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REPORTABLE

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMM ARBITRATION PETITION (L) NO. 1565 OF 2019**

Techno Unique Infratech Private Limited ...Petitioner
Versus
Gammon Infrastructure Projects Limited & Ors ...Respondents

Mr VR Dhond, Senior Advocate, with Naushad Engineer, Viraj Parikh, Khyati Kanani & Amit Kanani, i/b Kanani & Co., for the Petitioner.
Mr Ashish Kamat, with Shyam Kapadia & Smruti Kanade, i/b Negandhi Shah & Himayatullah, for Respondent No. 1.

CORAM: G.S. PATEL, J.
DATED: 10th January 2020

PC:-

1. Not on board. Mentioned. Taken on board upon a praecipe dated today, 10th January 2020, being presented by Mr Dhond, learned Senior Advocate on behalf of the Petitioner. The urgency is said to be that the bank guarantees in question have now been invoked and encashment is likely to be made by Monday, 13th January 2020.

2. I indicated to Mr Dhond that I am willing to take up the matter immediately for final hearing, especially in the circumstances to which I will immediately next turn. He agreed. On the basis that he could proceed on denials, so did Mr Kamat, learned Advocate for Respondent No. 1. I have accordingly heard both of them at some length and with their assistance considered the material on record and authorities placed.

3. The matter was first moved before me for ad-interim reliefs on 19th December 2019. I declined ad-interim reliefs. I said an Affidavit in Reply was to be filed and served on or before 11th January 2020 and listed the Petition on 15th January 2020, a few days hence. The Petitioner took that order in Appeal. That Appeal was disposed of this morning by the following order:

“1. The Appellants are aggrieved by the fact that on 19th December, 2019 ad-interim relief prayed for in the Application filed by the Appellants under Section 9 of the Arbitration and Conciliation Act, 1996 was not granted.

2. In paragraph 35 of the Appeal it is candidly admitted that the learned Single Judge was willing to record reasons declining ad-interim relief but the Appellants did not want any reasons to be recorded since the same might have caused prejudice to the Appellants at the final hearing stage and because the Bank Guarantees were not invoked as of said date. Learned Counsel urges that the Bank Guarantees have been since been invoked i.e. on 9th January, 2020.

3. If that be so we see no reason to entertain the instant Appeal for the reason if after the impugned order was passed the Bank Guarantees were invoked, the remedy available to the Appellants is to file an Application before

the learned Single Judge requesting the learned Single Judge to grant an urgent hearing and pass orders on the said Application.

4. Thus, while dismissing the Appeal we simply observe that if the Appellants file an Application before the learned Single Judge making a reference to the fact that the Bank Guarantees have been invoked the learned Single Judge would accord an urgent hearing to the Application.

5. In view of the dismissal of the Appeal, the Interim Application No.1 of 2020 does not survive and is disposed of as infructuous.”

4. There is some controversy about whether the statements in the Memo of Appeal are entirely accurate or even fair in regard to what transpired at the ad interim hearing. I do not propose to waste time on any of that. These are needless distractions and take us nowhere.

5. The dispute pertains to a road building contract in Madhya Pradesh. A few facts are necessary. This is a 105.6 km stretch of road on the Sidhi-Singrauli section of National Highway 75E in Madhya Pradesh. At some point, the estimated project cost was Rs. 871.15 crores although that figure may have subsequently changed.

6. The Madhya Pradesh Road Development Corporation Limited (“MPRDCL”) invited proposals for short-listing bidders willing to carry out various works for what is called a ‘four-laning’ of this road. For our purposes, all have agreed that the 1st Respondent, Gammon Infrastructure Projects Limited (“GIPL”) may be taken

as the successful bidder. This is because of subsequent events, which I will turn to presently, where the Engineering and Procurement Contract was first placed not with the 1st Respondent GIPL at all, but with its promoter company, associate or sister company, Gammon India Ltd (“**GIL**”). As is usual in such cases, the bidder floated a Special Purpose Vehicle (“**SPV**”) called Sindhi-Singrauli Roads Private Limited (“**SSRPL**”) to undertake and perform the obligations of the selected bidder.

