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

Reserved on : 17.10.2019

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Pronounced on: 03.12.2019

+ O.M.P.(I) (COMM.) 234/2019

LARSEN & TOUBRO LIMITED

..... Petitioner

Through: Mr. Rajiv Nayar & Mr. Akhil Sibal,
Senior Advocates with Mr. Kirat
Singh Nagra, Mr. Kartik Yadav, Mr.
Pranav, Mr. Parinay T. Vasandani,
Mr. Karanvir Singh, Mr. Shantanu
Parashar & Ms. Manjira Dasgupta,
Advocates

versus

EXPERION DEVELOPERS PVT. LTD & ORS

..... Respondents

Through: Mr. Sandeep Sethi & Mr. Arvind
Nayar, Senior Advocates with Mr.
Krishna Vijay Singh, Mr. Manish
Dembla, Mr. Nachiketa Goyal, Mr.
Pradyuman Sewar & Mr. Parakram
Roy, Advocates for respondent No. 1.

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J.

1. This is a petition under Section 9 of the Arbitration & Conciliation Act, 1996 ('Act') seeking interim injunction restraining the respondents from invoking Retention Money Bank Guarantees ('RMBG') for Rs.13,84,35,000/- each dated 18.04.2014 and 08.09.2014 respectively as well as Performance Bank Guarantee ('PBG') for Rs.31,68,44,008/- dated 15.03.2013.

2. The brief facts required to be captured for deciding the present

petition are that on 29.09.2012, respondent No. 1 issued a letter of intent in favour of the petitioner intending to award the work of Design and Build of a Group Housing Project at a cost of Rs. 682 Crores. A letter of acceptance was issued on 05.02.2013 by respondent No. 1 and a contract was executed between the parties on 07.02.2013. The date of commencement of the work was 09.01.2013 and date of completion was 09.01.2016.

3. On 15.03.2013, respondent No. 4 issued PBG in favour of respondent No. 1 on behalf of the petitioner for an amount of Rs. 34,10,00,000/- valid upto 10.04.2016. As per the terms of the PBG, it was to remain valid till the petitioner's obligations were fulfilled under the Contract or until its first expiry whichever was earlier. The PBG was however, extended from time to time and finally reduced to a sum of Rs. 31,68,44,008/-.

4. Likewise, on 18.04.2013, RMBG was issued by respondent No. 2 in favour of respondent No. 1 for an amount of Rs. 6,92,17,500/-, subsequently revised to Rs.13,84,35,000/-. The second RMBG was issued by respondent No. 2 in favour of respondent No. 1 on 08.09.2014 for an amount of Rs. 6,92,17,500/-, subsequently revised to Rs.13,84,35,000/-. The completion date of the project was later extended to 31.08.2016 by an addendum to the Contract executed on 20.01.2015. A partial extension of time for completion of the Project was made by respondent No. 1 on 20.01.2017 for a period of 11 days. Request of the petitioner for extension of time till 30.06.2019 elicited no response from respondent No. 1. Subsequent requests for extension were again not responded to. The PBG was however extended to 30.06.2019 and the second RMBG was also extended to 30.06.2019.

5. It is the case of the petitioner that pursuant to a meeting held on 02.05.2019 between the parties, a request was made by the petitioner to

extend the time for completion of the Project till 30.10.2019, in accordance with clause 8.4 of the Contract.

6. On 11.06.2019, respondent No. 1 informed the petitioner by a letter that it was not in a position to accept the timelines proposed by the petitioner and requested the petitioner to complete the occupational certificate inspection by 15.06.2019 and to renew the PBG for full value. Attempts to resolve the disputes amicably between the parties were unsuccessful.

7. It is the case of the petitioner that in these circumstances, respondent No. 1 invoked four Bank Guarantees (hereinafter referred to as 'BGs') against the petitioner viz. the three aforementioned and one Advance Bank Guarantee. Constrained by this invocation, petitioner filed a petition in this Court under Section 9 of the Act being OMP(I)(COMM) 200/2019. The petitioner invoked Arbitration Clause vide its letter dated 24.06.2019 and intimated the nomination of its Arbitrator.

8. On 01.07.2019, petitioner terminated the Contract under clause 16.2 of the Contract on account of respondent No. 1 not issuing payment certificates; not releasing interim payments and mala fide invocation BGs.

9. On 03.07.2019, this Court disposed of the petition under Section 9 of the Act. The Court directed that the order dated 19.06.2019 passed earlier, by which respondent Nos. 2 to 4 had been directed not to transfer the funds pursuant to the encashment of the BG by respondent No. 1, would continue, leaving it open to either party to seek modification/variation of the said order before the Arbitral Tribunal, subject to the condition that the petitioner shall keep the BGs alive. The Court further observed that since the restraint order was on the ground that respondent No. 1 had prima facie not established that the pre-conditions mentioned in sub-clause 4.2 of the

Agreement had been complied with, the order will not prejudice respondent No. 1 from invoking the BGs in accordance with sub-clause 4.2 of the Agreement, however, making it clear that such invocation or the arbitration proceedings or any challenge to the invocation, shall not be prejudiced by any observations made in the order dated 03.07.2019.

10. Thereafter, respondent No. 1 issued letter dated 15.07.2019 in which it raised claims to the tune of Rs.135.6 crores against the petitioner and also sought to terminate the contract by terming the petitioner's termination of the contract as invalid. It was mentioned in the notice that respondent No. 1 had arrived at a preliminary determination of the claims and the amounts mentioned were subject to change, besides reserving the right to raise claims under other heads. Petitioner was called upon to make the payment within seven days of the receipt of the notice, failing which interest was payable at the rate of 18% p.a.

11. It is the case of the petitioner in the present petition that the issuance of letter dated 15.07.2019 is in violation of clauses 4.2, 2.5 and 3.5 as well as the judgment dated 03.07.2019. The petitioner replied to the said letter on 19.07.2019 and pointed out that the said letter was an afterthought and the contract stood terminated at the instance of the petitioner by virtue of clause 16.2 of the GCC.

12. On 23.07.2019, respondent No. 1 nominated its co-Arbitrator in response to the invocation notice by the petitioner. It is the case of the petitioner that on the same day, it was learnt that respondent No. 1 was seeking to invoke the PBG and the RMBGs without any notice to the petitioner.

13. The present petition was thus filed seeking an injunction to restrain

respondent no. 1 from invoking and encashing the RMBGs and PBG respectively mentioned hereinunder:-

S.No.	Name of the Bank	BG No.	Date of Issuance	Current Amount (In Crores)	Valid Upto
(b)	IDBI Bank	130380IBGF00113	18.04.2013	13.84	30.11.2020
		140380IBGF00361	08.09.2014	13.84	31.10.2019
(c)	IndusInd Bank	0007PR13013736	15.03.2013	31.68	31.10.2019

14. When the matter came up for admission before this Court respondent no. 1 had orally undertaken not to encash the BGs in question and the oral undertaking is continuing.

15. Learned senior counsels informed the Court that the Arbitral Tribunal had been constituted and the next dates of hearing fixed before the Tribunal were 15th, 16th, 18th and 19th October, 2019. Both parties, however, insisted that the matter be heard and finally decided by this Court on the question of injunction against invocation and encashment of the BGs rather than being left to the Arbitral Tribunal. During the pendency of the proceedings, the dates before the Arbitral Tribunal, as mentioned above, have been cancelled at the instance of the petitioner on the ground that the matter is pending in this Court. With the consent of both the parties, the present petition is being heard on the merits of the case.

16. Learned senior counsels for the petitioner contend that the present agreement between the parties is a unique contract and not a typical Design and Build contract and unlike the other run off the mill contracts, has inbuilt

safeguards against trigger happy invocation of the BGs. It is submitted that Sub-Clause 4.2 of the GCC which concerns invocation of BGs mandates that the employer shall not make a claim under the Performance Security, except for the amounts which the employer is entitled to and a detailed procedure has been prescribed to determine the said amounts. Sub-Clause 4.2 is a negative covenant which prohibits invocation of BGs without first quantification of the amount claimed. Sub-Clause 4.2 read with Clause 2.5 of the GCC and Clause 14.9 of the GCC read with Clause 1.1.4.11 of PCC and Clauses 7.5, 7.6 and 2.5 of GCC concerning RMBGs create a threshold, that before invocation of BGs, determination of amount due, must be made under Clause 3.5 by an Engineer appointed under Clause 3 of the GCC. The submission is that in the present case no such determination has been made by the Engineer of the amounts due from the petitioner and thus it is not open to respondent No. 1 to invoke the said BGs.

17. The next contention of the learned senior counsels is that under Clause 2.5 of the GCC, the employer is bound to give notice detailing the particulars of its claims to the contractor. The particulars shall specify the basis of the claim and shall include substantiation of the amount, which the employer considers himself to be entitled in connection with the contract. Clause 3.5 provides that the that the Engineer shall make a determination in accordance with the contract and obligates the Engineer to give the notice of determination to all parties along with supporting particulars. No such notice under Clause 2.5 or 3.5 has been served upon the petitioner.

18. The next contention is that the illegal termination of the agreement by respondent no. 1 under Clause 15.2 of the Agreement even otherwise does not entitle respondent no. 1 to invoke the BGs, inasmuch as the agreement

already stood terminated by the petitioner vide its letter dated 1.7.2019 and the BGs were liable to be returned immediately thereafter. Clause 15.1 provides that if the contractor fails to carry out any obligation under the Contract, the Engineer may by notice require the contractor to make good the failure and to remedy it within a reasonable time. Clause 15.2 provides for termination on certain grounds mentioned therein. One of the grounds entitling the employer to terminate under 15.2 is the failure of the contractor to comply with sub-clause 4.2 or with a notice to correct under sub-clause 15.1 (notice to correct). It is submitted that neither has the petitioner failed to comply with sub-clause 4.2 nor any defect notice was issued by respondent No. 1 under sub-Clause 15.1. The other grounds entitling the employer to terminate the contract as mentioned in clauses (b) and (c) under Clause 15.2 have also not arisen in the present case. The work was never abandoned by the petitioner and rather there is a breach on the part of respondent no. 1.

19. It is next contended that Clause 4.2 of the GCC prohibits invocation of performance security except when the following events occur:

(a) failure of the petitioner to extend the validity of the performance security.

(b) failure of the petitioner to pay an amount due as agreed by the contractor or determined under sub-clause 2.5 or Clause 20.

(c) failure to remedy, a default within 42 days of receiving a notice to that effect.

(d) Circumstances entitling respondent no. 1 to terminate the contract under Clause 15.2, irrespective, whether termination notice has been given or not.

None of the events mentioned above have arisen against the petitioner and thus the BGs could not have been invoked by respondent No. 1.

20. Learned senior counsels contend that the same BGs had been invoked by letter dated 15.6.2019 and was challenged by the petitioner in OMP (I) COMM 200/2019. The petitioner was successful in the said challenge and this Court has restrained the encashment of the BGs. Between the earlier judgment and today the only intervening action by respondent no. 1 is the issuance of termination notice dated 15.7.2019. A bare perusal of the notice indicates that the grounds seeking termination are the same that existed prior to the judgment. There is no fresh or changed circumstance giving rise to any ground for fresh invocation. The grounds urged earlier by respondent no. 1 were: (a) Alleged deficiencies in the work carried out by the petitioner; (b) Delay in completion of works. Perusal of the notice indicates that the same grounds have been taken in the fresh notice to invoke the BGs. The submission therefore is that once these very grounds were tested in the earlier judgment and the action of the respondent no. 1 was found to be illegal being contrary to the contractual provisions, respondent no. 1 cannot be permitted to again invoke the said BGs, without remedying the earlier action. Plea also is that the invocation on same grounds is barred by principles of *Res-Judicata*.

