IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 31.07.2020

Delivered on : 14.08.2020

CORAM :

THE HONOURABLE MR. JUSTICE N. SATHISH KUMAR

O.A.Nos.246 and 247 of 2020

O.A.No.246 of 2020 :

M/s.Transtonnelstory – Afcons JV,
Comprising of
1. M/s.Transtonnelstroy Limited,
   4/1, Lunganskaya Street,
   Moscow 115583, Russia.

2. M/s.Afcons Infrastructure Limited,
   AFCONS House, 16, Shah Industrial Estate,
   Veera Desai Road, Azad Nagar (P.O.,),
   Post Box No.11978, Andheri (W),
   Mumbai – 400 053.
   Rep. by Mr.S.Sivamani ... Applicants

Vs

1. M/s.Chennai Metro Rail Limited,
   Administrative Building,
   Chennai Metro Rail Depot,
   Poonamallee High Road,
   Koyambedu, Chennai – 600 107.

2. Union Bank of India,
   Industrial Finance Branch,
   First Floor, Union Bank Bhavan,
   239, Vidhan Bhavan Marg,
   Nariman Point, Mumbai – 400 021. ... Respondents

O.A.No.247 of 2020 :

M/s.Transtonnelstory – Afcons JV,
Comprising of
1. M/s.Transtonnelstroy Limited,
4/1, Lunganskaya Street,
Moscow 115583, Russia.

2. M/s.Afcons Infrastructure Limited,
AFCONS House, 16, Shah Industrial Estate,
Veera Desai Road, Azad Nagar (P.O.,),
Post Box No.11978, Andheri (W),
Mumbai – 400 053.
Rep. by Mr.S.Sivamani ... Applicants

Vs

1. M/s. Chennai Metro Rail Limited,
Administrative Building,
Chennai Metro Rail Depot,
Poonamallee High Road,
Koyambedu, Chennai – 600 107.

2. IDBI Bank Ltd.,
Specialised Corporate Branch,
IDBI Building, Ground Floor,
Plot No.39, 41, Sector 11, CBD Belapur,
Navi Mumbair – 400 614. ... Respondents

Common Prayer: Original Applications filed under Order XIV Rule 8 of O.S. Rules read with Section 9 (ii) (d) of Arbitration & Conciliation Act, 1996 for injunctions restraining the first respondent, including their officers, employees, agents, servants and representatives, from invoking and receiving the amounts from Bank Guarantee No.49580IGL0074018, dated 16.10.2018, issued by Union Bank of India for Rs.25,77,48,750/-, and Bank Guarantee No.1000041BGP00943, dated 29.12.2010, issued by IDBI Bank Ltd., for

Rs.117,51,07,500/-, or any part thereof, pending disposal of Arbitration Proceedings under UAA-05 and UAA-01 Contracts, respectively.

For Applicants	:	Mr.G.Masilamani, Senior Counsel for Mr.D.Balaraman in both applications
For R1	:	Mr.R.Yashod Vardhan, Senior Counsel for Mr.S.Arjun Suresh for M/s. Dua Associates in O.A.No.246 of 2020
	:	Mr.P.H.Arvindh Pandian, Senior Counsel for Mr.S.Arjun Suresh for M/s. Dua Associates in O.A.No.247 of 2020
For R2	:	Mr.Srinath Sridevan in O.A.No.246 of 2020

COMMON ORDER

These Original Applications have been filed for grant of injunctions restraining the 1st respondent from invoking and receiving the amounts from Bank Guarantees viz., Bank Guarantee No.49580IGL0074018 dated 16.10.2018 issued by Union Bank of India for Rs.25,77,48,750/- relating to O.A.No.246 of 2020, and Bank Guarantee No.1000041BGP00943 dated 29.12.2010 issued by IDBI Bank Ltd. for Rs.117,51,07,500/- relating to O.A.No.247 of 2020, pending Arbitration Proceedings.

2.Since the facts of the case are identical in both the applications, this Court is inclined to dispose both the applications by a common order.

3.For the sake of convenience, the applicants 1 and 2 shall hereinafter be jointly referred as "applicant".

4.The brief facts leading to the filing of these applications are as follows :

4.1.The 1st respondent awarded the work of "Design and construction of underground stations at Shenoy Nagar, Anna Nagar East, Anna Nagar Tower, Thirumangalam and Associated Tunnels - Contract No.UAA-05" for a contract price of Rs.1030,99,50,000/- to the applicant under letter of acceptance dated 28.12.2010. In pursuance of the same, a formal contract was entered into between the applicant and the 1st respondent on 31.01.2011 (hereinafter referred as "Contract No.UAA-05" for brevity), which relates to O.A.No.246 of 2020.

4.2.Similarly, the 1st respondent awarded another work of "Design and construction of underground stations at Washermenpet, Mannadi, High Court, Chennai Central & Egmore and Associated Tunnels - Contract No.UAA-01" for a contract price of Rs.1566,81,00,000/- to the applicant vide letter of Acceptance dated 28.12.2010. In pursuance of the letter of acceptance, a formal contract was also entered into between the applicant and the 1st respondent on 31.01.2011 (hereinafter referred as "Contract No.UAA-01" for brevity), which relates to O.A.No.247 of 2020.

4.3.As per Clause 4.2 of General Conditions of Contract (GCC), the applicant has to furnish Performance Security by way of Bank Guarantee. The relevant clause reads as follows :

> *"4.2 : The Contractor shall obtain, at his cost, a performance security from a third party, in the amount and currencies specified in the Appendix to Tender, and deliver it to the Employer by the date 28 days after the Effective Date. The performance security shall be provided by an entity approved by the Employer and shall be in the form annexed, or in another form approved by the Employer.*
>
> *The performance security shall be valid until the Contractor has executed and completed the Works and*

remedied any defects. It shall be returned to the Contractor within 14 days of the issue of the Performance Certificate. Prior to making a claim under the performance security, the Employer shall, in every case, notify the Contractor stating the nature of the default for which the claim is to be made."

4.4.According to the applicant, in respect of Contract No.UAA-05, the applicant had furnished a Performance Security vide Bank Guarantee No.61410IGL0066010 dated 30.12.2010 for Rs.77,32,46,250/- issued by Union Bank of India in favour of the 1st respondent, and subsequent to that, had furnished a revised Bank Guarantee bearing No.49580IGL0074018, dated 16.10.2018, issued by Union Bank of India for Rs.25,77,48,750/- with validity till 26.08.2020, which is the subject matter of O.A.No.246 of 2020; in respect of Contract No.UAA-01, the applicant had furnished a Bank Guarantee bearing No.1000041BGP00943 dated 29.12.2010 issued by IDBI Bank Ltd. for Rs.117,51,07,500/- with renewed validity till 30.11.2021, which is the subject matter in O.A.No.247 of 2020.