7. On 14th May 2012, SSRPL and MPRDCL entered into a Concession Agreement for execution of this project. A concession project is one of the various models routinely deployed in road and highway building projects. There is the well-known Build-Operate-Transfer (BOT) model; and there is the concession model, where the person who undertakes a work is then allowed for a defined period of time to either collect tolls being charged on that road or, in at least one variant, receives periodical payment of a fixed amount spread over several years.

8. We are not presently concerned with the terms and conditions of the Concession Agreement. The construction was to be done within two years of the appointed date and the Concession Agreement had the usual clauses regarding financial closure, achievement of certain milestones etc. SSRPL (the concessionaire) had the exclusive right to operate the road and generate its revenues from toll collection but it had a corresponding obligation to maintain the road as well.

9. SSRPL awarded an engineering procurement and construction contract first to GIL, a promoter of GIPL. It was GIL that appointed the Petitioner, Techno Unique Infratech Private Limited (“**Techno Unique**”), a Hyderabad-based company, as its EPC sub-contractor.

10. The contract between GIPL and Techno Unique is dated 19th September 2013. It came to be executed in somewhat unusual circumstances. On 28th September 2012, Techno Unique issued two bank guarantees for Rs. 36.1 crores each, for an aggregate amount of Rs. 72.2 crores, said to be 10% of the contract value. I will turn to the terms of those guarantees shortly. Both guarantees were issued by the 2nd Respondent, Karur Vysya Bank Limited, in favour of GIL.

11. It seems that Gammon India expressed its inability to continue with the EPC Contract and assigned it to GIPL. This required SSRPL, the SPV, to in turn enter into a fresh EPC contract with GIPL. That was dated 3rd July 2013. Now under the original Concession Agreement the appointed date was 9th September 2013, which would put the initial completion date at around 9th September 2015.

12. 19th September 2013 is the date of the relevant agreement between GIPL (as the substituted EPC contractor) and Techno Unique (as the continuing EPC sub-contractor). The value of this EPC sub-contract is Rs. 722 crores. The EPC sub-contract required Techno Unique to provide bank guarantees for the total amount of

Rs. 72.2 crores, being 10% of the contract value. Hence, the two bank guarantees in the amounts of Rs. 36.1 crores each.

13. I am not concerned with the intervening events regarding notices and correspondence. Just one other date is immediately relevant. On 12th September 2019, MPRDCL issued a notice to the SPV, SSRPL, ostensibly suspending its rights under the Concession Agreement. I note this at the outset, for a significant part of Mr Dhond's argument centres around this document.

14. The first leg of Mr Dhond's submission is that the bank guarantees are not, in fact, invoked according to their tenor. These bank guarantees are for performance. If, he submits, MPRDCL has already 'suspended' the contract, then there is no question of performance, and if there be no question of performance, then, there is no question of invoking *performance* bank guarantees. Reference is first invited to clause 1.1 of the EPC sub-contract at page 656. This clause does indeed describe the bank guarantees as performance bank guarantees, but what the submission overlooks is clauses 1.1.2 and 1.1.3 which specifically give GIPL the right to invoke and encash the bank guarantees on demand and without demur at any time during their validity without assigning any reason.

15. But let us turn to the so-called suspension notice itself at page 976 and see whether this would furnish, according to the settled law, any form of special equity in favour of the Petitioner. This is a notice from MPRDCL and it is addressed to the SPV. It invokes clause 36.1

of the Concession Agreement and says that there has been a contractual default which gives MPRDCL the entitlement to suspend all rights of the Concessionaire, that is to say the SPV, including the right to collect tolls; and, consequently, empowers MPRDCL to take over the performance of SSRPL's contractual obligations, either on its own or through another party. The second part of this notice says that the Concessionaire, SSRPL, is in financial difficulty and, therefore, all its rights under the agreement are hereby suspended.

16. There are immediate problems with Mr Dhond's formulation. This is a suspension, not a termination. It does not end the Concession Agreement. It is not a termination (or even a suspension) of the EPC Contract or the EPC Sub-Contract. Second, what the notice suspends is the Concessionaire's (not GIPL's) *rights* under the Concession Agreement, perhaps the most important of which is toll collection and cost recoupment from that source. There is no suspension of SSRPL's *obligations* under the Concession Agreement, and this perhaps stands to reason: if a concessionaire is said to be in default, the project owner may (under the terms of the contract) suspend the contractual rights of the concessionaire while still demanding performance of obligations. As we shall see, this is precisely what seems to have happened over the next few months.