21. Learned senior counsels submit that in the earlier judgment the Court did not enter into the dispute regarding the correctness of the quantum of the monetary claim made by respondent no. 1. The Court examined the contract and its provisions and found that the various clauses of the agreement provided certain procedures which had to be followed prior to invocation of BGs. The Court specifically observed that Clause 4.2 required two distinct

conditions to be met before invocation viz. (1) one of the events specified in Clause 4.2 (a) to (d) has occurred and (2) such an event has resulted in respondent no. 1 becoming entitled for payments under the Contract, which have been determined by the Engineer after notice to the Contractor. Attention is drawn to paras 15, 16, 17, 24, 35 and 36 of the judgment. It is submitted that in para 35 of the judgment, this Court has expressly held that there must be a determination by an Engineer preceeded by a notice with particulars as per requirement of Clauses 4.2 read with Clauses 2.5 and 3.5. It is further submitted that for this reason the Court in para 43 of the judgment categorically held that though respondent no. 1 has the liberty to invoke the BGs afresh, but in such an eventuality procedure under Clause 4.2 shall be satisfied. It is thus not open to respondent no. 1 to ignore the said judgment and invoke the BGs without satisfying the conditions of Clause 4.2 read with Clauses 2.5 and 3.5. This judgment is binding on the parties and respondent no. 1 cannot reagitate the contentions which were rejected by the Court in the earlier round of litigation. The only way the respondent no. 1 can now invoke the BGs is by first following the procedure wherein after giving notice to the parties of the amount due, if any, determination would be made by the Engineer and no short cut can be adopted. Added to this is the contention that respondent no. 1 was conscious of this limited window given by the Court and therefore premised its invocation on purported compliance of the judgment, which is evident from a plain reading of the letter of invocation dated 22.07.2019.

22. Learned senior counsels further submit that even assuming that the termination notice amounts to a determination by the Engineer in terms of Clause 3.5, it was admittedly not preceeded by any notice with particulars as

required under Clause 2.5. If, on the other hand, it is a notice with particulars, then admittedly there is no determination under Clause 3.5. Surely, the notice dated 15.7.2019 cannot possibly satisfy both the requirements of being a notice under Clause 2.5 and a determination under Clause 3.5. Thus, the invocation is in the teeth of Clause 4.2 and the judgment dated 3.9.2019.

23. Per contra, learned senior counsels for respondent no. 1 argued that the contract in question was awarded to the petitioner for construction of a residential project, way back on 7.2.2013. The scheduled date of completion was 9.1.2016, but the petitioner abandoned the contract on 20.7.2019, despite seeking several extensions from time to time. Breaches by the petitioner have caused substantial financial loss to respondent no. 1, besides damage to its reputation. Claims by several aggrieved flat owners under RERA have been made against respondent no. 1.

24. It is submitted that vide judgment dated 3.7.2019 this Court had granted liberty to respondent no. 1 to invoke the PBG and RMBGs afresh and respondent no. 1 vide its termination notice dated 15.07.2019 has complied with the requirements of Clause 4.2 and determination has been made. Since it is a fresh invocation, the present case needs to be decided uninfluenced by any observations or findings in the earlier judgment as observed in the judgment itself. It is settled law that each successive invocation gives a fresh cause of action.

25. It is next contended that principles of Order XXXIX Rules 1 and 2 CPC would govern the proceedings under Section 9 of the Act. Any determination under Section 9 is only a prima facie adjudication and cannot operate as *res judicata* and would thus not bind subsequent proceedings. It

is vehemently argued that the law on restraint against invocation/encashment of unconditional BGs is more than settled. The BGs in question are unconditional and do not incorporate the provisions of the Contract. Under the terms of the BGs it is the sole discretion of respondent no. 1 as to when and under what circumstances they can be invoked and this is irrespective of any disputes under the main contract. The decision of respondent no. 1 regarding any breach etc. and the amount demanded is final and binding on the bank and the bank is not obliged to wait for any determination by the Engineer. Attention is drawn to the relevant Clauses of the PBG, which read as under:-

"1. Now, we the Guarantor, for the fulfillment of obligations of the Contractor under the Contract do hereby irrevocably and unconditionally agree and guarantee to immediately pay to the Employer, the sum not exceeding the Guaranteed Amount, without any demur, enquiry, protest or proof or satisfaction and without reference to the Contractor, merely on receipt of first written demand from the Employer stating that the amount is due by reason of any default, breach, failure, non-performance, delay or incapacity of/by the Contractor in relation to its obligations, covenants, undertakings, representations and warranties under the Contract. Any such demand made on the Guarantor by the Employer shall be binding and conclusive as regard the amount immediately due and payable by the Guarantor under this Guarantee, without any demur."

"3. We, the Guarantor, absolutely and conclusively undertake to pay to the Employer any money not exceeding the Guaranteed Amount so demanded notwithstanding any dispute or disputes raised by the Contractor, in any suit or proceeding pending before any court or Tribunal relating thereto, irrespective of the value, genuineness, validity, modification, regularity or enforceability of the Contract or the insolvency, bankruptcy, dissolution or liquidation of the Contractor or any

other circumstances whatsoever which might otherwise constitute a discharge or defence of a guarantor or a surety. The Guarantor shall have no recourse against the Employer for any payment made hereunder."

"5. We, the Guarantor, hereby agree that the decision of the Employer as to the default, breach, failure, non-performance, delay or incapacity of/by the Contractor in relation to its obligations, covenants, undertakings, representations and warranties under the Contract and as to the amount demanded under the Guarantee up to the total of the Guaranteed Amount shall be final and binding on us. "

6. The Guarantor's obligations under this Guarantee shall not be reduced by reason of any partial performance of the Contract. The Guarantor agrees that this guarantee shall not be wholly or partially satisfied or exhausted by any payments made to or settled with the Employer by the Contractor."

Provisions of the RMBG are stated to be to the same effect with some minor difference in the language.

26. It is thus sought to be argued that the said provisions of the BGs will govern the parties notwithstanding anything in the contract or any dispute between the parties, as BG is an independent contract, as held by catena of judgments. It is a fundamental principle of law that a case of invocation of BG must be decided without advertence to the contract. Reliance is placed on the judgments of the Apex Court as follows :

(a) Mahatma Gandhi Sahakra Sakkare Karkhane Vs. National Heavy Engg. Coop. Ltd. and Anr. (2007) 6 SCC 470.

(b) Gujarat Maritime Board Vs. L&T Infrastructure Development Projects Ltd. & Ors., (2016) 10 SCC 46.

27. It was next contended that it is no more res integra that injunction

against invocation or encashment of an unconditional BG can be granted only on two grounds which are the only exception to the general rule viz: (a) egregious fraud which vitiates the entire transaction and of which the bank has notice and (b) irretrievable injury/injustice. Reliance is placed on the judgment of *Vinitec Electronics Private Limited Vs. HCL Infosystems Ltd. (2008) 1 SCC 544, U.P. State Sugar Corporation Vs. Sumac International Ltd., (1997) 1 SCC 568*. It is submitted that in *U.P. State Sugar Corporation (supra)* the Apex Court further clarified that irretrievable injury would mean existence of exceptional circumstances of the kind which were subject matter of the decision in *Itek Corporation vs. First National Bank of Boston Etc. 566 Fed Supp 1210*, where it is absolutely impossible for the Guarantor to reimburse himself if he ultimately succeeds in final adjudication of the disputes.

28. It is argued that the petitioner's reliance on various terms of the contract is misconceived because BG is a separate contract and there is no necessity or obligation for the bank to look into the provisions of the main contract. The bank is obliged to honour the BG on its mere invocation by the employer. In the case of *Gujarat Maritime Board (supra)* the Apex Court was dealing with a similar controversy where the appellant alleged that the respondent had breached the conditions of the LOI and the cancellation was bad, the BG could not be invoked. The Apex Court held that the BG was a separate contract. No doubt that in terms of the BG also, the invocation was against the breach of the conditions in the LOI, but between the bank and the appellant the decision of the appellant as to the breach is absolute and binding. In the case of *Mahatma Gandhi Sahakra Sakkare Karkhane (supra)* the Apex Court had laid down that a person in whose favour the

Guarantee is furnished, cannot be prevented by an injunction in enforcing the same on the ground that the conditions for enforcement as per the terms of the agreement are unfulfilled. Attention of this Court is drawn to para 16 of the judgment dated 3.7.2019 to argue that the Court was conscious of the said principle that the BG is a separate and independent contract and injunction can only be granted on two principles, enumerated by the Court in the said para. Conscious of this law the Court had in para 20 observed that the bank cannot refuse to honour the Bank Guarantee on the ground that conditions of Clause 4.2 had not been satisfied by the petitioner and thus no restraint order can be passed against the Bank.

29. It is next contended by the senior counsels that in any case the judgment dated 3.7.2019 is in direct conflict with the law laid down by the Apex Court on invocation of BGs in the case of *Gujarat Maritime (supra)* etc. In *U.P. Cooperative Federation Ltd. vs. Singh Consultants & Engineers (P) Ltd. (1988) 1 SCR 1124*, it has been held that if an injunction is granted against the beneficiary when it cannot be granted against the Bank, it would amount to doing indirectly what cannot be done directly and the net effect would be to restrain the bank from honouring the BG. Thus, what applies to the bank must equally apply to the beneficiary.

30. Learned senior counsels submit that the Apex Court in *Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works (P) Ltd. and Anr, (1997) 6 SCC 450* has deprecated the practice of the High Courts, granting injunctions against encashment of unconditional BGs and not following the law laid down by the Apex Court. When a position in law is well settled by various pronouncement of the Apex Court, it would be a judicial impropriety for the High Courts to ignore the said decisions and

pass a contrary order. In about 25 reported judgments of the Apex Court on the issue of Bank Guarantees, only in three cases injunctions were granted and that too on their own peculiar facts.

31. It is submitted that a Division Bench of the Hyderabad High Court has held in *NCC Limited Vs. Sembcorp Gayatri Power Limited and Ors.* 2017 (6) ALT 354 that the law laid down by a Two-Judge Bench of the Apex Court in *Gangotri Enterprises Limited vs. Union of India & Ors.* (2016) 11 SCC 720 runs contrary to the law declared by the Three-Judge Bench of the Apex Court in *Ansal Engineering Projects Ltd. Vs. Tehri Hydro Development Corporation Ltd. and Anr.* (1996) 5 SCC 450. The Hyderabad High Court did not follow *Gangotri Enterprises Limited (supra)* on the ground that when conflicting judgments of the Apex Court are brought before the High Court it is bound to follow the judgment by a Bench of larger strength. Further, the fact that in *Hindustan Steel Works Construction Ltd. vs. Tarapore & Co. & Anr.* (1996) 5 SCC 34, the Apex Court had overruled a High Court judgment which had followed *Union of India (UOI) vs. Raman Iron Foundry* (1974) 2 SCC 231 was not brought to the notice of the Apex Court in *Gangotri Enterprises Limited (supra)*. Reliance has been placed on a Division Bench judgment of this Court in FAO(OS) 397/2014 titled as *Consortium of Deepak Cable India Limited & ABIR Infrastructure Private Limited (DCIL-AIPIL) THR ABIR v. Teestavalley Power Transmission Ltd.* decided on 15.09.2014, wherein summing up the law of BGs, it has been held that apart from the two exceptions of fraud and irreparable injury, there is no third exception, justifying a restraint on invocation or encashment of BGs.