5.It is the case of the applicant that, despite mobilization of necessary resources, there was a delay in commencement of works in respect of both the contracts and the entire delay was attributable to the 1st respondent, viz., Chennai Metro Rail Limited. Though the applicant requested the 1st respondent to revise the key dates as per the provisions of the contract for completion of work, the 1st respondent declined the same and this issue became a dispute between the parties. Hence, the matter was referred to Arbitral Tribunal consisting of three Arbitrators, individually in respect of each contract, for extension of time as well as for costs of the claim.

6.It is the further case of the applicant that, in respect of Contract No.UAA-05, the works between Shenoy Nagar and Thirumangalam Ramp were substantially completed and the 1st respondent took over the facilities, commenced commercial operations and started using it for the intended public purpose since 14.05.2017, however, the 1st respondent issued Taking-Over Certificate for the said works in piece meal on 11.05.2017 and on 15.07.2018, which was not accepted by the applicant. Similarly, in respect of Contract No.UAA-01, the works between Chennai Central and Egmore in Corridor-II were substantially completed and the 1st respondent issued Taking-Over Certificate for the said works on 24.05.2018 and took over the facilities, commenced commercial operations and started using it for the intended public purpose. The remaining stretch between Washermenpet and Mayday Park (Corridor-I) were substantially completed and the 1st respondent commenced commercial operations and started using it for the intended public purpose from 10.02.2019, however, the 1st respondent issued Taking-Over Certificate for Corridor-I in piece meal on 09.02.2019 and 30.11.2019. The piece meal taking-over and delayed effective date of taking-over were not accepted by the applicant.

7.It is the further case of the applicant that, after the issuance of the Taking-Over Certificates, the applicant had submitted Statements of Completion on 03.08.2017 and 03.05.2019 in respect of Contract Nos.UAA-05 and UAA-01 respectively. However, the 1st respondent, while certifying the Statements of Completion, reversed its earlier certification of many items, levied liquidated damages, and informed the applicant to deposit the amount.

8.The 1st respondent, referring to the alleged defaults, by invoking Clause 4.2 of GCC to make claim under the Performance Security, notified for encashment of Performance Bank Guarantees, viz., Bank Guarantee for Rs.25,77,48,750/- valid until 26.08.2020 in respect of Contract No.UAA-05 and Bank Guarantee for Rs.117,51,07,500/- with renewed validity till 30.11.2021 in respect of Contract No.UAA-01. Even before the applicant receiving the notices, the 1st respondent sent a communication to the 2nd respondent Banks to encash the Bank Guarantees referred above. However, the 1st respondent had not stated any specific default committed by the applicant by referring to the terms of the contract. The invocation of the Bank Guarantees by the 1st respondent, without disclosing any specific breach as contemplated under the contract and without following mandatory requirements envisaged in the contract, is clearly an attempt to derogation of contract conditions and an attempt to egregious fraud. The 1st respondent, viz., Chennai Metro Rail Limited, is an institution owned by the State and is expected to act in a fair and reasonable manner.

9.It is the further case of the applicant that, despite the fact that the Government has issued several restrictive orders in pandemic situation, without considering the hardships faced in the infrastructure area, the 1st respondent has started invoking the Bank Guarantees, though the works were completed long back and put into commercial operation. If the Bank Guarantees are invoked, the applicant will suffer irreparable loss and would be put to much hardship.

10.Therefore, these applications have been filed by the applicant for injunctions restraining the 1st respondent from invoking the aforesaid Bank

Guarantees pending Arbitration Proceedings.

11.The entire allegations made by the applicant have been denied by the 1st respondent in their counter affidavits filed in both the applications.

12.In the counter affidavits filed by the 1st respondent viz., Chennai Metro Rail Limited, they have taken the following stand :

12.1.A Bank Guarantee is a separate and independent contract that is unconditional and irrevocable in nature.

12.2.As far as the Bank Guarantee No. 49580IGL0074018 is concerned, a sum of Rs.25,77,48,750/- has already been encashed and therefore, O.A.No.246 of 2020 has become infructuous.

12.3.Further, these applications have been filed without referring to the particulars of the Arbitration Proceedings, though they are actually pending and the same are as follows :

Contract No.UAA-05 :

12.4.As far as Contract No.UAA-05 is concerned, the following claims are pending before the following Arbitral Tribunals, consisting of three Arbitrators each.

Arbitral Tribunal No.1 :

Claim	***Nature of Claim***	***Relief Sought***
Claim No.1	For the alleged delay events between 07.02.2011 and 31.12.2012	Extension of time for completion of works sought from 07.01.2015 to 28.12.2017
Claim No.2	For the alleged delay events upto 31.05.2014	Extension of time for completion of works sought from 28.12.2017 to 26.01.2019
Claim No.3	Cost allegedly arising out of Addendum No.1 (i.e. 08.01.2015 to 05.07.2015)	Rs.186.69 Crores

Arbitral Tribunal No.2 :

Claim	***Nature of Claim***	***Relief Sought***
Claim No.3A	Cost claimed for the period between 06.07.2015 and 11.05.2017	Rs.276.71 Crores
Counter claim	Liquidated damages	Rs.103.99 Crores

Contract No.UAA-01 :

12.5.Similarly, in respect of Contract No.UAA-01, the following claims are pending before the following Arbitral Tribunals, consisting of three Arbitrators each.

Arbitral Tribunal No.1 :

Claim	***Nature of Claim***	***Relief Sought***
Claim No.1	For the alleged delay events between 07.02.2011 and 28.02.2013	Extension of time for completion of works sought from 07.04.2015 to 29.12.2020
Claim No.2	For the alleged delay events upto 31.05.2014	Extension of time for completion of works sought from 29.12.2020 to 15.05.2021
Claim No.3	Cost allegedly arising out of Addendum No.1 (i.e. 08.04.2015 to 30.03.2016)	Rs.458.83 Crores

Arbitral Tribunal No.2 :

Claim	***Nature of Claim***	***Relief Sought***
Claim No.3A	Cost claim for the period between 31.03.2016 and 28.12.2018	Rs.841.16 Crores
Counter claim	Liquidated damages	Rs.156.681 Crores

12.6.The Bank Guarantees categorically provide that the Bank shall pay to the employer any money so demanded notwithstanding any dispute/disputes raised by the contractor in any suit or proceeding pending before any Court, Tribunal or Arbitrator/s relating thereto and the liability under the guarantee shall be absolute and unequivocal.

12.7.In the absence of a decision by the Supervisory Body and Project Management to initiate litigation against the 1st respondent, as per the Joint Venture Agreement dated 30.01.2011 entered into between the applicants, these applications are not maintainable. The applicant has failed to show any authorisation or minutes by the Supervisory Board authorising grant of powers to Mr.Sivamani to represent the applicant in these proceedings.

12.8.The Lead Partner, viz., the 1st applicant, had not been available at site during execution of critical works, which had also contributed to delay in tunneling works. The project was delayed by the applicant and there are many works remaining incomplete and even there are serious defects in the works executed by the applicant so far.