17. But I understood Mr Dhond to place his submission on this submission at something of an extremity. The suggestion conveyed was that the result of the suspension notice was virtually a project shut-down. Everybody — SSRPL, GIPL and Techno Unique —

were ejected from the site. Therefore his submission that in demanding performance by Techno Unique, GIPL was demanding the impossible.

18. It is with this background that Mr Dhond draws my attention to the document at Exhibit “Z” at pages 1069-1070. This is GIPL’s letter of 12th December 2019 to Techno Unique inter alia threatening to invoke the bank guarantee. According to Mr Dhond, by this letter GIPL quite incorrectly and, to use his phrasing, ‘fraudulently’, called upon Techno Unique to immediately take up maintenance works and to re-commence works within seven days, failing which GIPL would be constrained to act according to the EPC sub-contract and take all remedial steps such as termination and invocation of bank guarantees. How, asks Mr Dhond, is this even remotely possible, except by fraud if, as a result of the suspension notice of 12th July 2019, everybody was rendered, as it were, offsite?

19. But, as we have seen, the suspension of SSRPL’s rights under the Concession Agreement are not shown to have resulted in the ejection of all these players — SSRPL, GIPL and Techno Unique — from the project site at all.

20. And that is not all. The facts even as they are presented in the Petition and without even requiring a detailed Affidavit in Reply do not substantiate this case at all. I am shown by Mr Kamat, for instance, a series of documents including minutes of meetings held between July and December 2019 (in particular, of 16th August

2019, 1st November 2019 and 6th November 2019) — that is to say *after* the suspension notice — all of which indicate that all the authorities, right up Central Government agencies continued to pursue project completion by SSRPL and GIPL. Nobody was thrown off site. Nobody seems to have been asked to stop work. On the contrary, the entire tenor is to press for more work (by the contracting parties), an accelerated pace, and issues of existing delay being cured. This fortifies my view that the suspension notice, correctly read, spoke to SSRPL's rights as a concessionaire under the Concession Agreement and was not either (a) a termination of the Concession Agreement; or even (b) a removal or ejection of the contractors from the site.

21. Techno Unique knew of these various meetings. It was represented at least at some of them. That GIPL and SSRPL faced a financial crunch, and that all saw the need for a further infusion of cash, are matters that have no bearing at all on the argument that GIPL was demanding the impossible because no further work was permitted after the suspension notice. Indeed, the documents say to the contrary.

22. The suspension notice cannot be read in isolation. If it is to be so read, then, there is no explanation why at a meeting held on 16th August 2019, GIPL was even invited to be present (and so, incidentally, was Techno Unique). If the Petitioner's argument of the suspension notice having forced everyone off the site is to be accepted, then the continued participation by GIPL and Techno

Unique on project-related matters after the suspension notice is inexplicable.

23. This is an appropriate juncture to note Mr Kamat's submission that far from anyone being kept off site or prevented from doing any work, it was Techno Unique that stopped work entirely in October 2018, several months prior to the suspension notice. He says that it is in that stoppage by Techno Unique — it being the sole EPC contractor for the entire project — that triggered the suspension notice to begin with.

24. In September 2019, Techno Unique renewed both bank guarantees for another year until 25th September 2020. This is an important circumstance. If there was in fact a suspension of July 2019, and the only remaining thing was to hunt for a replacement, then there could not have been a question of renewal of the bank guarantee. Mr Dhond's argument that that renewal was in the normal course and that it would subsist to the benefit of a replacement EPC contractor is not one that commends itself. The bank guarantees are specific to GIPL. Obviously, without the concurrence of the issuing bank, the beneficiary could not be changed. If there was a substitution of the EPC contractor, the earlier guarantees would have had to be cancelled and replaced. That they were not would in fact *prima facie* indicate that the suspension did not have the kind of terminal effects Mr Dhond claims it did.

25. Finally, the entire argument is actually one on the underlying contract. That is beyond the purview of a court confronted with an application for an injunction against encashment of bank guarantee.

26. There is, therefore, no substance to the first submission by the Petitioner that the bank guarantees were not invoked according to their tenor, or that there could not have been a demand for performance.