32. On the question of the binding effect of the judgment dated 3.7.2019,

on this Court, learned senior counsels for respondent no. 1 submit that where a Court is faced with two conflicting judgments, one by a Co-ordinate Bench and the second by a higher Bench or the Apex Court, it is required to follow the latter not the former. It is only where the Co-ordinate Bench differs from the view taken by another Co-Ordinate Bench that the matter is referred to a Larger Bench. Reliance is placed on ***Siddharam Satlingappa Mhetre vs. State of Maharashtra & Ors. (2011) 1 SCC 694*** for the said proposition. Relying on the judgment in OMP (Comm) No. 149/2017 titled ***National Highways Authority of India Vs. NCC-VEE(JV)*** decided on 12.04.2018 and in OMP(T)(Comm) No. 22/2017 titled ***HRD Corporation (Marcus Oil & Chemical Division) vs. GAIL (India) Limited (Formerly Gas Authority of India Ltd.)*** decided on 24.04.2017, it is pointed out that two Single Judges of this Court did not follow judgments of the Division Bench as the same was contrary to the judgment of the Apex Court. Following this principle, this Court is not obliged either to refer the matter to a Larger Bench or be bound by the judgment of 03.07.2019, as the said judgment is directly in conflict with the settled law on the issue of injunction against invocation of unconditional BGs as laid down by the Apex Court and Division Bench of this Court in several judgments.

33. Taking the argument forward, learned senior counsels submit that even otherwise the Co-ordinate Bench in the said judgment has not passed any final order and the observations are only a prima facie view. Reading of para 43 of the judgment clearly indicates that liberty has been granted to respondent no. 1 to invoke the BGs afresh and thus this judgment cannot constitute *res judicata* between the parties. Reliance is placed on a judgment of a Co-ordinate Bench of this Court in ***Bharti Tele-Ventures Ltd.***

& Ors. vs. DSS Enterprises Pvt. Ltd. & Ors. 2018(6)ARBLR 118 (Delhi) wherein it is held that to attract the doctrine of *res judicata* there must be a conscious and final adjudication of an issue and an order passed on an application under Order 39 Rules 1 and 2 CPC, is only prima facie view and does not decide an issue finally between the parties.

34. Even otherwise it is contended that there can be no *res judicata* on a question of law. Relying on ***Bharti Tele-Ventures Ltd. (supra)*** it is contended that even between the same parties the Court is not bound to decide a lis in violation of law at successive stages, merely because an error of law may have been committed in the earlier order or judgment. Reliance is also placed on the judgment of the Apex Court in ***Canara Bank vs N.G Subbaraya Setty & Anr. being Civil Appeal No. 4233 of 2018*** decided on 20.04.2018.

35. Learned senior counsels vehemently contend that the public policy contained in settled law against injunction on invocation of BGs is to repose faith in commercial transactions. Various judgments have highlighted the importance of BGs in facilitating trade and commerce and the damage done in restraining their invocations. Reliance is placed on the judgments of the Apex Court in ***State of Maharastra & Anr. vs. National Construction Co., Bobay & Anr. 1996 1 AD (SC) 458.***

36. On the issue of compliance with para 43 of the judgment dated 3.7.2019, learned senior counsels for respondent no.1 highlight that pursuant to the liberty granted by the said judgment a preliminary determination of an amount of Rs.135.61 crores was made; Clause 15.2 of the agreement was invoked and termination notice was issued on 15.07.2019. It is only thereafter that respondent no. 1 invoked the BGs vide letter dated 22.7.2019.

The petitioner has never disputed that requirements of Clauses 4.2(c) and (d) have been satisfied and the only contention is that procedure in Clauses 2.5 and 3.5 had not been followed. It is pointed out that respondent no. 1 itself has been named as the Engineer in the Appendix to the Tender and the Court having noticed the same observed that either a prior notice of claims by respondent no. 1 or a determination as an Engineer was enough. Had the Court intended that the notice was to be given and the determination was to be done by the Engineer, the word used in para 35 would have been 'and' not 'or'. Thus, having given a notice of claims, requirement of the judgment has been met.

37. It is further contended by the learned senior counsels that sub-clause 3.5 requires the Engineer to make a fair determination but the respondent itself being an Engineer, any such determination would not be fair. Thus, the said provision is not enforceable. The determination and notice by respondent no.1, through its letter dated 15.7.2019 is sufficient compliance with clause 4.2. Reliance is placed on the judgment in *State of Karnataka vs. Shree Rameshwara Rice Mills, Thirthahalli (1987) 2 SCC 160*. It is further sought to be contended that keeping this in view the provisions contained in the contract pertaining to determinations, certifications, etc. by the Engineer have been done away with and the same is evident from the fact under clause 8.7 of the GCC, respondent no.1 has itself determined the delayed damages without following procedure in clauses 2.5 and 3.5 and the petitioner never raised any objection to the same. Similarly, clause 3.2 requires the Engineer to nominate a primary nominee. No such nominee was ever appointed and petitioner never raised any grievance. Various other instances, under several clauses of the GCC have been pointed out

where respondent no.1 has taken action, instead of an ‘Engineer’ and the petitioner acquiesced in each one of them.

38. It is submitted that without prejudice to the other contentions, respondent No.1 has determined its claims due from the petitioner to the tune of at least Rs. 135.61 crores in the notice dated 15.07.2019 and this is clearly a determination as required under the contract. Whether or not, the determination is correct and whether the procedure envisaged under clause 2.5 and 3.5 has been followed or not, is a dispute to be adjudicated by the Arbitral Tribunal. This is a matter to be decided at final stage and not, at any interim stage.

39. It is further contended that respondent no. 1 has invoked the BGs on the basis of clause 4.2 (c) and (b) which operate independently from clauses (a) and (b). The same are not subject to the procedure specified in clause 2.5. Reasons for termination are mentioned in paragraphs 20 to 34 of the notice, being delay of more than 3 years in completion of the work and non-rectification of the defects. If the requirement of having the amount determined under clauses 2.5 and 3.5 was applicable to all sub-clauses of clause 4.2, there was no need to have incorporated sub-clauses (c) and (d) as Clauses (a) and (b) would have sufficed for all eventualities. Thus, the interpretation given by the petitioner would render sub-clauses (c) and (d) otiose. Significantly sub clauses (c) and (d) do not refer to clause 2.5. Wherever, therefore, the parties intended, the said contract makes a reference to clause 2.5, such as the indemnity clause. Since the invocation is in terms of clause 4.2 (c) and (d), the same is valid.

40. Attention of this Court is drawn to a judgment passed by the coordinate Bench in OMP (I) (COMM) 271/2017 titled as ***IVRCL Ltd. vs.***

Rail Vikas Nigam Ltd. & Ors. 2017 decided on 22.12.2017, wherein the Court has rejected a similar contention and held that while it may be true that in terms of clause 2.5 the respondent may not have raised a separate claim, but the right to encash the BG upon termination of the contract is a separate right vested in the employer under clause 4.2 and 15.4 and the encashment cannot be injuncted. Clearly, upon termination, clause 15.4 GCC provides a discretion to the employer to either proceed in accordance with clause 2.5 or recover from the contractor any losses and damages incurred by the employer.

41. The next contention is that even assuming for the sake of arguments that clause 4.2 is applicable, the same would not apply to RMBGs. The requirement to furnish RMBGs is in sub clause 1.1.4.11 of the Particular Conditions of Contract (PCC). Under this there is no requirement to follow the procedure in Clause 4.2 herein. As per clause 14.9 of the GCC, petitioner can seek release of 50% retention money/ reduction by 50% upon issuance of taking over certificate and the remaining 50% upon expiry of the defect period plus 30 days. The option of giving a BG in lieu of deduction of retention money from the Bills is a concession to the petitioner. In the present case, the petitioner has failed to complete the work and is thus not entitled to the release of 50% of the RMBGs nor has the defect liability period expired.

42. Learned senior counsels for the petitioner, in the rejoinder reiterate the contention that the judgment dated 3.7.2019 is binding between the parties. Without there being a notice and a determination by the Engineer of the amounts payable by the petitioner, the invocation could not have been done on 22.7.2019. It is submitted that the respondent no.1 is trying to

justify its actions by stating that the earlier judgment is *per incuriam* and that the judgment itself gave them the liberty for a fresh invocation. Learned senior counsel submits that this is a complete misreading of the judgment. The coordinate Bench has clearly given a finding that there were prohibitory covenants in the contract and any action to invoke the BG were circumscribed by a prior action of determination under clause 3.5. The Court has clearly held that it is impermissible for respondent no.1 to invoke the BGs without following the contractual procedure. Yet, respondent no. 1 has chosen to invoke the BGs on the same grounds without following the procedure mandated under the contract and by this Court. The consideration and reasoning of the Court is clearly reflected in paras 11 to 12 and 19 to 25.

43. Learned senior counsels have argued that a bare reading of clause 2.5 shows that if the employer considers himself entitled to any payment under any clause of these conditions or under the contract, it shall give a notice with particulars. The Engineer shall then proceed in accordance with sub-clause 3.5 to determine the amount, if any, payable by the Contractor. Clause 3.5 requires the procedure to be followed before a fair determination is made and that requires notice to both parties with supporting particulars.

44. Attention of this Court is drawn to various other clauses of the agreement in order to substantiate the argument that wherever the parties so envisaged that clause 2.5 will apply, it has been so mentioned in the relevant clauses. Clause 7.5 which relates to rejection also provides that if the rejection and retesting causes the employer to incur additional costs, the contractor shall, subject to clause 2.5, pay these costs. Similarly, the procedure under clause 7.6 relating to remedial work is also subject to

procedure under clause 2.5. Similar clauses like 8.6, 9.4, 11.3 and 11.4 have been brought to the notice of this Court.

45. Learned senior counsels for the petitioner submit that after a notice of termination under sub-clause 15.2, which relates to termination by the contractor, has taken effect, the employer shall under Clause 16.4 of the GCC promptly return the performance security to the contractor. Since, the petitioner had terminated the contract by a notice dated 15.07.2019, the security ought to have been returned and cannot be encashed.

46. The petitioner next contends that by the judgment dated 03.07.2019, the Court has rendered some important findings that PBG and RMBG have to be treated identically; circumstances under clause 4.2 have not arisen and the Engineer has not determined any amount payable. It is submitted that para 24 of the judgment is very significant, where the Court has noted that respondent No.1 had agreed not to invoke the BGs except in circumstances mentioned in clause 4.2 in the contract and, therefore, it cannot now rely on the general principles of BGs to contend that no injunctions can be granted even though the invocation is in breach of the terms of the agreement. The Court has held that to accept this would be to defeat Section 42 of the Specific Relief Act, 1963 and make the terms of the contract otiose. It is argued that in para 32 of the judgment, the Court has taken note of several clauses of the contract which are dependent on the determination by the Engineer under clause 2.5 and in para 35. There is a clear finding after interpreting the said clauses that the first step would be the notice to the contractor giving relevant particulars followed by the determination by the Engineer of the amount due. The Court has categorically rejected the submission of the respondent that no determination is to be made by the

Engineer before invoking the BG in view of clause 4.2 of the agreement. In Para 36 of the judgment, the said principles have been made applicable to invocation of the RMBGs as well.