12.9.Vide Addendum No.1 dated 29.08.2013 entered into between the applicant and the 1st respondent, the key dates were revised, and the time for completion of the works was extended, inspite of which, there were many delays attributable to the applicant. Addendum No.1 also provides that the liquidated damages payable by the applicant are applicable to the revised key dates also.

12.10.In respect of Contract No.UAA-05, a part of the works was substantially completed in May 2017 after a delay of approximately two years from the revised completion date, i.e., 05.07.2015, as agreed mutually by the parties vide Addendum No.1. As per Clause 10.2 of GCC, the completed portion of the works was taken over by the 1st respondent to commence commercial operations in public interest upon issuing a Partial Taking-Over Certificate to the applicant. This Partial Taking-Over Certificate was issued along with a list of balance outstanding works and snags to be completed during the Defect Liability Period. Thereafter, on a without prejudice basis, the ER issued a Taking-Over Certificate in August 2018, i.e., after a delay of more than three years, from the revised completion date, i.e. 05.07.2015. The applicant has failed to complete the balance works or to rectify the defects within the prescribed time. The major defects and shortcomings in the works executed by the applicant are set out in the counter affidavit filed by the 1st respondent in detail.

12.11.Similarly, in respect of Contract No.UAA-01 also, there were many delays attributable to the applicant, however, a part of the works was completed by the applicant in May 2018, after a delay of more than two years from the revised date of completion, i.e. 30.03.2016, as agreed mutually by the parties vide Addendum No.1. As per Clause 10.2 of the GCC, this completed portion of the works was taken over by the 1st respondent to commence commercial operations in public interest upon issuing a Partial and conditional Taking-Over Certificate to the applicant, with a list of balance outstanding works and snags to be attended to and completed by the applicant. Thereafter, the remaining works were taken over on 09.02.2019, after a delay of almost three years from the revised date of completion, i.e. 30.03.2016, upon issuance of another Partial and conditional Taking-Over Certificate, with a list of balance outstanding works and snags to be completed within a reasonable time. The various defects and shortcomings in the works executed by the applicant have also been set out in detail in the counter affidavit.

12.12.As far as Contract No.UAA-05 is concerned, a sum of Rs.1240,30,76,344/- has been paid to the applicant by the 1st respondent and a sum of Rs.209.31 Crores has been certified and paid to the applicant under the contract over and above the contract price of Rs.1030.99 Crores. Similarly, as far as Contract No.UAA-01 is concerned, a sum of Rs.1847,24,90,868/- has been paid to the applicant by the 1st respondent and a sum of Rs.280.43 Crores has been certified and paid to the applicant under the contract over and above the contract price of Rs.1566.81 Crores.

12.13.Despite making numerous requests and reminders, the applicant has failed to complete the outstanding works and snags to the satisfaction of the 1st respondent in respect of both the contracts.

12.14.On the whole, considering several defects and shortcomings in the works executed by the applicant, which were not set right by the applicant despite numerous requests and reminders, the 1st respondent is constrained to and is also entitled to invoke and encash the Bank Guarantees, in respect of both the contracts, which were executed in the nature of Performance Security.

13.It is stated by the Union Bank of India, the 2nd respondent in O.A.No.246 of 2020, that a sum of Rs.25,77,48,750/- was encashed and they were unaware of the order of the Court dated 08.07.2020. The amount was paid at 16.29 hours on 08.07.2020. It is further stated that the alleged e-mail sent to them informing of the order of the Court was also not received by them. The entire amount had been transferred through wire and they were not aware of the interim order of the Court.

14.1.Mr.G.Masilamani, learned Senior Counsel appearing for the applicant, vehemently contended that a Bank Guarantee can be enforced only on the basis of the underlying contract. The Bank Guarantees in the present case have been issued only as per the requirements of the underlying contracts. The 1st respondent cannot invoke the Bank Guarantees ignoring the mandatory conditions set out in the underlying contracts. If the underlying contract is eschewed, the Bank Guarantee will become unsupported by consideration, which cannot be enforced. Hence, it is the contention of the learned Senior Counsel that the Bank Guarantees alone cannot be enforced in isolation leaving behind the underlying contracts. The invocation of Bank Guarantee will arise only in the event of any shortcoming or default or breach of the contract. The underlying contracts also provide a mechanism to resolve the dispute/disputes between the parties. The Arbitration Proceedings are now pending and Award is yet to be passed. The Bank Guarantees are admittedly valid as on date. Hence, there is no necessity whatsoever for the 1st respondent to invoke the Bank Guarantees. The 1st respondent has invoked the Bank Guarantee at this stage even without any information to the applicant, that too, while the Arbitration Proceedings are pending.

14.2.It is the further contention of the learned Senior Counsel that, in the invocation letters dated 06.07.2020, there is no mention about the amount towards liability or damage resulting from any defect or shortcoming in the works executed by the applicant. Without ascertaining the employer sustaining liability or damages resulting from the defects or shortcomings in the works executed by the applicant, the 1st respondent cannot invoke the Bank Guarantees, inasmuch as the Bank Guarantees are enforceable only when the employer has any liability or damage due to the defects or shortcomings of the contractor, as per the conditions contained therein. Hence, it is the contention of the learned Senior Counsel that, sustaining any liability or damage resulting from any defect or shortcoming of the applicant is the essential prerequisite for the 1st respondent to invoke the Bank Guarantees. Hence, without showing the nature of the liability or damages sustained by the 1st respondent, the Bank Guarantees cannot be invoked. The letters of invocation are also silent about any breach or non-compliance of the terms of the underlying contracts.

14.3.It is the further contention of the learned Senior Counsel that the Clause 4.2 of GCC stipulates that the employer shall, in every case, notify the contractor stating the nature of the default for which the claim is to be made. It is his contention that, in this case, the works have been substantially completed and Taking-Over Certificates have also been issued by the 1st respondent and trains have been put into commercial use for more than two years. It is his further contention that the works yet to be done are only minor insignificant rectification works and even the same have also been attended to during the rectification period. It is his further contention that, when Taking-Over Certificates have been issued by the employer for substantial completion of works, there is no question of partial taking-over of the works. The letters of the respondent in this regard clearly indicate that the works have been substantially completed and tracks were put into use and trains are running for commercial use.

14.4.The learned Senior Counsel further contended that, as per Clause 4.2 of GCC read with CPA 7, the Performance Security originally provided shall be reduced to 2.5% of the contract price within 14 days of the issue of the Taking-Over Certificate, subject to the contractor providing a new Performance Security for 2.5% of the contract price, which shall be returned to the contractor within 14 days of the issue of the Performance Certificate. Further, Clause 10 of GCC also shows the manner in which the work shall be taken-over by the employer when they have been completed in accordance with the contract. The contracts also indicate that, after Taking-Over Certificate has been issued, the liquidated damages for delay in completion of the remainder of the works shall be reduced in the proportion which the value of the part so certified bears to the value of the works or section. Further, if any part is taken over by the employer and put in use before the Taking-Over Certificate is issued, the part which is used shall be deemed to have been taken-over on the date on which it is used. Hence, it is the contention of the learned Senior Counsel that, when the works have been substantially completed and the same have been put into use, the Performance Security has to be reduced from 7.5% to 2.5% of the contract price, which has not been considered by the 1st respondent in respect of Contract No.UAA-01.

