocation notice. Clause 3.1 reproduced above unequivocally states that the Bank will make the payment on demand by the beneficiary and such a demand is conclusive and binding on the bank, notwithstanding any dispute before any court or authority. The very purpose of the bank guarantee would be negated, in case, the submissions advanced by Mr. Mehta is accepted.

26. The Supreme Court has held that commitments of bank must be honored free from interference by the Courts. Otherwise, trust in commerce, internal as well as international, would be irreparably damaged. The only exceptions carved out, as noted above, are cases of fraud and irretrievable injustice, where the Courts would interfere. The petition does not show any fraud underlying the establishment of Bank Guarantee. The fraud, being one of the exceptions, is also of a very high degree, one which would vitiate the very foundation of the bank guarantee. The entire petition is abysmally silent on this aspect. The allegations of fraud have been leveled, but only to the effect that since the allegations of breach are false, the invocation of the

bank guarantee would tantamount to egregious fraud. Such vague and indefinite allegations do not satisfy the requirement of law. There is no factual foundation in support of the plea of fraud. The entire argument is premised on the allegation of breach of contract. I have no hesitation to say that this is not the correct position in law. Whether the breach is a valid one or not is to be examined by the Arbitral Tribunal. Even on merits, the submission is misconceived. The main object of the company NEXCEN is of a business in direct competition with the Respondent's business. In a Section 9 petition, the Court cannot accept the version of the Petitioner that the Memorandum of Association of NEXCEN inadvertently mentions the object as what is noted in para 20 above. Mr. Kathpalia is correct in saying that even if the submission of Mr. Mehta is accepted that the Company was incorporated for the purpose of sale purchase of an immovable property, at this stage, it has to be assumed that such sale/purchase would be in furtherance of the main object and none other. The incorporation of the Company, which according to the Petitioner is defunct as on date and is in the process of being struck off from the records of Register of Companies, would not in any way cure the breach committed. This incorporation *prima facie* is in breach of the terms of the NCU in terms of Clause 1.1 of the NCU as noted above. *Prima facie*, I am also of the view that striking off the company would not in any way cure the breach.

27. The contention of Mr. Mehta that the invocation is prior to the expiry of the cure period is untenable. The Court cannot read a cure period in the Clause 1.5 of the NCU referred above. There is no such cure period defined in the agreement. The unamended Clause 3.1 which makes a reference to

the default notice and a period to cure the breach, by consent between the parties, has been amended. The invocation therefore cannot be said to be contrary to the terms of the Contract. The notice dated 4th March 2019 invoking bank guarantee though uses the expression that the principle obligors have failed to cure the failure, however, this would not in any way render the invocation invalid. What would prevail is the terms of the Contract and the same do not provide for a cure period and the invocation cannot be said to be contrary to the terms of the bank guarantee or the contract. The reliance placed by the petitioner on the decisions of the Supreme Court in ***Raman Iron Foundry(supra)*** and ***Gangotri Enterprises (supra)***, is also misplaced. In ***Gangotri Enterprises (supra)***, there were also other reasons for restraining the respondents from encashing the bank guarantee. First of all, that the amount claimed by the respondents (therein) was not in relation to the contract in respect of which the performance bank guarantee had been furnished. Secondly, the works in relation to which the performance bank guarantee was furnished had been completed to the satisfaction of the respondents. Thus, the facts and circumstances in the present case are significantly different from both, in the case of ***Raman Iron Foundry (supra)*** as well as ***Gangotri Enterprises (supra)***.

28. The contention of Mr. Mehta that there is absolutely no material to show a breach of the contract, as discussed above, is not only beyond the scope of inquiry in the present petition but is also without merit as discussed above. Additionally, the question whether the lease period of properties in Noida have been extended, by allowing the affiliate to move from one to another, is also *prima facie* in conflict to the terms of the NCU. Certainly it cannot be

said that there is absolutely no case whatsoever for the Respondent No. 1 to invoke the bank guarantee, in view of the facts noted above. Whether the cause of action is adequate for invoking the bank guarantee is not a factor to be considered in deciding the question relating to invocation.

29. The other contention of Mr. Mehta that the NCU is unenforceable agreement being in conflict with Section 27 of the Contract Act is also not tenable. Firstly, this question cannot be examined in the present petition and secondly even if the contention is considered only for forming a prima facie view for the purpose of deciding the present petition, I still cannot come to the conclusion the way Petitioner wants the contract to be interpreted. This I say by noting specific clauses incorporated in NCU. Clause 1.6 of NCU records as under:-

“1.6 Each Covenantor acknowledges and agrees and shall cause their Affiliates and Relatives; Former Affiliates and their Affiliates, to acknowledge and agree that (i) the restrictions in this Undertaking are considered reasonable with regard to duration and scope for the legitimate protection of the Business and goodwill of the Company; and (ii) such undertakings are material for the willingness of the New Shareholders to undertake the transactions mentioned in the Transaction Documents. Each Covenantor further acknowledges and agrees and shall cause their Affiliates and Relatives; Former Affiliates and their Affiliates, to acknowledge and agree that in the event any restriction or provision of this Undertaking shall be found to be void, but would be valid if some part thereof was deleted or the scope, period or area of application were reduced, the above restriction shall apply with the deletion of such words or such reduction contained in this Undertaking valid and effective Notwithstanding the limitation of this provision by any Laws for the time being in force, each Covenantor shall undertake and cause their Affiliates and Relatives; Former Affiliates and their

Affiliates to undertake at all times to observe and be bound by the spirit of this Undertaking. Provided however, upon revocation, removal or diminution of the Law or provisions, as the case may be, by virtue of which the restrictions contained in this Undertaking were limited as provided hereinabove, the original restrictions would stand renewed and be effective to their original extent, as if they had not been limited by Law or provisions revoked.”

The aforesaid Clause used in the Contract has to be appreciated along with the exception 1 to Section 27 of the Indian Contract Act which reads as under:-

“Saving of agreement not to carry on business of which goodwill is sold.—One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein, provided that such limits appear to the Court reasonable, regard being had to the nature of the business.”

30. Thus, for the purpose of the present petition, at the threshold, while deciding an issue relating to invocation of a bank guarantee, the Court *prima facie* holds the agreement to be a valid one. Whether indeed such a clause is in conflict with Section 27, would be the subject matter of the Arbitration proceedings that perhaps the parties would shortly engage in. The judgments in the case of **Gujarat Bottling Co. Ltd** (*supra*) and **Le Passage to India Tours and Travels** (*supra*) are thus, not applicable to the facts of the present case.

31. Further, the plea of special equities raised by Mr. Mehta is to be noted only for rejecting the same. The second exception to the rule of granting

injunctions i.e. resulting of irretrievable injury has been held to be of such a circumstance that would make it impossible for the guarantor to reimburse himself, if he ultimately succeeds. It has to be decisively established and proved to the satisfaction of this Court that there would not be any possibility whatsoever of the recovery of the amount from the beneficiary, by way of restitution (*Dwarikesh Sugar Industries Ltd. V. Prem Heavy Engineering Works (P) Ltd (1997) 6 SCC 450*). This is neither the case here nor it has been argued as such. Likely consequences that would affect financial credibility do not fall in the second exception.

32. Needless to say, opinion expressed by this Court on disputed facts, is only a *prima facie* view. The arbitral tribunal as and when constituted shall decide the issues uninfluenced by the observations made herein.

33. In view of the aforesaid observations, the petitioner is not entitled to any of the reliefs prayed for in the present petition. The petition is hereby dismissed. No costs.

SANJEEV NARULA, J

MARCH 19, 2019/ss