47. Learned senior counsels for the petitioner submit that the stand of the respondents has been self-contradictory as regards interpretation of para 43 of the judgment dated 03.07.2019. In reply to the application under Section 17 of the Act before the Arbitral Tribunal, the respondents have stated in para (s) that the respondents after complying with Clause 4.2 reinvoked the BGs on 23.7.2019. To the same effect is an averment in para (u). However, in para (w), it is averred that clause 4.2 is not applicable to RMBGs. Again in para (bb), it is averred that termination notice was issued on 15.7.2019 determining the claims and thereby complying with provisions of para 4.2. In contrast to this, a stand is being taken here that no determination is required under clause 4.2. Paras (s), (u), (w) and (bb) read as under:

“s) The contents of paragraph no. 13(s) of the Application are wrong, misleading and denied. It is wrong and denied that the Hon’ble Delhi High Court directed that the Respondent shall not be permitted to invoke certain BGs. It is submitted that the Hon’ble Delhi High Court in paragraph 43 of the judgment dated 03.07.2019 had stated that it shall not prejudice the Respondent from invoking the bank guarantee in accordance with Sub-Clause 4.2 of the Agreement. Therefore, the Respondent, after complying with the provisions of Sub-Clause 4.2 re-invoked the bank guarantees on 23.07.2019. It is therefore wrong, misleading and denied that the Respondent, without fulfilling the terms of the Contract, or in wilful disobedience of the Hon’ble Delhi High Court’s judgment has invoked the aforesaid BGs on 23.07.2019.

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u) The contents of paragraph no. 13(u) of the Application are wrong, misleading and denied. It is the case of the Respondent that the judgment dated 03.07.2019 is bad in law and therefore, the Respondent had the right to file an appeal against the same. Further, since there was a specific liberty granted by the Hon'ble Court in the said judgment, the Respondent again invoked the bank guarantees after complying with the provisions of Clause 4.2 without prejudice to any of its other rights or remedies including the right to challenge the judgment dated 03.07.2019. It is wrong and denied that such conduct of the Respondent tantamount to forum shopping or ought to be viewed by this Hon'ble Tribunal with utmost circumspection. It is submitted that the Respondent has the right to avail all legal remedies available to it and merely because the Respondent has filed an appeal against the judgment dated 03.07.2019, it cannot be stated that the Respondent is indulging in forum shopping.

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w) The contents of paragraph no. 13(w) of the Application are wrong, misleading and denied. It is wrong and denied that the Respondent did not comply with the provisions of Clause 2.5, as alleged or otherwise. It is submitted that the conditions stated in Clause 4.2 of the GCC have been duly fulfilled. Without prejudice to any other contention of the Respondent, Clause 4.2 is not applicable to RBGs. With respect to Clause 2.5, the contentions are contained in the foregoing preliminary objections/preliminary submissions, the contents of which are not being repeated herein for the sake of brevity.

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bb) The contents of paragraph no.13(bb) of the Application are wrong and denied. It is wrong and denied that there was no material change in circumstances between 15.06.2019 till 15.07.2019 or even thereafter, which could have entitled the Respondent to invoke the Bank Guarantees. It is submitted that the Respondent vide the letter dated 15.07.2019 clearly

determined its claims and issued the termination notice under Sub-Clause 15.2 thereby complying with the provisions of Sub-Clause 4.2 and therefore invocation of the BGs is not liable to be declared illegal, as alleged or otherwise.”

48. Learned senior counsels for the petitioner have relied on the judgment in the case of ***Simon Carves v. Ensus UK (2011) EWHC 657 (TCC)*** in support of the proposition that while deciding a case of Bank Guarantee, the underlined contract would have to be looked into and more particularly the provisions which impose restriction on the beneficiary party in invoking the bank guarantee. Reliance is also placed on ***Doosan Babcock Ltd. v. Comercializadora de Equipos y Materiales Mabe Lda (formerly Mabe Chile Lda) (2013) EWHC 3201 (TCC)*** for the same proposition.

49. The petitioner also relies on the judgment of the Apex Court in ***Gangotri Enterprises Limited (supra)*** to contend that the Apex Court in the said case had granted injunction against the respondent from encashing the Bank Guarantee in question, relying on the judgment in the case of ***Raman Iron Foundry (supra)***. In the case of ***Raman Iron Foundry (supra)***, the Court was examining the interpretation of the words ‘sum due’ under the contract as well as the clause relating to recovery of ‘sum due’. The question was whether the said clause empowered Union of India to make recovery of the amount claimed by way of damages for breach of Contract pending Arbitration Proceedings from the contractor and whether injunction could be granted from recovering the said sum.

50. Reliance is placed on ***Hindustan Construction Company v. State of Bihar (1999) 8 SCC 436*** to argue the proposition that there is no blanket bar in granting injunctions against invocation of the Bank Guarantees. The Apex

Court in the said case had in fact, set aside the order of the Division Bench of the High Court in so far as it vacated the injunction order granted by the Single Judge. It is submitted that the grant of injunction would depend upon whether the Bank Guarantee is unequivocal and unconditional or is conditional. If the Bank Guarantee is unconditional, the Court would refrain from issuing the injunction but if it is conditional the beneficiary does not have an unfettered right to invoke the guarantee and the Court can issue injunction in the facts of the case.

51. Petitioner has relied on the judgment of *Nusli Neville Wadia v. Ivory Properties & Ors. SLP (CIVIL) Nos. 31982- 31983 of 2013* decided on 4th October, 2019 to contend that there is a difference between existence and exercise of jurisdiction. In case jurisdiction is exercised with material irregularity or illegality, it would constitute jurisdictional error. However, if the Court has jurisdiction to entertain a suit, but a mistake is committed in exercise of jurisdiction, though it would be a jurisdictional error but not lack of it and would be open for interference in appellate jurisdiction. Relying on this judgment, it was submitted that while passing the earlier judgment the Court did not lack the jurisdiction to consider the petition under Section 9 of the Act. No objection to the jurisdiction of the Court was ever raised by respondent No. 1 during the proceedings of the said case and thus the said judgment would not constitute an exception to the principle of *res-judicata*.

52. Learned senior counsels for the petitioner have relied on the judgments in the case of *Canara Bank (supra)*, *Makhija Construction & Engg Pvt Ltd v. Indore Development Authority (2005) 6 SCC 304* and *Fuerst Day Lawson v. Jindal Exports (2001) 6 SCC 356* to argue that the earlier judgment of this Court is not *per incuriam*. In fact, the doctrine of *per*

incuriam is inapplicable where the earlier judgment of a co-ordinate bench is between the same parties and would have more value than being a mere legal precedent. Reliance is also placed on the judgment of ***Mamleshwar Prasad and Ors. v. Kanhaiya Lal (dead) through L. Rs. (1975) 2 SCC 232*** for the proposition that certainty of law, consistency of rulings and conity of courts converge to the conclusion that a decision once rendered must later bind like cases. Further reliance is placed on the judgment in ***S.Nagraj (Dead) By LRS v. BR Vasudeva (2010) 3 SCC 353*** where the Apex Court has held that principle of *per incuriam* has relevance to the doctrine of precedents and has no application to the doctrine of *res-judicata*. Attention is drawn to a paragraph from the judgment of the Calcutta High Court in ***Tarini Charan Bhattacharjee v. Kedar Nath Haldar AIR 1928 Cal 777*** where the Court held that the doctrine of *res-judicata* clearly connotes that in certain circumstances the Court shall deal with the matter on the footing that it is a matter no longer open to contest by reason of a previous decision. To say that the previous decision was wrong on a point of law or otherwise and could be disregarded is an indefensible form of reasoning. Petitioner has also placed reliance on the judgment of the Apex Court in ***Sub-Inspector Rooplal & Anr. v. Lt Governor through Chief Secretary, Delhi & Ors. (2000) 1 SCC 644*** to emphasise that once a matter is decided by a Co-ordinate Bench, it would be judicial impropriety for second Bench to disagree with the decision of the Co-ordinate Bench. In case, the second Bench was to disagree, the only option would be to refer the matter to a larger Bench.

53. Learned senior counsels for the petitioner have sought to distinguish the judgments cited by respondent No. 1. It is argued that in ***Siddharam***

Satlingappa Mhetre (supra), relied on by respondent No. 1, the Apex Court had held that a judgment rendered in ignorance of a statute or a judgment of a higher Forum would be *per incuriam*. In the instant case, however, the judgment dated 03.07.2019 has been rendered after considering the law laid down by the Supreme Court as well as various other judgments of this Court. Judgments in the case of *HRD Corporation (Marcus Oil & Chemical Division)(supra)* and *National Highways Authority of India (supra)* were cases in which certain decisions were held to be *per incuriam* as they had failed to consider the binding precedents, which is not the case here.

54. Learned senior counsels for the respondent in response to the arguments of the petitioner in rejoinder, have argued that the petitioner cannot seek a restrain of a BG agreement, which is between the respondent and a third party, i.e. the Bank. It is submitted that there are five basic principles guiding the invocation of a BG, viz. (a) it is a contract independent of the main contract; (b) invocation relates to the BG contract and not the main contract; (c) *inter se* disputes are irrelevant to the Bank Guarantee Agreement; (d) egregious fraud must be pleaded; (e) irreparable injury must be shown. The petitioner has neither pleaded nor shown any fraud on the part of the respondent nor any evidence has been brought to that effect. No apprehension, that it would not be able to recover the money in case it succeeds before the Arbitral Tribunal, has even been raised.

55. Learned senior counsels for respondent No. 1 have distinguished the judgment in the case of *Gangotri Enterprise Limited (supra)* relied upon by the petitioner. It is argued that the facts of the said case were peculiar as the BGs were sought to be encashed to recover dues in relation to some other

contract and not in respect of the contract for which the BGs had been furnished. There was a clause in the other contract permitting them to do so. In so far as the contract in relation to which the PBG was given, the work had been completed to the satisfaction of the respondents and there was no grievance regarding any breach.

56. I have heard the learned senior counsels for the parties and examined their contentions.

57. Certain provisions and clauses of the agreement that need to be looked into while deciding the present controversy are extracted hereunder for ready reference:

“2.5 Employer's Claims

If the Employer considers himself to be entitled to any payment under any Clause of these Conditions or otherwise in connection with the Contract, and/or to any extension of the Defects Notification Period, the Employer or the Engineer shall give notice and particulars to the Contractor. However, notice is not required for payments due under Sub-Clause 4.19 [Electricity, Water and Gas], under Sub-Clause 4.20 [Employers Equipment and Free-Issue Material], or for other services requested by the Contractor.

The notice shall be given as soon as practicable after the Employer became aware of the event or circumstances giving rise to the claim. A notice relating to any extension of the Defects Notification Period shall be given before the expiry of such period.

The particulars shall specify the Clause. or other basis of the claim, and shall include substantiation of the amount and/or extension to which the Employer considers himself to be entitled in connection with the Contract. The Engineer shall then proceed in accordance with Sub-clause 3.5 [Determinations] to agree or determine (i) the amount (if any) which the Employer

is entitled to be paid by the Contractor, and/or (ii) the extension (if any) of the Defects Notification Period in accordance with Sub-Clause 11.3 [Extension of Defects Notification Period].

This amount may be included as a deduction in the Contract Price and Payment Certificates. The Employer shall only be entitled to set off against or make any deduction from an amount certified in a Payment Certificate, or to otherwise claim against the Contractor, in accordance with this Sub-Clause.

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3.5 Determinations

Whenever these Conditions provide that the Engineer shall proceed in accordance with this Sub-Clause 3.5 to agree or determine any matter, the Engineer shall consult with each Party in an endeavour to reach agreement. If agreement is not achieved, the Engineer shall make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances.