14.5.It is the contention of the learned Senior Counsel that, without considering all the above facts, the 1st respondent has invoked the Bank Guarantees, which, in fact, will have a serious impact on the applicant, particularly, during the pandemic situation, which would also cause irreparable injury and damage to the applicant at this particular point of time.

14.6.The learned Senior Counsel further contended that the 1st respondent has not even estimated the liability or damages in order to invoke the Bank Guarantees as per the contract. In the absence of any estimation made by the 1st respondent, the Bank Guarantees cannot be encashed in entirety. It is the contention of the learned Senior Counsel that the purpose of estimating the liability is to strike a balance between the defects and the liability. In case, if the estimated amount is lesser than the amount covered under the Bank Guarantee, and in such case, if the Bank Guarantee is enforced in entirety, the ultimate sufferer will be the applicant. Hence, it is his contention that, without estimation of the liability or damages, or without assigning any reason for invocation of Bank Guarantees, the Bank Guarantees cannot be invoked by the 1st respondent.

14.7.The learned Senior Counsel further contended that, partial taking-over of the works is not contemplated under the contracts. The remaining minor works are not to be treated as a part as per the contract and they are to be attended to only during the Defect Liability Period. Therefore, the question of partial taking-over of the work does not arise in this case and the works have already been substantially completed. Two certificates have been issued in respect of Contract No.UAA-05, and similarly, three certificates have been issued in respect of Contract No.UAA-01 for substantial completion of works. Hence, it is his contention that, when the substantial completion of works has been accepted by the 1st respondent, minor works cannot be treated as a part, and the Bank Guarantees cannot be invoked in full.

14.8.The learned Senior Counsel further submitted that the defects now canvassed by the 1st respondent in these applications are only minor in nature. Admittedly, the 1st respondent, viz., Chennai Metro Rail Limited, have also retained more than 35 Crores with them. The seepages pointed out by the 1st respondent are very common. Out of 45,000 alignments, seepages were found only in 300 alignments, which are only minor in nature. It is the submission of the learned Senior Counsel that the respondent has not found any defect in the applicant's work from the beginning.

14.9.In response to the question of maintainability of these applications raised by the 1st respondent, the learned Senior Counsel submitted that the contention of the 1st respondent is that only the Supervisory Body has to make a decision to initiate proceedings against the 1st respondent as per the Joint Venture Agreement between the applicants 1 and 2, however, the 1st respondent themselves have stated in their counter affidavit that the Lead Partner, viz., the 1st applicant is not available from the year 2013, in spite of which, the contractors were allowed to continue and works have also been completed and moreover, several payments have been made as per the contract. Therefore, the technical ground taken by the 1st respondent has no legs to stand.

14.10.The learned Senior Counsel further submitted that, though Arbitration Proceedings are pending before the Arbitral Tribunal consisting of three Arbitrators, all of whom are senior citizens, trial has been completed in respect of Contract No.UAA-01. Therefore, at this stage, the applicant is not in a position to get an efficacious remedy before the Arbitral Tribunal, and hence, the applicant has approached this Court by way of these applications for grant of injunction.

14.11.The learned Senior Counsel concluded his arguments by submitting that the invocation of Bank Guarantees by the 1st respondent, that too for the entire value, while the disputes with regard to extension of time and costs are pending before the Arbitral Tribunal, is not valid in the eye of law and hence, prayed for grant of injunction.

14.12.In support of his submissions, the learned Senior Counsel relied upon the following judgments.

i. *Standard Chartered Bank Ltd. v. Heavy Engineering Corporation Ltd. and another* ***[(2019) SCC Online SC 1638]***

ii. *Gujarat Maritime Board v. Larsen and Toubro Infrastructure Development Projects Ltd. and another* ***[(2016) 10 SCC 46]***

iii. *Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co.* ***[(2007) 8 SCC 110]***

iv. *Hindustan Steelworks Construction Ltd. v. Tarapore & Co. and another* ***[(1996) 5 SCC 34]***

v. *M/s.Gammon OJSC Mosmetrostroy JV v. M/s.Chennai Metro Rail Ltd. and another* ***[(2015) SCC Online Mad 8193]***

vi. *M/s.Chennai Metro Rail Ltd. v. M/s.Gammon OJSC Mosmetrostroy JV and another* ***[O.S.A.Nos.192, 193 and 194 of 2015 - Madras High Court]***

vii. *Oriental Insurance Co. Ltd. v. Raj Kumari (Smt) and others* ***[(2007) 12 SCC 768]***

viii. *Padmasundara Rao and others v. State of Tamil Nadu and others* ***[(2002) 3 SCC 533]***

ix. *Godhra Electricity Co. Ltd. and another v. State of Gujarat and another* ***[(1975) 1 SCC 199]***

x. *Mohinder Singh Gill and another v. The Chief Election Commissioner, New Delhi and others* ***[(1978) 1 SCC 405]***

xi. *State of Punjab v. Bandeep Singh and others* ***[(2016) 1 SCC 724]***

xii. *United India Insurance Co. Ltd. v. Pushpalaya Printers* ***[(2004) 3 SCC 694]***

15.1.Mr.R.Yashod Vardhan, learned Senior Counsel, appearing for the 1st respondent, viz., Chennai Metro Rail Limited in O.A.No.246 of 2020, submitted that Bank Guarantee is a separate and independent transaction and the underlying contract is not relevant to decide the enforcement of the Bank Guarantee.

15.2.It is his further contention that, as per Clause 10.2 of GCC, partial taking-over by the 1st respondent is permissible. Clause 10.2 of GCC makes it very clear that the employer shall not use any part of the works unless the employer's representative has issued a Taking-Over Certificate for such part. Hence, it is his contention that, certain portions of the works were substantially completed in the year 2017 and a partial taking-over was done in respect of those completed parts of the works after two years, i.e., after the Defect Liability Period was over.

15.3.It is his further contention that, Clause 12.9 of GCC makes it clear that the contract shall not be considered to be completed until Performance Certificate has been signed by the employer's representative and delivered to the contractor, stating the date on which the contractor completed his obligations to the employer's representative's satisfaction. It further states that the Performance Certificate shall be given by the employer's representative by the date 28 days after the expiry of the contract period, or as soon after such date as the contractor has provided all the construction documents and completed and tested all the works, including remedying any defects; only the Performance Certificate shall be deemed to constitute approval of the works. Therefore, it is the contention of the learned Senior Counsel that, merely based on the fact that Taking-Over Certificate was issued in respect of a part of the work, it cannot be construed that the entire work has been substantially completed.