27. The second submission is that the bank guarantees are not themselves unconditional. They carry with them a mandatory precondition. GIPL can only invoke the bank guarantees if it is directed to do so by the SSRPL. Absent any such direction, there can be no invocation, and there can be no such direction because SSRPL has been suspended. Now this is a remarkably circular argument. If, therefore, this suspension does not in fact operate in the manner that Mr Dhond would have it, then there is no question about a direction being required. But that apart, the argument is in the teeth of the specific wording of the guarantees themselves. I will take only one of them. I believe it is best to now reproduce at the cost of somewhat lengthening this order what both performance bank guarantees say:

“WHEREAS:

- i. The Contractor/Supplier (as hereinafter defined/described) has undertaken, in pursuance of the Contract / Purchase Order (as hereinafter defined/described) to supply you the Services/Equipment (as hereinafter defined/described);

ii. It has been stipulated by you in the Contract/Purchase Order that the Contractor/Supplier shall furnish you with a Performance Bank Guarantee of the sum specified therein, in a form and from a Bank acceptable to you, as and by way of security to secure compliance/fulfillment by the Contractor/Supplier of its obligations under the Contract/Purchase Order and

iii. We, the Bank/Guarantor (as hereinafter defined/described) have agreed to furnish the Performance Bank Guarantee for the Guaranteed Amount (as hereinafter defined/described), as security for compliance/fulfillment by the Contractor/Supplier of its obligations undertaken the Contract/Purchase Order.

NOW THEREFORE, we, the Bank/Guarantor hereby affirm that we, as the guarantor, are responsible to you, on behalf of the Contractor/Supplier for the Guaranteed Amount and we hereby unconditionally and irrevocably undertake to pay you, upon your first written demand and without demur or argument, any sum or sums within the limits of the Guaranteed Amount, without your needing to prove or to show the grounds or reasons for your demand for the sum. The Guaranteed Amount shall be payable merely on demand by you. A letter from you stating that the amount claimed in the demand notice is due and payable, signed on your behalf, shall be final, binding and conclusive upon us, as regards to the amount due and payable by the Bank to you under this guarantee.

a. We hereby agree to pay on written demand, within the Specified Banking Days (as hereinafter defined/described) of the receipt of the demand, the Guaranteed Amount, without demur by issuing a cheque for the amount demanded, payable at par at Mumbai. Without prejudice to our obligation to the foregoing, the

Guaranteed Amount will carry an interest @ 18% per annum after the expiry of the Specified Banking Days from the date of receipt of the demand notice by us. Any forbearance shown by you shall not tantamount to any waiver of your rights or affect any of about obligations under this guarantee.

b. We undertake to pay you the amount so demanded notwithstanding any dispute raised by the Contractor/Supplier in any suit or proceedings pending before nay court or tribunal whatsoever or otherwise; our liability under this guarantee being absolute and unequivocal. The payment so made by us under this guarantee, shall be a valid discharge of our liability for payment hereunder and the Contractor/Supplier shall have no claim against us for making such payments.

c. We hereby undertake that this Guarantee is absolute, irrevocable and unconditional and shall be enforceable against us notwithstanding any security or securities comprised in any instrument executed or to be executed by the Contractor/Supplier in your favour. This guarantee shall be continuing guarantee and shall remain in full force and effect during the period that would be taken by the Contractor/Supplier to fulfill all its obligations in terms of and in accordance with the provisions of the Contract/Purchase Order and shall remain enforceable till all your dues in terms of the Contract/Purchase Order are fully received by you and its claims satisfied or discharged or till you certify that the terms & conditions of the Contract/Purchase Order have been fully and properly carried out. We undertake not to revoke this guarantee except with your prior written consent."

(Emphasis added)

28. I do not believe for a single minute that it is possible to read these guarantees as Mr Dhond would have me do without doing incalculable violence to the language. The wording of the bank guarantees is as plain as can be. There is not the slightest ambiguity about any of it. The bank guarantees are unconditional. They say so. Nothing Mr Dhond says can alter that.

29. In any case, any reference to a so-called pre-condition is an argument that affects the merits of the underlying contract and the disputes on that underlying contract. That cannot be examined while considering an application to restrain payment under a bank guarantee.

30. The law is well settled. Bank guarantees are separate and independent contracts. There is no question of a Court when asked to restrain invocation examining any of these issues affecting the underlying contract.

31. Now this takes us to the final submission, itself a trifecta of arguments that lie at the heart of the matter: the law on bank guarantees, and, specifically, considerations of (i) fraud; (ii) irretrievable injury and (iii) special equities.