The Engineer shall give notice to both Parties of each agreement or determination, with supporting particulars. Each Party shall give effect to each agreement or determination unless and until revised under Clause 20 [Claims, Disputes and Arbitration].

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4.2 Performance Security

The Contractor shall obtain (at his cost) a Performance Security for proper performance, in the amount and currencies stated In the Appendix to Tender. If an amount is not stated in the Appendix to Tender, this Sub-Clause shall not apply.

The Contractor shall deliver the Performance Security to the Employer within 28 days after receiving the Letter of Acceptance, and shall send a copy to the Engineer. The Performance Security shall be issued by an entity and from within a country (or other jurisdiction) approved by the

Employer, and shall be in the form annexed to the Particular Conditions or in another form approved by the Employer.

The Contractor shall ensure that the Performance Security is valid and enforceable until the contractor has executed and completed the Works and remedied any defects. If the terms of the Performance Security specify its expiry date, and the Contractor has not become entitled to received the Performance Certificate by the date 28 days prior to the expiry date, the Contractor shall extend the validity of the Performance Security until the Works have been completed and any defects have been remedied.

The Employer shall not make a claim under the Performance Security, except for amounts to which the Employer is entitled under the Contract in the event of:

(a) failure by the Contractor to extend the validity of the Performance Security as described in the preceding paragraph, in which event the Employer may claim the full amount of the Performance Security.

(b) failure by the Contractor to pay the Employer an amount due, as either agreed by the Contractor or determined under Sub-Clause 2.5 [Employer's Claims] or Clause 20 [Claims, Disputes and Arbitration], within 42 days after this agreement or determination,

(c) failure by the Contractor to remedy a default within 42 days after receiving the Employer's notice requiring the default to be remedied, or

(d) circumstances which entitle the Employer to termination under Sub-Clause 15.2 [Termination by Employer], irrespective of whether notice of termination has been given.

The Employer shall indemnify and hold the Contractor harmless against and. from all damages, losses and expenses

(including legal fees and expenses) resulting from a claim under the Performance Security to the extent to which the Employer was not entitled to make the claim.

The Employer shall return the Performance Security to the Contractor within 21 days after receiving a copy of the Performance Certificate.

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15.1 Notice to Correct

If the Contractor fails to carry out any obligation under the Contract, the Engineer may by notice require the Contractor to make good the failure and to remedy it within a specified reasonable time.

15.2 Termination by Employer

The Employer shall be entitled to terminate the Contract if the Contractor:

- (a) fails to comply with Clause 4.2 [Performance Security] or with a notice under Sub-Clause 15.1 [Notice to Correct],*
- (b) abandons the Works or otherwise plainly demonstrates the intention not to continue performance of his obligations under the Contract,*
- (c) without reasonable excuse falls:*
 - (i) to proceed with the Works in accordance with Clause 8 [Commencement, Delays and Suspension], or*
 - (ii) to comply with a notice issued under Sub-Clause 7.5 [Rejection] or Sub-Clause 7.6 [Remedial Work], within 28 days after receiving it,*
- (d) subcontracts the whole of the Works or assigns the Contract without the required agreement,*
- (e) becomes bankrupt or insolvent, goes into liquidation, has a receiving or administration order made against him,*

compounds with his creditors, or carries on business under a receiver, trustee or manager for the benefit of his creditors, or if any act is done or event occurs which (under applicable Laws) has a similar effect to any of these acts or events, or other thing of value, as an inducement or reward:

- (i) for doing or forbearing to do any action in relation to the Contract, or*
- (ii) for showing or forbearing to show favour or disfavour to any person in relation to the Contract,*

or if any of the Contractor's Personnel, agents or Subcontractors gives or offers to give (directly or indirectly) to any person any such inducement or reward as is described in this sub-paragraph (f). However, lawful inducements and rewards to Contractor's Personnel shall not entitle termination.

In any of these events or circumstances, the Employer may, upon giving 14 days notice to the Contractor, terminate the Contract and expel the Contractor from the Site. However, in the case of sub-paragraph (e) or (f), the Employer may by notice terminate the Contract Immediately.

The Employer's election to terminate the contract shall not prejudice any other rights of the Employer, under the Contract or otherwise.

The Contractor shall then leave the Site and deliver any required Goods, all

Contractor's Documents, and other design documents made by or for him, to the Engineer. However, the Contractor shall use his best efforts to comply Immediately with any reasonable instructions included in the notice (i) for the assignment of any subcontract, and (ii) for the protection of life or property or for the safety of the Works.

After termination, the Employer may complete the Works and/or arrange for any other entities to do so. The Employer and these

entities may then use any Goods, Contractor's Documents and other design documents made by or on behalf of the Contractor.

The Employer shall then give notice that the Contractor's Equipment and Temporary Works will be released to the Contractor at or near the Site. The Contractor shall promptly, arrange their removal, at the risk and cost of the Contractor. However, if by this time the Contractor has failed to make a payment due to the Employer, these items may be sold by the Employer in order to recover this payment. Any balance of the proceeds shall then be paid to the Contractor.

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16.2 Termination by Contractor

The contractor shall be entitled to terminate the contract if:

- (a) the Contractor does not receive the reasonable evidence within 42 days after giving notice under Sub-Clause 16.1 [Contractor's Entitlement to Suspend Work] in respect of a failure to comply with Sub-Clause 2.4 [Employer's Financial Arrangements],
- (b) the Engineer fails, within 56 days after receiving a Statement and supporting documents, to issue the relevant Payment Certificate,
- (c) the Contractor does not receive the amount due under an Interim Payment Certificate within 42 days after the expiry of the time stated in Sub-Clause 14.1 [Payment] within which payment is to be made (except for deductions in accordance with Sub-clause 2.5 [Employer's Claims]),
- (d) the Employer substantially fails to perform his obligations under the Contract,
- (e) the Employer fails to comply with Sub-Clause 1.6 [Contract Agreement] or Sub-Clause 1.7 [Assignment],
- (f) a prolonged suspension affects the whole of the Works as described in Sub-Clause 8. 11 [Prolonged Suspension], or
- (g) the Employer becomes bankrupt or insolvent, goes into liquidation, has a receiving or administration order made against him, compounds with his creditors, or carries on

business under a receiver, trustee or manager for the benefit of his creditors, or if any act is done or event occurs which (under applicable Laws) has a similar effect to any of these acts or events.

In any of these events or circumstances, the Contractor may, upon giving 14 days' notice to the Employer, terminate the Contract. However, in the case of sub-paragraph (f) or (g), the Contractor may by notice terminate the Contract immediately.

The Contractor's election to terminate the Contract shall not prejudice any other rights of the Contractor, under the Contract or otherwise."

58. In order to decide the present petition two issues arise as under:-
- A. Whether the BGs in question are unconditional and if so whether their invocation/encashment can be restrained?
 - B. Whether the judgment of the Co-ordinate Bench in OMP (I) (COMM) 200/2019, between the same parties is binding on this Court and the effect of the said judgment on a second invocation between the same parties.
59. The law on invocation/encashment of unconditional BGs is no more *res integra*. It is settled that injunction against invocation/encashment of unconditional BGs can be granted only in two exceptional cases:
- A. In the event of egregious fraud, which vitiates the entire underlined transactions and of which the Bank has notice; or
 - B. Irretrievable injury/injustice. The irretrievable injury must be of an exceptional circumstance of the kind where it is impossible for the guarantor to reimburse himself if he ultimately succeeds in final adjudication of the disputes.
60. The Apex Court in the case of ***Gujarat Maritime Board (Supra)*** held

that injunction against invocation of an absolute and an unconditional BG cannot be guaranteed except in the exceptional two cases mentioned above. Reliance was placed by the Apex Court on an earlier judgment of the Apex Court in *Himadari Chemicals Industries Ltd. v. Coal Tar Refining Company (2007) 8 SCC 110*, wherein certain principles were formulated to be followed in matters of injunctions to restrain encashment of a Bank Guarantee. The following are the principles that were laid down:

“(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.”

61. The Apex Court was examining the Bank Guarantee given by the Bank to the appellant therein which contained the following stipulation:

“without any demur, merely on a demand from GMB (appellant) stating that the said lead promotor failed to perform the covenants...”. It has also been undertaken by the bank that such written demand from the appellant shall be “...conclusive, absolute and unequivocal as regards the amount due and payable by the bank under this guarantee”. Between the appellant therein and the first respondent, in the event of failure to perform the obligations under the LOI the appellant was entitled to cancel the LOI and invoke the Bank Guarantee. On being satisfied of the failure of the respondent, the appellant cancelled the LOI and invoke the Bank Guarantee.”

62. The Apex Court held that between the Bank and the appellant, the moment there was a written demand for invoking the BG pursuant to breach of the covenant between the appellant and the respondent, the bank was bound to honour the payment under the Guarantee. The Apex Court held that the Bank Guarantee is a separate contract and is not qualified by the contract or performance of the obligations. No doubt, in terms of the BG also, the invocation is only against a breach of the conditions in the LOI, but between the appellant and the bank the decision of the appellant as to the breach is absolute and binding on the Bank.

63. In ***Dwarikesh Sugar Industries Ltd. (supra)***, the Apex Court has deprecated the practice of the High Courts in granting injunctions restraining the encashment of unconditional BGs and held that this would mean not complying with the law laid down by the Apex Court and would amount of judicial impropriety. The Apex Court held that the High Court was not justified in invoking the principle of unjust enrichment and denying the appellant the right to encash the BG. It was further observed that if the High Court had taken the trouble to see the law on the point, it would have been clear that in encashment of BG, principle of undue enrichment has no

application. Relevant para of judgment reads as under:

“29. It is unfortunate that the High Court did not consider it necessary to refer to various judicial pronouncements of this Court in which the principles which have to be followed while examining an application for grant of interim relief have been clearly laid down. The observation of the High Court that reference to judicial decisions will not be of much importance was clearly a method adopted by it in avoiding to follow and apply the law as laid down by this Court. Yet another serious error which was committed by the High Court, in the present case, was not to examine the terms of the bank guarantee and consider the letters of invocation which had been written by the appellant. If the High Court had taken the trouble of examining the documents on record, which had been referred to by the trial court, in its order refusing to grant injunction, the court would not have granted the interim injunction. We also do not find any justification for the High Court in invoking the alleged principle of unjust enrichment to the facts of the present case and then deny the appellant the right to encash the bank guarantee. If the High Court had taken the trouble to see the law on the point it would have been clear that in encashment of bank guarantee the applicability of the principle of undue enrichment has no application.

32. When a position, in law, is well settled as a result of judicial pronouncement of this Court, it would amount to judicial impropriety to say the least, for the subordinate courts including the High Courts to ignore the settled decisions and then to pass a judicial order which is clearly contrary to the settled legal position. Such judicial adventurism cannot be permitted and we strongly deprecate the tendency of the subordinate courts in not applying the settled principles and in passing whimsical orders which necessarily has the effect of granting wrongful and unwarranted relief to one of the parties. It is time that this tendency stops.”