15.4.The learned Senior Counsel further contended that, now, the applicant has taken a stand that the entire works have been completed and the percentage of Performance Security has to be reduced as per Clause 4.2 of GCC read with CPA 7 in appreciation of the work completed. However, all these contentions are disputed by the 1st respondent, and such disputes now raised by the applicant were never raised in the pending Arbitration Proceedings. So, such claims cannot be now canvassed before this Court in these applications for grant of injunction.

15.5.The learned Senior Counsel further contended that, absolutely there is no evidence or material to infer the nature of fraud played by the 1st respondent, as alleged by the applicant.

15.6.The learned Senior Counsel further contended that, before the Arbitral Tribunal, the applicant has taken a stand that the works have not been completed within the prescribed time and the delay was solely attributable to the 1st respondent, and therefore, they have sought extension of time, however, now, in these applications, the applicant is taking a contrary stand before this Court as if the entire works have been completed by the applicant and taken-over by the 1st respondent.

15.7.Therefore, the learned Senior Counsel concluded his arguments by submitting that the invocation of Bank Guarantees by the 1st respondent is valid in the eye of law and needs no interference and prayed for dismissal of these applications.

15.8.In support of his arguments, the learned Senior Counsel placed reliance on the following judgments :

i. *U.P.Cooperative Federation Ltd. v. Singh Consultants and Engineers (P) Ltd.* ***[(1988) 1 SCC 174]***

ii. *Syndicate Bank v. Vijay Kumar and others* ***[(1992) 2 SCC 330]***

iii. *U.P.State Sugar Corporation v. Sumac International Ltd.* ***[(1997) 1 SCC 568]***

iv. *Hindustan Construction Co. Ltd. v. State of Bihar and others* ***[(1999) 8 SCC 436]***

v. *BSES Ltd. (Now Reliance Energy Ltd.) v. Fenner India Ltd. And another* ***[(2006) 2 SCC 728]***

vi. *Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co.* ***[(2007) 8 SCC 110]***

vii. *Vinitec Electronics Private Ltd. v. HCL Infosystems Ltd.*

[(2008) 1 SCC 544]

viii.Standard Chartered Bank v. Heavy Engineering Corporation Ltd. and another ***[(2020) 4 MLJ 104 (SC)]***

16.Mr.P.H.Arvindh Pandian, learned Senior Counsel, appearing for the 1st respondent viz., Chennai Metro Rail Limited in O.A.No.247 of 2020, concurring with the submissions of Mr.R.Yashod Vardhan submitted that the works have not been fully completed by the applicant and there are 403 balance works and in fact, they have detected more than 2000 snags in the entire work. It is his further contention that, as the Bank Guarantees are unconditional and independent, the 1st respondent cannot be prevented from enforcing the same. The learned Senior Counsel further submitted that, Taking-Over Certificate was issued only in respect of part of the works and not in respect of the entire work. It is his further contention that the issue raised before this Court at this time regarding reduction of percentage of Performance Security cannot be agitated in these applications. Hence, the learned Senior Counsel prayed for dismissal of these applications.

17.This Court gave its anxious consideration to the rival submissions and carefully perused the materials available on record.

18.On a perusal of the materials placed before this Court, the following facts are taken note of :

O.A.No.246 of 2020 :

18.1.It is not disputed that the 1st respondent awarded a work, viz., Contract No.UAA-05, to the applicant for a contract price of Rs.10,30,99,50,000/- vide letter of acceptance dated 28.12.2010 and a Performance Security at 7.5% of the contract price was issued by the applicant on 30.12.2010 in the form of Bank Guarantee and then it was reduced to 2.5% of the contract price on 16.10.2018 valid till 26.08.2020.

18.2.In the contract, the date of completion of work was mentioned as 07.01.2015, however, as per Addendum No.1 dated 29.08.2013, entered into between the parties, time was extended and the date of completion was fixed as 05.07.2015.

18.3.However, on 11.05.2017, Taking-Over Certificate was issued for substantial completion of a part of the works, subject to rectification of defects and completion of minor outstanding works. Further, Taking-Over Certificate was issued on 27.08.2018 for substantial completion of another part of the works, subject to rectification of defects and completion of minor outstanding works, along with Annexure-A indicating the minor outstanding works (snag list).

18.4.The letter dated 11.05.2017 makes it clear that the applicant has failed to complete "whole of the works" as per the requirements of the contract, and hence, the employer is compelled to take-over only "part of the works" in order to achieve the revenue operation. While issuing the Taking-Over Certificate, it is made clear that certain works were not completed and the same require more than a couple of weeks to complete and the contractor is required to complete all the remaining works.

18.5.Similarly, vide letter dated 27.08.2018, Taking-Over Certificate has been issued for another part of the works, subject to rectification of defects and completion of minor outstanding works as listed out in Annexure-A to that letter.

18.6.Vide letter dated 30.08.2019, the 1st respondent has intimated the applicant to set right the balance works.

<u>O.A.No.247 of 2020</u> :

18.7.It is not disputed that the 1st respondent awarded a work, viz., Contract No.UAA-01, for a contract price of Rs.1566,81,00,000/- to the applicant vide letter of acceptance dated 28.12.2010 and a Performance Security at 7.5% of the contract price was issued by the applicant on 29.12.2010 in the form of Bank Guarantee. It is also not disputed that it was renewed till 30.11.2011.

18.8.In the contract, the date of completion of work was mentioned as 07.04.2015, however, as per Addendum No.1 dated 29.08.2013, entered into between the parties, time was extended and the date of completion was fixed as 30.03.2016.

18.9.However, on 24.05.2018, Taking-Over Certificate was issued for substantial completion of work in respect of Corridor-2 (Egmore to Chennai Central), subject to rectification of defects and completion of minor outstanding works. Another Taking-Over Certificate was issued on 09.02.2019 for substantial completion of part of the works in respect of Corridor-1 (Washermenpet to Mayday Park), subject to rectification of defects and completion of minor outstanding works.

18.10.The letter dated 24.05.2018 makes it clear that the applicant has failed to complete "whole of the works" as per the requirements of the contract, and hence, the employer is compelled to take over only "part of the works" in order to achieve the revenue operation. Accordingly, invoking Clause 10.2 of GCC, they intend to use part of the works in respect of Egmore and Chennai Central Station. While issuing the Taking-Over Certificate, it is made clear that certain works were not completed and the same require more than a couple of weeks to complete and the contractor is required to complete all the remaining works.

18.11.Similarly, vide letter dated 09.02.2019, Taking-Over Certificate has been issued for a part of the works, in accordance with Clause 10.2 of GCC, subject to rectification of defects and completion of minor outstanding works.

18.12.Vide letter dated 13.12.2019, the 1st respondent has reminded the applicant of the various correspondences of the 1st respondent to set right the balance works.

19.It will be useful to extract certain clauses contained in the contracts for better appreciation of the arguments advanced on either side.