32. Mr Dhond puts it like this. First, that while the bank guarantee itself is not obtained fraudulently or is not in itself fraudulent, its invocation is. Second, allowing that invocation to go through will cause the Techno Unique irretrievable injury. Third, so precarious is the condition of GIPL that there today arise in favour

of Techno Unique quite extraordinary special equities that justify the grant of an injunction; specifically that if there is a pay-out under the bank guarantees to GIPL, Techno Unique has not the slightest possibility of ever being able to recover that amount.

33. All three are tied to a solitary argument of GIPL being in financial distress. Mr Dhond attempted to demonstrate from documents on record that there are admissions of a financial crunch, of GIPL being indebted to Techno Unique, that GIPL is in quest of an investor and so on.

34. Of this last adventure, perhaps the less said the better, because one such 'third party investor' allegedly 'sourced' by Techno Unique was nothing but its own alter-ego. Meaning, clearly, that the Techno Unique wanted to substitute itself in place of GIPL and possibly SSRPL. This of course has to be read in the context of Mr Kamat's allegation that it was Techno Unique which stopped the work. If a party stops work, triggers a suspension notice to the main concessionaire, then feigns supports by finding an investor for the financially beleaguered EPC Contractor, and puts up one of its own avatars, then, Mr Kamat says, the declining arch of the project is quite possibly one engineered by Techno Unique itself; at the very least, that is not something that can be discarded as too far-fetched. It will speak to equities generally, and to special equities in particular, and no court will countenance an application for a bank guarantee injunction from a party that conducted itself like this.

35. There are other disputes between the parties. These are not highlighted by Techno Unique. In its demand notice at pages 1069-1070 of 12th December 2019, GIPL clearly says that there has been an unprecedented delay on the part of Techno Unique in performing its obligations. It says it never asked Techno Unique to search for an investor. It points to repeated defaults and as a result, consequent difficulties not only in completing the project but in maintaining the existing road. There is even a reference to a local law and order problem due to shoddy work or incomplete work, and even a threat to treat the non-maintenance of the road as a criminal act. All of this GIPL lays squarely at Techno Unique's door.

36. What is curious in all this is that the so-called 'fraud' is invoked by Techno Unique only at this stage. There was no mention of this at the time of suspension notice. There was no mention of it at the time even in September 2019 when Techno Unique renewed both bank guarantees for another year, until 25th September 2020.

37. The inevitable consequence of an encashment is that the 2nd Respondent Bank will recover the amount of the guarantees from Techno Unique. That is always a consequence of encashment. It furnishes no ground per se to warrant an injunction. Guarantees must, as the Supreme Court has repeatedly said, be honoured according to their tenor and given commercial efficacy.

38. Knowing this, what Mr Dhond presents is actually a combination of the case on irretrievable injury and special equities. He says that the share prices of Gammon India are today trading

well below par. It is deeply mired in debt. There are documents to show that its own management does not have the fullest confidence in the entity as the going commercial concern. These are not my concern. For, unless I am shown a categorical document that GIPL has been put into liquidation and has been completely ejected from the EPC contract — that it has been completely removed — I do not see how I can examine these questions having regard to the settled law on the subject. In fact, the minutes of the two meetings of 1st November 2019 and 6th November 2019 seem to indicate broadly that the Central Government continues to entertain GIPL as the EPC contractor and SSRPL as the concessionaire. It may be looking at fund infusions and perhaps even certain additional concessions but that does not necessarily constitute a special equity. This line of argument will not take Mr Dhond the distance he must traverse to succeed.

39. The reason is that the law in this area is now too firmly settled to admit of any dispute. *Hindustan Steelworks Construction Ltd v Tarapore & Co & Anr*¹ was a case that came up before the Supreme Court against an order granting an injunction. Reviewing the previous law on the subject, the Supreme Court re-stated the applicable principles. There can be no interference with an unconditional bank guarantee except when fraud is established or an apprehension of irretrievable injustice is demonstrated: *UP Cooperative Federation Ltd v Singh Consultants & Engineers (P) Ltd.*² This principle, well-settled in English law, could not be distinguished in Indian law, and, importantly for our present

1 (1996) 5 SCC 34.