64. The Apex Court in the case of **UP State Sugar (Supra)** was dealing with a Company which had become a Sick Industrial Company and the

reference was pending before the BIFR. The question was about the enforcement of an irrevocable and unconditional BG, payable on demand without demur. The Apex Court held that the law relating to invocation of unconditional Bank Guarantees is well settled. When in course of commercial dealings an unconditional Bank Guarantee is given or accepted, the beneficiary is entitled to realise the BG irrespective of any pending dispute. The Bank is bound to honour it as per the terms of the BG irrespective of any dispute raised by its customer. The very purpose of giving such a BG would otherwise be defeated. The Apex Court relied on the earlier judgment of the Apex Court in *U.P. Cooperative Federation (supra)*, where the Apex Court held that the Bank is not concerned in the least with the relations between the supplier and the customer and nor with the question whether the supplier has performed his contractual obligations and is in default or not. The Bank must pay according to the tenor of its guarantee, on demand, without proof or condition. The Apex Court significantly also held that a mere irretrievable harm or injury would not be enough to restrain the invocation of the BG and the threshold should be as high as was the kind envisaged in the case of *Itek Corporation case (supra)* where there was a war like situation and recovery was impossible. To the same effect is the judgment of the Apex Court in *Vinitec Electronics Private Limited (supra)* more particularly paragraphs 11 and 12.

65. The Apex Court in the case of *Mahatma Gandhi 2007 (Supra)* ruled that the right of the purchaser to recover from the guarantor, the guaranteed amount shall not be effected or suspended by reasons of the fact that any dispute or disputes have been raised by the sellers with regard to their liability or that any proceedings are pending in any other Court of Law. The

Apex Court was dealing with certain clauses of the BG where the guarantor had undertaken to pay to the appellant within 30 days of demand, without demur, a certain sum of money. The Apex Court repelled the contention of the seller that the purchaser could invoke the bank guarantee only on failure of the supplier to conduct the trial test and fulfil other obligations and held that the argument that pending a dispute relating to the failure or breach of one party, cannot be accepted as being a ground to restrain invocation. The dispute, if any, with regard to the liability in any Court of law will have no bearing on encashment of the BG. It was held that once the BG is unconditional and irrevocable, it is not open to the bank to raise any objection whatsoever to pay the amounts under the Guarantee. The person in whose favour the guarantee is furnished by the bank cannot be prevented by an injunction in enforcing the same on the ground that the condition for enforcing the BG in terms of the agreement has not been fulfilled. Such a course is impermissible. Relevant paras read as under;

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

19. However, Shri Jayant Bhushan, learned Senior Counsel submitted that the purchasers were entitled to invoke the bank guarantee and demand the payment of money only upon the failure of the supplier to conduct the trial test of the sugar plant by 24-7-2003 and also upon the failure of the sellers to commission the project before December 2003. This condition forms an integral part of the bank guarantee was the submission. We find it difficult to accept the submission. The guarantee executed by the guarantor (PNB) in favour of the purchaser (the appellant) cannot be dissected in the manner suggested by the learned Senior Counsel for the respondent. Clauses 1 and 2 of the guarantee executed by the banker in favour of the purchaser are required to be read together. The respondent cannot be allowed to contend that there is a dispute as to whether it had failed to conduct the trial test of the sugar plant by 24-7-2003 and therefore bank guarantee cannot be invoked. The acceptance of the argument would make Clause 2 of the bank guarantee totally meaningless and inoperative. The guarantor essentially agreed that the purchasers alone shall be the sole judge in the matter as to whether the amount of bank guarantee has become recoverable from the sellers or whether the seller had committed any breach of the terms and conditions of the agreement. The dispute, if any, between the parties with regard to the liability in any proceedings either before the Arbitral Tribunal or court in no manner affects the right of the purchaser to invoke the bank guarantee and realise the guaranteed sum from the guarantor.

22. In our considered opinion if the bank guarantee furnished is an unconditional and irrevocable one, it is not open to the bank to raise any objection whatsoever to pay the amounts under the guarantee. The person in whose favour the guarantee is furnished by the bank cannot be prevented by way of an injunction in enforcing the guarantee on the pretext that the condition for enforcing the bank guarantee in terms of the agreement entered between the parties has not been fulfilled. Such a course is impermissible. The seller cannot raise the dispute of whatsoever nature and prevent the purchaser from

enforcing the bank guarantee by way of injunction except on the ground of fraud and irretrievable injury.”

66. This was reaffirmed by the Apex Court in ***Gujarat Maritime Board (supra)***.

67. In a recent case tiled as ***Classic-KSM Bashir JV Vs. Rites Limited and Ors. 2018 SCC OnLine Del 8888***, this Court has summarised the law of Bank Guarantees. The relevant paragraphs read as under:

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

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

“The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving

such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take the advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country.”

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

“... The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear, both as to the fact of fraud and as to the bank's knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it discharged.”

(emphasis supplied)

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

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

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

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

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

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

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

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

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

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

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

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

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

12. An injunction against the invocation of an absolute and an unconditional bank guarantee cannot be granted except in situations of egregious fraud or irretrievable injury to one of

the parties concerned. This position also is no more res integra. In Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co. [Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co., (2007) 8 SCC 110], at para 14: (SCC pp. 117-18)

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

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

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

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

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

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

(vi) Allowing encashment of an unconditional bank guarantee or a letter of credit would result in irretrievable harm or

injustice to one of the parties concerned.”

13. The guarantee given by the Bank to the appellant contains only the condition that in case of breach by the lead promoter viz. the first respondent of the conditions of LoI, the appellant is free to invoke the bank guarantee and the Bank should honour it “... without any demur, merely on a demand from GMB (appellant) stating that the said lead promoter failed to perform the covenants...”. It has also been undertaken by the Bank that such written demand from the appellant on the Bank shall be “... conclusive, absolute and unequivocal as regards the amount due and payable by the Bank under this guarantee”. Between the appellant and the first respondent, in the event of failure to perform the obligations under the LoI dated 6-2-2008, the appellant was entitled to cancel the LoI and invoke the bank guarantee. On being satisfied that the first respondent has failed to perform its obligations as covenanted, the appellant cancelled the LoI and resultantly invoked the bank guarantee. Whether the cancellation is legal and proper, and whether on such cancellation, the bank guarantee could have been invoked on the extreme situation of the first respondent justifying its inability to perform its obligations under the LoI, etc. are not within the purview of an inquiry under Article 226 of the Constitution of India. Between the Bank and the appellant, the moment there is a written demand for invoking the bank guarantee pursuant to breach of the covenants between the appellant and the first respondent, as satisfied by the appellant, the Bank is bound to honour the payment under the guarantee.”

68. The Bench declined to restrain the respondents from invoking the unconditional Bank Guarantee. To the same effect is the decision of a Co-ordinate Bench of this Court in ***ECI-Nayak (JV) Vs. Ircon International Limited and Another*** 2019 SCC OnLine DEL 9418. Relevant paras of the said judgment read as under:

“21. Before considering the submissions made by the learned counsels for the parties, it would be relevant to remind oneself of the limited scope of the jurisdiction of the Court in matters of injunction encashment of Bank Guarantee. As repeatedly held by the Supreme Court, the Bank Guarantee being an independent contract between the bank and the beneficiary, injunction on encashment thereof can be granted only on the ground of egregious fraud and irretrievable injury being established by the petitioner. In the present case, even as per the allegations of the petitioner, no case of fraud or irretrievable injury has been made out by the petitioner.

22. As far as the submission of the petitioner that it was the respondent no. 1 who was guilty of not handing over the possession of the land and/or drawings and for other defaults which had an adverse impact on completion of work within the time stipulated, the same can be considered only by the Arbitral Tribunal upon parties leading evidence before it. However, the same would not be a relevant consideration for restraining the respondent no. 1 from exercising its rights under the Bank Guarantee(s) which is separate contract between the respondent no. 1 and the bank. The Bank Guarantees are unconditional in nature. Therefore, the invocation and encashment thereof cannot be restrained on account of any dispute relating to the Agreement between the petitioner and respondent no. 1.”

69. Traversing through the judgments referred to above, it is crystal clear that when an unconditional Bank Guarantee is furnished, the beneficiary has a right to invoke the same *de hors* the inter se disputes between the beneficiary and the party on whose behalf the Bank Guarantee was furnished. The Bank Guarantee is an independent contract between the Bank and the beneficiary. It is equally well-settled that the Courts cannot and should not injunct the invocation or encashment of any unconditional and irrevocable BG except in the case of egregious fraud or irretrievable

injury of the highest threshold, as in the case of *Itek Corporation (supra)*.

70. To decide the first issue the terms and conditions of BGs in the present case need to be examined. There is no dispute between the parties that the provisions of the RMBGs are the same as PBG, except for few minor changes. A perusal of the terms of the BGs leaves no manner of doubt that the BGs are unconditional and the bank has given an unconditional promise to respondent No. 1 that it would without any demur, enquiry, protest, proof or satisfaction, merely on receipt of the first written demand stating that the amount is due on account of default etc. of the contractor would honour the Guarantee and pay to the employer. Significantly the terms also clearly incorporate that the payment would be made without any reference to the contractor and notwithstanding any dispute raised by the contractor in any suit or proceeding, before any Court of Law.

71. As held by the Apex Court, the Bank Guarantee is clearly an independent contract and has to be construed on its own terms. I find merit in the contention of Mr. Sethi, learned senior counsel that in view of the settled law, unconditional BGs have to be honoured and restraint orders against their invocations cannot be passed by the Courts save and except in the case of the two exceptions mentioned above. I also find merit in the contention that the PBG and the RMBGs in the present case are clearly unconditional and irrevocable BGs. Thus, following the law laid down by the Apex Court in several judgments no injunction can be issued by this Court restraining the invocation/encashment of the BGs in question in this petition.

72. In view of the law settled by the Apex Court and the Division Bench of this Court, in my opinion, the judgments relied upon by the petitioner in

the case of *Simon Carves (supra)*, *Gangotri Enterprises Limited (supra)* and *Hindustan Construction Company (supra)* would be of no avail to the petitioner and are clearly distinguishable.

73. Mr. Sethi is also right in his contention that no case of alleged fraud or irretrievable injury has even been pleaded or set up by the petitioner in the present case. In the present case thus, this Court need not concern itself with the two exceptions carved out to the law of unconditional BGs.

74. BGs are unconditional and their invocation/encashment cannot be restrained. Hence, the first issue is decided in favour of respondent No. 1 and against the petitioner.

75. The argument of the petitioner on the second issue is in two parts. The first argument is that clause 4.2 of the Agreement between the parties permits invocation of the BGs only when a determination has been made by the Engineer and it is ascertained as to what is payable to the respondent and that the said determination is preceded by a notice. The second part of the argument focuses on the findings and observations in the judgment dated 03.07.2019, between the parties and to sum up, the contention is that vide the said judgment this Court has already held that before invocation of the BGs determination must be made under clause 4.2 read with clauses 2.5 and 3.5. The judgment being inter-party is binding on the parties and the only way the respondent can succeed in invoking the BGs is by first determining the amount due. Since there has been no such determination by the Engineer preceded by notice, the invocation is in the teeth of the said judgment. Coupled with this is an equally emphatic contention that the judgment being one of a Coordinate Bench is binding on this Court and thus this Court is bound to take the same view and restrain respondent no. 1 from

invoking the BGs. It is argued that the invocation letter is against the liberty given in para 43 of the judgment, which was the only limited window available to respondent No. 1.

76. I have carefully examined the said contention of the petitioner as well as the counter submissions of respondent No. 1. The issue that this Court needs to decide is whether the judgment dated 03.07.2019 has a binding effect on this Court. The contention of the respondent no.1 is that where a Court is faced with two conflicting judgments, one by a Coordinate Bench and second by a Bench of larger strength or the Apex Court, it has to follow the latter. It is only when there is no judgment of the higher Forum and the coordinate Bench has rendered a judgment on the said issue that the matter needs to be referred to a larger Bench, if the Second Bench disagrees with the view taken in the earlier judgment by the Coordinate Bench.