19.1.Clause 4.2 of GCC reads as follows :

*"**Clause 4.2** : The Contractor shall obtain, at his cost, a performance security from a third party, in the amount and currencies specified in the Appendix to Tender, and deliver it to the Employer by the date 28 days after the Effective Date. The performance security shall be provided by an entity approved by the Employer and shall be in the form annexed, or in another form approved by the Employer.*

The performance security shall be valid until the Contractor has executed and completed the Works and remedied any defects. It shall be returned to the Contractor within 14 days of the issue of the Performance Certificate. Prior to making a claim under the performance security, the Employer shall, in every case, notify the Contractor stating the nature of the default for which the claim is to be made."

19.2.Under CPA 7, the Clause 4.2 is modified as follows :

*"**Clause 4.2 read with CPA 7** : The Contractor shall obtain, at his cost, a performance security from a third party, in the amount and currencies specified in the Appendix to Tender, and deliver it to the Employer by the date 28 days after the Effective Date. The performance security shall be provided by an entity approved by the Employer and shall be in the form annexed, or in another form approved by the Employer.*

CPA-7 : Replace the second sentence of the second paragraph of GC Clause 4.2 with the following :

The performance security shall be valid until the Contractor has executed and completed the Works and remedied any defects. The originally provided Performance Security shall be reduced to 2.5% of the Contract Price within 14 days of the issue of the Taking-Over Certificate, subject to the Contractor providing a new Performance Security for 2.5% of the Contract Price, which shall be returned to the Contractor within 14 days of the issue of the Performance Certificate. Prior to making a claim under the performance security, the Employer shall, in every case, notify the Contractor stating the nature of the default for which the claim is to be made."

19.3.Clause 10.1 of GCC reads as follows :

*"**Clause 10.1** : Except as stated in Sub-Clause 9.4, the Works shall be taken over by the Employer when they have been completed in accordance with the Contract (except as described in sub-paragraph (a) below), have passed the Tests on Completion and a Taking-Over Certificate for the Works has been issued, or has deemed to have been issued in accordance with this Sub-Clause. If the Works are divided into Sections, the Contractor shall be entitled to apply for a Taking-Over Certificate for each Section.*

The Contractor may apply by notice to the Employer's Representative for a Taking-Over Certificate not earlier than 14 days before the Works or Section (as the case may be) will, in the Contractor's opinion, be complete and ready for taking over. The Employer's Representative shall, within 28 days after the receipt of the Contractor's application:

(a) issue the Taking-Over Certificate to the Contractor, stating the date on which the Works or Section were completed in accordance with the Contract (except for minor outstanding work that does not affect the use of the Works or Section for their intended purpose) including passing the Tests on Completion; or

(b) reject the application, giving his reasons and specifying the work required to be done by the Contractor to enable the Taking-Over Certificate to be issued: the Contractor shall then complete such work before issuing a further notice under this Sub-Clause.

If the Employer's Representative fails either to issue the Taking-Over Certificate or to reject the Contractor's application within the period of 28 days, and if the Works or Section (as the case may be) are substantially in accordance with the Contract, the Taking-Over Certificate shall be deemed to have been issued on the last day of that period."

19.4.Clause 10.2 of GCC reads as follows :

*"**Clause 10.2** : The Employer shall not use any part of the Works unless the Employer's Representative has issued a Taking-Over Certificate for such part. If a Taking-Over Certificate has been issued for any part of the Works (other than a Section), the liquidated damages for delay in completion of the remainder of the Works (and of the Section of which it forms part) shall, for any period of delay after the date stated in such Taking-Over Certificate, be reduced in the proportion which the value of the part so certified bears to the value of the Works or Section (as the case may be); such values shall be determined by the Employer's Representative in accordance with the provisions of Sub-Cause 3.5. The provisions of this paragraph shall only apply to the rate of liquidated damages under Sub-Clause 8.6, and shall not affect the limit of such damages.*

If the Employer does use any part of the Works before the Taking-Over Certificate is issued :

(a) the part which is used shall be deemed to have been taken over at the date on which it is used,

(b) the Employer's Representative shall, when requested by the Contractor, issue a Taking-Over Certificate accordingly, and

(c) the Contractor shall cease to be liable for the care of such part from such date, when responsibility shall pass to the Employer.

After the Employer's Representative has issued a Taking-Over Certificate for a part of the Works, the Contractor shall be given the earliest opportunity to take such steps as may be necessary to carry out any outstanding Tests on Completion, and the Contractor shall carry out such Tests on Completion as soon as practicable, before the expiry of the Contract Period."

20.1.It is the contention of the applicant in O.A.No.247 of 2020 that, as Taking-Over Certificate has been issued for substantial completion of works, Performance Security has to be reduced from 7.5% to 2.5% of the contract price as per Clause 4.2 of GCC read with CPA 7.

20.2.This contention of the applicant has been disputed by the 1st respondent. Admittedly, the disputes that were referred in the Arbitration Proceedings which are now pending were only with regard to extension of time and costs. Nowhere this issue with regard to reduction of percentage of Performance Security has been raised as a claim before the Arbitral Tribunal. It appears that, it is for the first time it is canvassed before this Court.

20.3.Therefore, this Court is of the opinion that such an issue or dispute cannot be decided in these applications for grant of injunction filed under Section 9 of the Arbitration and Conciliation Act, 1996.

21.1.A reading of Clauses 10.1 and 10.2 of GCC together (extracted supra) makes it clear that the works shall be taken-over by the employer when they have been completed in accordance with the contract and have passed the Tests on Completion and a Taking-Over Certificate for the works has been issued or is deemed to have been issued. These clauses also make it clear that the employer is permitted to take-over any part of the work which is completed substantially. The correspondences referred above in respect of both the contracts indicate that only part of the works which were substantially completed have been taken-over.

21.2.Clause 12.9 of GCC reads as follows :

> *"**Clause 12.9** : The Contract shall not be considered to be completed until the Performance Certificate has been signed by the Employer's Representative and delivered to the Contractor, stating the date on which the Contractor completed his obligations to the Employer's Representative's satisfaction.*

The Performance Certificate shall be given by the Employer's Representative by the date 28 days after the expiry of the Contract Period, or as soon after such date as the Contractor has provided all the Construction Documents and completed and tested all the Works, including remedying any defects.

Only the Performance Certificate shall be deemed to constitute approval of the Works."

The above makes it clear that, only after Performance Certificate is issued, the work could be considered to be completed and only such Performance Certificate shall be deemed to constitute approval of the works. Therefore, unless Performance Certificate is issued, it cannot be said that the entire works have been completed and taken-over. Clause 10.2 of GCC also permits taking-over in part. Moreover, the letter issued by the applicant dated 13.05.2017 also makes it very clear that the subject matter was with regard to "Issuance of Taking-Over Certificate for 'Part of the works' ", which makes it clear that the applicant was also aware of the fact that the Taking-Over Certificate has not been issued in respect of entire work but only for a part of the work. Their own letter substantiates the same. Another letter of the applicant dated 12.06.2020 makes it clear that they raised an issue contending that the works were completed in the year 2017 and the

Defect Liability Period is also over by 11.05.2019, and hence sought for issuance of Performance Certificate as per Clause 12.9 of GCC. However, the 1st respondent, vide letter dated 10.07.2020, has disputed the contentions raised by the applicant in letter dated 12.06.2020. The above letter makes it clear that the issue of Performance Certificate has culminated into a dispute between the parties, but it appears that the same has not been referred in the pending Arbitration Proceedings. Therefore, such a dispute, which has never been referred to the Arbitral Tribunal, cannot be now agitated before this Court in these applications seeking injunctions against the 1st respondent from enforcing the Bank Guarantees.