2 (1988) 1 SCC 174.

purposes, in the case of a performance bank guarantee.³ It was next argued before the *Hindustan Steelworks* court that fraud was not the only ground for interference. Exceptional circumstances creating special equities would also justify an interference. This was countered by relying on the 1988 decision in *UP Cooperative Federation* to say that special equities or exceptional circumstances had to be shown to be a result of that fraud. *Hindustan Steelworks* rejected that submission, and said it was an incorrect reading of *UP Cooperative Federation*. Correctly read, *UP Cooperative Federation* held that interference is warranted only in cases of fraud *or* irretrievable injustice. Fraud is not the only exception.⁴ In fairness to Mr Dhond, while on the question of fraud, it must be noted that *Hindustan Steelworks* explicitly recognized two layers or levels of fraud: a fraud by one of the parties to the underlying contract vitiating it entirely, or a fraudulent demand by the beneficiary unrelated to any fraud at the time of execution but because of subsequent events or circumstances. It is precisely this to which Mr Dhond has addressed himself.

40. It is in this background that *Hindustan Steelworks* stated the position in law thus:

23. We are, therefore, of the opinion that the correct position of law is that **commitment of banks must be honoured free from interference by the courts and it is only in exceptional cases, that is to say, in case of fraud or in a case where irretrievable injustice would be done if bank guarantee is allowed to be encashed, the court should interfere.**

3 *Hindustan Steelworks, supra*, paragraph 13.

4 *Hindustan Steelworks, supra*, paragraph 18.

(*Emphasis added*)

41. Chronologically, the next decision in point of time is *UP State Sugar Corporation v Sumac International Ltd*,⁵ where the Supreme Court laid out the fundamental principles. In commercial dealings, an unconditional bank guarantee will be realized irrespective of any pending disputes. The bank must honour it according to its terms; else its purpose is lost. Injunctions are not to be readily granted. The law admits of only two exceptions: a fraud vitiating the very foundation of the bank guarantee, or a resultant irretrievable harm or injustice. In this context, the *Sumac International* court explained what irretrievable injustice means, and, more importantly, what it does not: a payout adversely affecting the bank and the customer who furnished the bank guarantee is *not* within the frame. The injustice must be so exceptional and so utterly irretrievable that it would, in the words of the Supreme Court, ‘override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country’. This tells us that while a bank guarantee’s encashment or realization has a localized adverse effect on the bank and its customer (the entity at whose instance the bank guarantee was provided), this must be set against, and weighed against, the larger adverse effect on country-wide commerce of the grant of an injunction itself. Therefore, to successfully obtain an injunction, the localized injustice to the bank and its customer must be shown to be so grave, so monumental and so catastrophic, that the ill-effects or wider ramifications of an injunction would pale in comparison. Explaining the two exceptions, on the question of

5 (1997) 1 SCC 568.

fraud, the *Sumac International* court emphasized that the issuing bank is wholly unconcerned with any contractual disputes or relations between its customer and the customer's contracting opposite party. The bank is bound by the tenor of the bank guarantee it issues. If fraud is invoked, it must be so egregious as to vitiate the entire underlying transaction.⁶ As to the second exception, of irretrievable injustice, *Sumac International* referenced the American decision in *Itek Corporation v First National Bank of Boston*,⁷ a case perhaps positioned at an extremity, for the context there was a contractual dispute between an American exporter and the Government of Iran at the time of the Iranian hostage crisis. I do not read *Sumac International* to suggest, as a matter of law, that it is only the legal question of 'impossibility of performance' that falls within the second exception. The reliance on *Itek Corporation* was perhaps to illustrate just how exceptional the circumstances must be, and must be shown to be, to justify or warrant an injunction.⁸ But what is important is the following observation in paragraph 14, that:

14. ... To avail of this exception, therefore, **exceptional circumstances which make it impossible for the guarantor to reimburse himself if he ultimately succeeds, will have to be decisively established.** Clearly,

⁶ For our present purposes, I will take it that this statement of law was positioned at the broader level, but did not address the second level or layer of fraud noticed in *Hindustan Steelworks*, i.e. a fraud in invocation by subsequent events or circumstances.

⁷ 566 Fed Supp 1210; a decision of the US District Court for the District of Massachusetts, 28th June 1983.

⁸ That is why *Sumac International* says the irretrievable injury has to be '*of the nature noticed in the case of Itek Corp*'.

a mere apprehension that the other party will not be able to pay, is not enough.