77. In the case of *Siddharam Satlingappa Mhetre (supra)*, the Apex Court was dealing with the same contention. The relevant para reflecting the issue involved is as under:

“28. Mr Jethmalani fairly submitted that the practice of passing orders of anticipatory bail operative for a few days and directing the accused to surrender before the Magistrate and apply for regular bail are contrary to the law laid down in Sibbia case [(1980) 2 SCC 565 : 1980 SCC (Cri) 465] . The decisions of this Court in Salauddin Abdulsamad Shaikh v. State of Maharashtra [(1996) 1 SCC 667 : 1996 SCC (Cri) 198] , K.L. Verma v. State [(1998) 9 SCC 348 : 1998 SCC (Cri) 1031] , Adri Dharan Das v. State of W.B. [(2005) 4 SCC 303 : 2005 SCC (Cri) 933] and Sunita Devi v. State of Bihar [(2005) 1 SCC 608 : 2005 SCC (Cri) 435] are in conflict with the above decision of the Constitution Bench in Sibbia case [(1980) 2 SCC 565 : 1980 SCC (Cri) 465] . He submitted that all these orders which are contrary to the clear legislative

intention of law laid down in Sibbia case [(1980) 2 SCC 565 : 1980 SCC (Cri) 465] are per incuriam. He also submitted that in case the conflict between the two views is irreconcilable, the Court is bound to follow the judgment of the Constitution Bench over the subsequent decisions of Benches of lesser strength.”

78. The Apex Court, examining the said issue, held that not only the judgment of a larger strength is binding on a judgment of smaller strength but judgment of a co-equal strength is also binding on a Bench of co-equal strength. However, if the judgment rendered by a Bench of co-equal strength is in ignorance of judgment of a Constitution Bench or a larger Bench, then the said judgment is *per incuriam*. Relevant paras of the said judgment are as under:

“138. The analysis of English and Indian law clearly leads to the irresistible conclusion that not only the judgment of a larger strength is binding on a judgment of smaller strength but the judgment of a coequal strength is also binding on a Bench of Judges of coequal strength. In the instant case, judgments mentioned in paras 124 and 125 are by two or three Judges of this Court. These judgments have clearly ignored the Constitution Bench judgment of this Court in Sibbia case [(1980) 2 SCC 565 : 1980 SCC (Cri) 465] which has comprehensively dealt with all the facets of anticipatory bail enumerated under Section 438 CrPC. Consequently, the judgments mentioned in paras 124 and 125 of this judgment are per incuriam.

139. In case there is no judgment of a Constitution Bench or larger Bench of binding nature and if the Court doubts the correctness of the judgments by two or three Judges, then the proper course would be to request the Hon'ble the Chief Justice to refer the matter to a larger Bench of appropriate strength.

140. In the instant case there is a direct judgment of the Constitution Bench of this Court in Sibbia case [(1980) 2 SCC 565 : 1980 SCC (Cri) 465] dealing with exactly the same issue

regarding the ambit, scope and object of the concept of anticipatory bail enumerated under Section 438 CrPC. The controversy is no longer res integra. We are clearly bound to follow the said judgment of the Constitution Bench. The judicial discipline obliges us to follow the said judgment in letter and spirit.”

79. In view of the law laid down in the said judgment, it is not open to the petitioner to argue that the law laid down in *Nusli Neville Wadia(supra)* and *Canara Bank (supra)*, *Fuerst Day Lawson(supra)*, *Makhija Construction & Engg Pvt Ltd (supra)* would enure to its advantage.

80. Insofar as the judgment dated 03.07.2019 rendered by the Co-ordinate Bench is concerned, the Court had restrained the respondent from encashing the BG without first following the conditions laid down in clause 4.2 of the agreement. The said judgment has been challenged by the petitioner and is pending in appeal before a Division Bench of this Court. It is not open to this Court as a Coordinate Bench to decide the correctness or otherwise of the said judgment. Insofar as the binding effect is concerned, suffice would it be to state that once the Apex Court has held in several judgments that other than in two exceptional circumstances, unconditional BGs should not be interfered with, this Court is bound by the law laid down by the Apex Court. Thus, following the dicta of the several judgments mentioned above, I do not see any reason to interfere with the encashment of the BGs as none of the two exceptions have been pleaded or set up in the present case.

81. There can be no quarrel to the proposition laid down by the Apex Court in the case of *Sub-Inspector Rooplal(supra)* that judicial propriety demands that a Co-ordinate Bench must follow and regard the judgment of a Co-ordinate Bench. However, the law as laid down by the Apex Court in

Siddharam Satlingappa Mhetre (supra) cannot be ignored. If there is a decision of a higher Forum then the Bench deciding the petition is bound by the dicta of law laid down by the Apex Court or the Larger Bench and not the judgment of the Co-ordinate Bench if the same has taken a different view.

82. As far as the reliance of the petitioner on the judgment in the case of *Mahadeolal Kanodia vs. Administrator-General of West Bengal (1960) 3 SCR 578* is concerned, suffice would it be to say that this Court is bound by the several judgments cited above, both by the Apex Court and the Division Benches of this Court where it has been repeatedly held that invocation of unconditional and irrevocable BGs cannot be restrained.

83. The petitioner has also sought to argue that in terms of the said judgment dated 03.07.2019, respondent No. 1 was bound to follow the procedure laid down in clause 4.2 of the Agreement and only then invoke the BGs. The Apex Court in the case of *Gujarat Maritime (supra)* has clearly held that the BG is a separate contract and is not qualified by the contract or performance of the obligation. The existence of any dispute between the parties to the contract cannot be a ground for issuing an injunction to restrain enforcement of the BGs. A Division Bench of this Court *Consortium of Deepak Cable India Limited (supra)*, has reiterated the said position of law and held that the disputes pertaining to BGs have to be resolved de hors **the terms of the main contract between the parties**. It was further held that once it is an unconditional BG, if not honoured by the Bank, would cause irreparable damage to the trust in Commerce and deprive vital oxygen to the money supplied and money flow in Commerce, which is necessary for economic growth. Disputes pertaining to the main contract

cannot be considered by a Court, when a claim is made under a BG.
Relevant portion of the judgment is as under:

“145. The legal position which can be summarized would be that a bank guarantee is an independent contract between the bank and the beneficiary and disputes pertaining to bank guarantees have to be resolved de-hors the terms of the main contract between the parties or disputes relatable to the main contract between the parties. Where a bank guarantee is a conditional guarantee invocation thereof would have to be in strict conformity with the conditions on which the guarantee is issued. In such a case an injunction can be granted against payment under the bank guarantee was issued has not been complied with or met. But where the guarantee is conditional and /or the bank has agreed to make payment without demur or protest, on the beneficiary invoking the bank guarantee the bank is obliged to honour the same for the reason like letters of credit, a bank if not honoured would cause irreparable damage to the trust in commerce and would deprive vital oxygen to the money supply and money flow in commerce and transaction which is necessary for economic growth. Disputes pertaining to the main contract cannot be considered by a Court when a claim under a bank guarantee is made and the Court would be precluded from embarking on an enquiry pertaining to the prima facie nature of the respective claim of the litigating parties relatable to the main dispute. The dispute between the parties to the underlying contract has to be decided at the civil forum i.e. a civil suit if there exists no arbitration clause in the contract or before the arbitral tribunal if there exists an arbitration clause in the contract. Pendency of arbitration proceedings is no consideration while deciding on the issue of grant of an interim injunction. That certain amounts have been recovered under running bills and have to be adjusted for is of no concern in matters relating to invocation of bank guarantee. That there are serious disputes on questions as to who committed the breach of the contract are no circumstances justifying granting an injunction pertaining to a bank guarantee. Plea of lack of good faith and/or enforcing the

guarantee with an oblique purpose or that the bank guarantee is being invoked as a bargaining chip, a deterrent or in an abusive manner are all irrelevant and hence have to be ignored. There are only two well recognized exceptions to the rule against permitting payment under a bank guarantee. The same are: -

A. A fraud of egregious nature'

B. Encashment of the bank guarantee would result in irretrievable harm or injustice of an irreversible kind to one of the parties.

146. The irretrievable harm or injustice of an irreversible kind must relate to a situation akin to the one found in Itek Corporation's case (supra) or of the kind or in Elan's case (supra).

147. There is no separate third exception of a special equity justifying grant of an injunction to restrain the beneficiary from receiving under an unconditional bank guarantee and if there exists any third exception of a special equity the same has to be of a kind akin to irretrievable injustice or putting a party in an irretrievable situation.

148. Contractual disputes cannot be projected by attempting to urge that the beneficiary under the bank guarantee is in default. Issues of fraud require pleadings to bring out a case of a fraud of an egregious nature and we do not find any brought out in the pleadings. The irretrievable injury or irretrievable injustice or special equity would mean a situation where the party at whose behest the bank guarantee is issued is rendered remediless. The pleadings do not bring out so."

84. It is thus clear that this Court while deciding the question of encashment of BGs will not concern itself with the interpretation or breach or compliance of the clauses of the contract and therefore, the issue as to whether the procedure laid down in clause 4.2 read with clauses 2.5 and 3.5 has been followed by respondent no.1 or not, is beyond the domain of this Court, while deciding a petition under Section 9 of the Act, relating to

restraint against an unconditional BGs.

85. I may at this stage refer to para 43 of the judgement dated 03.07.2019 on which much has been argued by both the sides. Relevant para reads as under:-

“43. As the encashment of the Bank Guarantees except for the Advance Money Bank Guarantee, for which separate directions have been passed in the present order, has been restrained only on the ground that the respondent no. 1 has, prima facie, not established the pre-conditions mentioned in Sub-Clause 4.2 of the Agreement, this order shall not prejudice the respondent no. 1 from invoking the Bank Guarantees in accordance with Sub-Clause 4.2 of the Agreement. Such invocation or any challenge thereto, as also the arbitration proceedings, shall in no manner be prejudiced by any observation made in the present order.”

Reading of the said para, in my view, indicates that the Court did not finally adjudicate the issue of BGs between the parties. Rather, respondent No. 1 was given liberty to invoke the BGs again. This is fortified by the observation that nothing in the judgment will effect the re-invocation. In so far as the direction to comply with clause 4.2 is concerned, the law as laid down the Apex Court will apply. This Court cannot enter into the interpretation and provisions of the terms of the contract while deciding the dispute with respect to BGs. Thus, in my view, para 43 of the said judgement cannot help the petitioner.

86. Learned counsel for respondent No. 1 has laboured to demonstrate that in any case, the procedure prescribed under clauses 4.2 read with 3.5 and 2.5 has been complied with and in the fresh notice issued by respondent No. 1, there is a determination by the Engineer of the amounts due from the petitioner, though the quantum arrived at is only tentative, at present.

87. Learned senior counsel has also argued that the mandate of the Court in the earlier judgment was to comply with clause 4.2 which has several sub-clauses i.e. 4.2(a) and 4.2(d). It was sought to be argued that the invocation is in accordance with the terms of clauses (c) and (d) and therefore, it is wrong to contend that clause 4.2 has not been complied with. In my view, the question of compliance of the procedure in clause 4.2 or any other clause of the contract would be decided by the Arbitral Tribunal and has no relevance for the present petition.