21.3.As stated above, there is a serious dispute with regard to the nature of completion of work, particularly with regard to the completion of work within the specified date as alleged by the applicant and denied by the others. Such an assertion of the applicant and denial of others itself has emanated as a dispute. Whether or not the entire works were completed within the contract period is not germane for decision in these applications. But what appears from the available records is that, even after execution of Addendum No.1, Taking-Over Certificates in respect of parts of the works were issued only after a period of two years from the date agreed for completion of works.

21.4.Be that as it may, admittedly, claims have been preferred by the applicant before the Arbitrators contending that there was a delay in execution of the works and the delay was solely attributable to the 1st respondent and for costs for such delay, and those claims are still pending adjudication before the Arbitral Tribunal.

21.5.In such view of the mater, this Court is restrained from going into the dispute with regard to completion of entire works by the applicant or issuance of Performance Certificate in these applications under Section 9 of the Arbitration and Conciliation Act, 1996, for grant of injunction.

22.1. It is the main contention of the learned Senior Counsel appearing for the 1st respondent, viz., Chennai Metro Rail Limited, that, in the absence of a decision by the Supervisory Body and Project Management to initiate litigation against the 1st respondent, and in the absence an authorisation by the Supervisory Board authorising grant of powers to Mr.Sivamani to represent the applicant in these proceedings, the applications are not maintainable and the Power of Attorney is not valid now in the eye of law, as the 1st applicant has abandoned the work long back.

22.2.It is to be noted that the works were awarded to the 1st and 2nd applicants who entered into a Joint Venture Agreement on 30.01.2011, which is not in dispute. The 1st respondent themselves, in their counter affidavit, have averred that the 1st applicant had abandoned the work since 2013. Even assuming that the 1st applicant has abandoned the work long back, the works have been continued and some portions have been admittedly taken-over by the 1st respondent and have been put into commercial use and Taking-Over Certificate have also been issued by the 1st respondent and several payments have also been made to the applicant by the 1st respondent. In such view of the matter, this Court is of the opinion that the question of maintainability has no relevance in these applications. While the applicants themselves have not disputed the Joint Venture Agreement and they are party to the agreement and works have been carried out and payments were also made towards the works, merely because a resolution or minutes is not filed as per the Joint Venture Agreement, it cannot be said that these applications are not maintainable.

22.3.Accordingly, the objection of the 1st respondent with regard to maintainability of these applications is overruled.

23.Therefore, the only issue that has to be decided in these applications is whether the invocation of Bank Guarantees by the 1st respondent is valid or not in the eye of law.

24.1.It would be useful to extract certain clauses of the Bank Guarantees executed in respect of both the contracts :

The relevant clauses of the Bank Guarantee in respect of Contract No.UAA-05 are extracted as follows :

> *"4.Now we the Undersigned Union Bank of India being fully authorized to sign and to incur obligations for and on behalf of and in the name of Union Bank of India, hereby declare that the said Bank will guarantee the Employer the full amount of Rs.25,77,48,750/- (Rupees Twenty Five Crores Seventy Seven Lacs Forty Eight Thousand Seven Hundred Fifty Only) as stated above.*
>
> *5.After the Contractor has signed the aforementioned Contract with the Employer, the Bank is engaged to pay the Employer, any amount up to and inclusive of the*

aforementioned full amount upon written order from the Employer to indemnify the Employer for any liability of damage resulting from any defects or shortcomings of the Contractor or the debts he may have incurred to any parties involved in the Works under the Contract mentioned above, whether these defects or shortcomings or debts are actual or estimated or expected. The Bank will deliver the money required by the Employer immediately on demand without delay and demur and without reference to the Contractor and without the necessity of a previous notice or of judicial or administrative procedures and without it being necessary to prove to the Bank the liability or damages resulting from any defects or shortcomings or debts of the Contractor. The Bank shall pay to the Employer any money so demanded notwithstanding any dispute/disputes raised by the Contractor in any suit or proceedings pending before any Court, Tribunal or Arbitrator/s relating thereto and the liability under this guarantee shall be absolute and unequivocal.

...

11. ... (c) We are liable to pay the guarantee amount or part thereof under this Bank Guarantee only & only if you serve upon us a written claim or demand on or before 26/08/2020."

The relevant clauses of the Bank Guarantee in respect of Contract No.UAA-01 are extracted as follows :

"4.Now we the Undersigned IDBI Bank Limited being fully authorized to sign and to incur obligations for and on behalf of and in the name of IDBI Bank Limited, hereby declare that the said Bank will guarantee the Employer the full amount of Rs.117,51,07,500/- (Rupees One Hundred and Seventeen Crores Fifty One Lacs Seven Thousand Five Hundred Only) as stated above.

5.After the Contractor has signed the aforementioned Contract with the Employer, the Bank is engaged to pay the Employer, any amount up to and inclusive of the aforementioned full amount upon written order from the Employer to indemnify the Employer for any liability of damage resulting from any defects or shortcomings of the Contractor or the debts he may have incurred to any parties involved in the Works under the Contract mentioned above, whether these defects or shortcomings or debts are actual or estimated or expected. The Bank will deliver the money required by the Employer immediately on demand without delay and demur and without reference to the Contractor and without the necessity of a previous notice or of judicial or administrative procedures and without it being necessary to prove to the Bank the liability or damages resulting from any defects or shortcomings or debts of the Contractor. The Bank shall pay to the Employer any money so demanded notwithstanding any dispute/disputes raised by the Contractor in any suit or proceedings pending before any

Court, Tribunal or Arbitrator/s relating thereto and the liability under this guarantee shall be absolute and unequivocal.

11. ... (c) We are liable to pay the guarantee amount or part thereof under this Bank Guarantee only & only if you serve upon us a written claim or demand on or before 10/04/2015."

24.2.On a reading of the above, Clause 4 of the Bank Guarantee in both the contracts make it clear that the Bank has agreed to pay the full amount covered under the Bank Guarantee. Though Clause 5 indicates that the employer can claim upto and inclusive of the full amount, a written order is required from the employer to indemnify the employer for any liability of damage resulting from any defects or shortcomings of the contractor or the debts he may have incurred. The subsequent clause makes it clear that the Bank shall pay the employer any money so demanded, notwithstanding any dispute/disputes raised by the contractor in any suit or proceedings pending before any Court, Tribunal or Arbitrator/s relating thereto. Sub Clause (c) of Clause 11 makes it clear that the Bank agrees to honour the agreement by paying the entire amount.