(Emphasis added)

As we shall immediately see, these words were reaffirmed by a later decision of the Supreme Court.

42. *Sumac International* is important for another reason: it directly addressed the question of financial incapacity of the party invoking the bank guarantee, and a resultant unlikelihood of the party seeking the injunction (who had got the bank guarantee issued) being unable to recover in restitution. The party invoking the bank guarantee in that case (the appellant) had a reference pending against it before the Board of Industrial and Financial Reconstruction under the then Sick Industrial Companies (Special Provisions) Act, 1985. The precise contention was that even if the respondent succeeded in arbitration, it would not be able to realize its claim. This is what the Supreme Court said:

17. ... The respondent contends that even if it succeeds before the Arbitrator it will not be able to realise its claim from the appellant. **The mere fact that a reference under the Sick Industrial Companies (Special Provisions) Act, 1985 is pending before the Board, is, in our view, not sufficient to bring the case in the ambit of the “irretrievable injustice” exception. ... There can, therefore, be no presumption that the company will, in no circumstance, be able to discharge its obligations.**

(Emphasis added)

This is, indeed, just what Mr Dhond asks me to do — to *presume* that GIPL is all but insolvent and that in any arbitration, Techno Unique will never be able to recover its dues or the amount of the two bank guarantees. Mr Dhond's efforts to show that there is an 'admission of liability' by GIPL of some Rs.30 crores to Techno Unique is directed towards this. But that admission has not yet been tested. It may yet be explained; and while an admission does furnish the best evidence, the law on that is well-settled, viz., that it only does so if the admission remains unexplained.⁹ That is yet to happen, and indeed is a great distance from happening. I note, too, Mr Kamat's case that GIPL has a very significant claim against Techno Unique. Therefore, Techno Unique's claim against GIPL is, at present, anything but done and dusted. I must decline Mr Dhond's invitation to make any such presumption.

43. The third decision in sequence is *Dwarikesh Sugar Industries Ltd v Prem Heavy Engineering Works (P) Ltd & Anr.*¹⁰ The Supreme Court noted the previous decisions, including *Hindustan Steelworks* and *Sumac International*, quoting from the latter, and also reaffirming the statement of law in *UP Cooperative Federation*. Then, in paragraph 22, Dwarikesh Sugar paraphrased the ratio of *Sumac International* on the question of irretrievable injustice:

⁹ *Ramji Dayawala & Sons (P) Ltd v Invest Import*, (1981) 1 SCC 80: "admissions, *unless explained*, furnish the best evidence". See also: *Bharat Singh & Ors v Bhagirathi*, AIR 1966 SC 405: clear admissions, *duly proved*, are substantive evidence against the person making them, but are not conclusive (paragraph 19); followed in *Murlidhar Bapuji Valve v Yallapa Lalu Chaugule*, AIR 1994 Bom 358, paragraph 14.

¹⁰ (1997) 6 SCC 450.

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.**

(Emphasis added)

44. Both Mr Dhond and Mr Kamat, good friends that they are, rely on the same paragraph 22, but with antipodal results. Only one of them can be correct. Unfortunately, it is not Mr Dhond. The second sentence of this paragraph makes that abundantly clear. Mr Kamat is right in saying that in order to invoke these special equities, that is to say that the person against whom invocation is made would never be able to recover the amount under the bank guarantees, it must be shown *decisively* to the satisfaction of the Court that there is *no* possibility — i.e. not the slightest possibility at all — of restitution in this amount. Again, showing that GIPL is in a precarious financial condition, or that its shares are trading below par is insufficient for this purpose. What must be demonstrated must be something far more clear than a mere apprehension. That is *Sumac International*. That is *Dwarikesh Sugar*. And that, therefore, is the law.

45. We should also not forget that until as late as November and December 2019, neither the Madhya Pradesh state government nor

the Central Government were contemplating a removal of GIPL or SSRPL from the project.

46. The three arguments on fraud, irretrievable injustice or special equities cannot be accepted.

47. For these reasons, I find no merit in the Petition. It is dismissed.

48. This being a commercial arbitration petition, costs would have had to be awarded in the normal course. But in view of the invocation of the bank guarantees, and having regard to the quantum of those bank guarantees, I decline to make an order of costs against the Petitioner.

(G. S. PATEL, J)