88. One of the arguments of the petitioner was that the judgment dated 03.07.2019 has been passed in proceedings between the same parties and constitutes *res judicata*. This argument is legally flawed for two reasons. Firstly, the Coordinate Bench in para 43 of the judgment has itself permitted the respondent to invoke the BG and it is evident that by giving the said liberty, the Court never intended that the judgment would finally decide the right of respondent No. 1 to invoke the BGs in future. Moreover, there can be no *res judicata* on the question of law. In the case of ***Bharti Tele-Ventures Ltd. (supra)***, a Coordinate Bench of this Court has clearly held so. In fact, the Court has held that between the same parties at successive stages of the same proceeding, the Court is not bound to decide a *lis* in violation of law merely because some error of law has been committed in the earlier judgment which has attained finality. Relevant portion of the judgment is as under:

*“22. Even otherwise, there can be no *res judicata* on a question of law, even between the same parties, at successive stages of the same proceeding and the Court is not bound to decide a *lis* in violation of law, merely because an error of law may have been committed in a earlier order/judgment which has attained*

finality between the parties. Supreme Court, in Erach Soman Khavar vs. Tukaram Shridhar Bhatta MANU/SC/1288/2013: (2013) 15 SCC 655, held that to attract the doctrine of res judicata, it must be manifest that there has been conscious adjudication of an issue; a plea of res judicata cannot be taken aid of unless there is an expression of an opinion on the merits; it is well settled in law that principle of res judicata is applicable between the two stages of the same litigation but the question or issue involved must have been decided at earlier stage of the same litigation. An order on an application under Order XXXIX Rules 1 & 2 of the CPC is not an order delineating on merits the respective contentions, it is only on a prima facie view of the matter. Recently, in Canara Bank vs. KG. Sabbaraya Setty 2018 SCC Online Sc, 427, after considering a host of case law, it was summarized (i) the general rule is that all issues that arise directly and substantially in a former suit or proceeding between the same parties are res judicata in a subsequent suit or proceeding between the same parties; these would include issues of fact, mixed questions of fact and law and issues of law; (ii) to this general proposition, there are certain exceptions, when it comes to issues of law; (iii) where an issue of law decided between the same parties in a former suit or proceeding relates to jurisdiction of the Court, an erroneous decision in the former suit or proceeding is not res judicata in a subsequent suit or proceeding between the same parties, even where the issue raised in the second suit or proceeding is directly and substantially the same as that raised in the former suit or proceeding; an erroneous decision as to the jurisdiction of a Court cannot clothe a Court with jurisdiction where it has none; and (iv) an issue of law which arises between the same parties in a subsequent suit or proceeding is not res judicata, if by an erroneous decision given on a statutory prohibition in the former suit or proceeding, the statutory prohibition is not given effect to; this is despite the fact that the matter in issue between the parties may be the same as that directly and substantially in issue in previous suit or proceeding-this is despite the fact that the matter in issue between the parties may be the same as that

directly and substantially in issue in previous suit or proceeding-this is for the reason that in such cases, the rights of the parties are not the only matter for consideration, as the public policy contained in the statutory prohibition cannot be set at naught.”

89. In the said judgment, the Court has placed reliance on a recent judgment of the Apex Court in **Canara Bank (supra)**. Relevant portion reads as under:

“5. Res Judicata is, thus, a doctrine of fundamental importance in our legal system, though it is stated to belong to the realm of procedural law, being statutorily embodied in Section 11 of the Code of Civil Procedure, 1908. However, it is not a mere technical doctrine, but it is fundamental in our legal system that there be an end to all litigation, this being the public policy of Indian law. The obverse side of this doctrine is that, when applicable, if it is not given full effect to, an abuse of process of the Court takes place. However, there are certain notable exceptions to the application of the doctrine. One well known exception is that the doctrine cannot impart finality to an erroneous decision on the jurisdiction of a Court. Likewise, an erroneous judgment on a question of law, which sanctions something that is illegal, also cannot be allowed to operate as res judicata....

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33. Given the conspectus of authorities that have been referred to by us hereinabove, the law on the subject may stated as follows:-

(1) The general rule is that all issues that arise directly and substantially in a former suit or proceeding between the same parties are res judicata in a subsequent suit or proceeding between the same parties are res judicata in a subsequent suit or proceeding between the same parties. These would include issues of fact, mixed questions of fact and law, and issues of law.

(2) To this general proposition of law, there are certain exceptions when it comes to issues of law:

(i) Where an issue of law decided between the same parties in a former suit or proceeding relates to the jurisdiction of the Court, an erroneous decision in the former suit or proceeding is not re judicata in a subsequent suit or proceeding. This follows from a reading of Section 11 of the Code of Civil Procedure itself, for the Court which decides the suit has to be a Court competent to try such suit...

...(ii) An issue of law which arises between the same parties in a subsequent suit or proceeding is not res judicata if, by an erroneous decision given on a statutory prohibition in the former suit or proceeding, the statutory prohibition is not given effect to. This is despite the fact that the matter in issue between the parties may be the same as that directly and substantially in issue in the previous suit or proceeding. This is for the reason that in such cases, the rights of the parties are not the only matter for consideration (as is the case of an erroneous interpretation of a statute inter parties), as the public policy contained in the statutory prohibition cannot be set at naught. This is for the same reason as that contained in matters which pertain to issues of law that raise jurisdictional questions...

...(iii) Another exception to this general rule follows from the matter in issue being an issue of law different from that in the previous suit or proceeding. This can happen when the issue of law in the second suit or proceeding is based on different facts from the matter directly and substantially in issue in the first suit or proceeding. Equally, where the law is altered by a competent authority since the earlier decision, the matter in issue in the subsequent suit or proceeding is 49 not the same as in the previous suit or proceeding, because the law to be interpreted is different.”

90. It is pertinent at this stage to notice that even in the judgment of 03.07.2019, so heavily being relied upon by the petitioner, the Coordinate Bench while noticing the various judgments on the issue of BGs, clearly held that a BG is a separate and independent contract between the Bank and respondent No. 1 and is to be governed by its own terms. If the BG is

unconditional, the Bank cannot refuse to enforce the invocation for an underlying dispute between the parties. It was further held that as far as the Bank is concerned, it cannot refuse to honour the invocation on the ground that conditions set up in clause 4.2 have not been satisfied. The Bank is bound to honour the invocation in terms of the BG. Relevant portion of the judgment is as under:

“16. The parties, therefore, by way of the above clause have themselves restricted the right of respondent no.1 to make a claim against the Bank Guarantees. It may be true that a Bank Guarantee is a separate and independent contract between the respondent no.1 and the bank and is to be governed by its own terms. As has been explained by the Supreme Court in the above referred judgments, as far as the bank is concerned, if the Bank Guarantee is unconditional, it cannot refuse to enforce the invocation thereof for an underlining dispute between the two contracting parties as this would not be any of its concern. Invocation of such unconditional Bank Guarantees can be restrained only on the limited exceptions of “fraud” and “irretrievable injustice” as explained by the Supreme Court in its various judgments, including the one mentioned hereinabove, or where such invocation is not in terms of the Bank Guarante.

17. However, having said the above, the two contracting parties in the Contract between them this regard have agreed to restrict the right of respondent no.1 to invoke the Bank Guarantees only in the events mentioned in Sub-Clause 4.2 and for the amounts to which respondent no.1 is entitled to under the Agreement. The petitioner by way of the present petition seeks to enforce this contractual term by way of an injunction.

18. In the present case, the dispute is whether the respondent no.1 in terms of the agreement between the petitioner and respondent no.1 is at all entitled to invoke the Bank Guarantees in question.

19. Though, the Bank Guarantee may be an independent Contract between the bank and the beneficiary, it has been

given by the petitioner to respondent no.1 in fulfillment of the contractual terms given in the Agreement. The Agreement then safeguards the petitioner from otherwise unfettered right of the beneficiary/respondent no. 1 to invoke the Bank Guarantees, by circumscribing/restricting the right of respondent no.1 to invoke such Bank Guarantees only on existence of certain circumstances. The respondent no.1 having obtained the Bank Guarantees with such restrictions, cannot then rely upon the general law applicable to such Bank Guarantees and wish away the contractual limitations to its rights. Any other interpretation would make the Sub-Clause 4.2 of the Agreement otiose.

20. To put it differently, as far as the bank is concerned, it cannot refute to honour the invocation on the ground that the conditions set out in Clause 4.2 of the Agreement have not been satisfied; the bank has to honour such invocation if it is otherwise in terms of the Bank Guarantee...”

91. Having clearly enunciated the position of law, the Coordinate Bench enjoined, respondent No. 1 from invoking the BG on the ground that it had itself undertaken to invoke the BG only under certain circumstances, as mentioned in the contract.

92. Respondent No. 1 has rightly contended that one cannot be permitted to do indirectly what one cannot do directly. In the case of ***U.P. Cooperative Federation Ltd. (supra)***, the Apex Court clearly observed that the learned Judge had proceeded on the basis that what it was granting was not an injunction sought against the Bank, but an injunction sought against the appellant. However, the net effect of the injunction was that it restrained the Bank from honouring its obligation under the BG in a case where no fraud was involved and there was no question of irretrievable injustice. Relevant para of the judgment is as under:

“21. In the instant case, the learned Judge has proceeded on the basis that this was not an injunction sought against the bank but

this was the injunction sought against the appellant. But the net effect of the injunction is to restrain the bank from performing the bank guarantee. That cannot be done. One cannot do indirectly what one is not free to do directly. But a maltreated man in such circumstances is not remediless. The respondent was not to suffer any injustice which was irretrievable. The respondent can sue the appellant for damages. In this case, there cannot be any basis for apprehension that irretrievable damages would be caused if any. I am of the opinion that this is not a case in which injunction should be granted. An irrevocable c commitment either in the form of confirmed bank guarantee or irrevocable letter of credit cannot be interfered with except in case of fraud or in case of question of apprehension of irretrievable injustice has been made out. This is the well-settled principle of the law in England. This is also a well-settled principle of law in India, as I shall presently notice from some of the decisions of the high Court and decisions of this Court.

22. In the instant case, there was no fraud involved and no question of irretrievable injustice was involved.”

93. In view of the plethora of judgments referred to above, laying down the law on the scope of interference by a Court in matters of restraint against invocation/encashment of unconditional BGs, which this Court is bound by, Issue no. 2 framed by this Court is decided in favour of respondent no. 1 and against the petitioner. The effect of the judgment dated 03.07.2019 on the present petition has been dealt with in the earlier part of the judgment. At the cost of repetition, it may be noted that the Co-ordinate Bench while rendering the judgment had itself granted liberty to respondent no. 1 to invoke the BGs afresh and had clarified that no observation in the said judgment shall in any manner prejudice such invocation or any challenge thereto, as also the arbitration proceedings.

94. In view of the settled law, this Court is unable to agree with the

contentions of the petitioner. No order restraining the BGs in question can be granted by this Court, the BGs being unconditional and irrevocable.

95. The disputes as to the breach of the obligations under the contract as well as on the question of determination of the amount payable by the petitioner, if any, to respondent No. 1 or vice versa amongst other disputes are left to be decided by the Arbitral Tribunal.

96. It is made clear that the narration of facts above is only with a purpose to decide the question of restraint on invocation/encashment of the BGs and this Court has not expressed any opinion on the merits of the case.

97. With these observations, the petition is dismissed being devoid of merits. Respondent No. 1 is absolved of his oral undertaking given to the Court against invocation/encashment of the three BGs, which are a subject matter of the present petition.

JYOTI SINGH, J

DECEMBER 3rd, 2019

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