24.3.It is noteworthy that, before invocation of the Bank Guarantees, the 1st respondent have issued notices dated 06.07.2020 to the applicant, notifying the applicant that they are invoking Clause 4.2 of GCC. As stated above, the conditions stipulated in the Bank Guarantees make it clear that the Banks are bound to pay the amount covered under the Bank Guarantees.

24.4.Though the learned Senior Counsel appearing for the applicant tried to convince this Court in his own amiable style and with vehemence that the Bank Guarantees cannot be enforced by the 1st respondent, without following the obligations contained in the underlying contracts, this Court cannot lose sight of the following settled propositions of law :

24.5.In *Standard Chartered Bank Ltd. v. Heavy Engineering Corporation Ltd. and another (supra)*, the Hon'ble Apex Court has held as follows :

> *"23.The settled position in law that emerges from the precedents of this Court is that the bank guarantee is an independent contract between bank and the beneficiary and the bank is always obliged to honour its guarantee as long as it is an unconditional and irrevocable one. The dispute between the beneficiary and the party at whose instance the bank has given the guarantee is immaterial and is of no*

consequence. There are, however, exceptions to this Rule when there is a clear case of fraud, irretrievable injustice or special equities. The Court ordinarily should not interfere with the invocation or encashment of the bank guarantee so long as the invocation is in terms of the bank guarantee.

...

26.In our considered view, once the demand was made in due compliance of bank guarantees, it was not open for the appellant Bank to determine as to whether the invocation of the bank guarantee was justified so long as the invocation was in terms of the bank guarantee. The demand once made would oblige the bank to pay under the terms of the bank guarantee and it is not the case of the appellant Bank that its defence falls in any of the exception to the rule of case of fraud, irretrievable injustice and special equities. In absence thereof, it is not even open for the Court to interfere with the invocation and encashment of the bank guarantee so long as the invocation was in terms of the bank guarantee and this what has been observed by the Division Bench of the High Court in the impugned judgment and that reflected the correct legal position."

24.6.In *M/s.Gammon OJSC Mosmetrostroy JV v. M/s.Chennai Metro Rail Ltd. and another (supra)*, this Court has held as follows :

"28.Thus, I am of the considered view that the JV Agreement, the Contract Agreement and Bank Guarantee, are interlinked with each other and therefore, it cannot be said that such Bank Guarantee furnished by the respective Banks is to be treated as an independent Contract."

24.7.In *U.P.State Sugar Corporation v. Sumac International Ltd. (supra)*, the Hon'ble Apex Court has held as follows :

"16.Clearly, therefore, the existence of any dispute between the parties to the contract is not a ground for issuing an injunction to restrain the enforcement of bank guarantees. There must be a fraud in connection with the bank guarantee. ..."

24.8.In *Hindustan Construction Co. Ltd. v. State of Bihar and others (supra)*, the Hon'ble Apex Court has held as follows :

"21.As pointed out above, Bank Guarantee constitutes a separate, distinct and independent contract. This contract is between the Bank and the defendants. It is independent of the main contract between the HCCL and the defendants. .."

24.9.In *BSES Ltd. (Now Reliance Energy Ltd.) v. Fenner India Ltd. And another (supra)*, the Hon'ble Apex Court has held that the Bank is obliged to make payment when the guarantee is called in, irrespective of any contractual dispute between the parties.

24.10.In *Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co. (supra)*, the Hon'ble Apex Court has held as follows :

> *"11. Except under these circumstances, the courts should not readily issue injunction to restrain the realization of a Bank Guarantee or a Letter of Credit. So far as the first exception is concerned, i.e. of fraud, one has to satisfy the court that the fraud in connection with the Bank Guarantee or Letter of Credit would vitiate the very foundation of such a Bank Guarantee or Letter of Credit. So far as the second exception is concerned, this court has held in that decision that it relates to cases where allowing encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. While dealing with the case of fraud, this court in the case of U.P. Coop. Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd. (1988) 1 SCC 174 held as follows:*
>
> > *"The fraud must be of an egregious nature such as to vitiate the entire underlying transaction.*
> >
> > *(emphasis supplied)*
> >
> > *While coming to a conclusion as to what constitutes fraud, this court in the above case quoted with approval the observations of Sir John Donaldson, M.R. in Bolivinter Oil SA V/s. Chase*

Manhattan Bank (1984) 1 All ER 351 (CA)at p. 352g-h which is as follows.

> *"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 banks 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 banks 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)""*

...

13.So far as the second exception is concerned, this court in U.P. State Sugar Corporation Vs. Sumac International Ltd. as considered herein earlier, at para 14 on page 575 observed as follows :

> *"14. ... To avail of this exception, therefore, exceptional circumstances which make it impossible for the guarantor to reimburse himself it he ultimately succeeds, will have to be decisively established. Clearly, a mere apprehension that the other party will not be able to pay, is not enough. In Itek case, there was certainty on this issue.*

> *Secondly, there was good reason, in that case for the Court to be prima facie satisfied that the guarantors i.e. the bank and its customer would be found entitled to receive the amount paid under the guarantee. (Emphasis supplied)""*

24.11.From the above said judgments, it is clear that, Bank Guarantee is an independent contract which has to be honoured by the Bank, despite any dispute between the contractor and the employer in respect of the obligations in the main contract.

24.12.As seen from the materials and in view of the submissions made on either side, the primary disputes appear to be with regard to the date of completion of work, issuance of Taking-Over Certificate, defects detected in the works, and the cause of delay. Admittedly, Arbitration Proceedings are pending in respect of some other claims, but not in respect of the aforesaid disputes.

24.13.Though Clause 5 of the Bank Guarantee indicates that the Bank is engaged to pay any amount towards the liability of the employer, it is the contention of the learned Senior Counsel for the applicant that the liability has to be estimated for the purpose of indemnifying and making good the loss which the employer has suffered in consequence of the act or default of the contractor. It is his contention that, without estimating the actual liability or damage, the Bank Guarantees cannot be enforced. It is the contention of the learned Senior Counsel that, as the liability has not been estimated and fixed, in case, if the liability arrives at an amount lesser than the Bank Guarantee, and in such case, if the entire value of Bank Guarantee is encashed by the 1st respondent, it would cause an irreparable injury to the applicant. Such a submission is also not a ground for grant of injunction for the simple reason as could be seen from the counter affidavit filed by the 1st respondent that the applicant has paid an amount over and above the contract price all these years which is not in dispute. If liability comes lesser than B.G.in the event of encashment of entire Bank Gurarantee, it is always open to applicant to recover the differential amount from the respondent. It is pertinent to note that, whether or not the applicant has received a lesser amount is not a dispute raised anywhere, except while advancing arguments before this Court. Hence, the above submission is no way beneficial to the applicant, who actually seeks injunction. Further, as already indicated, the applicant has been paid amount from time to time over and above the contract price. Besides, his claim towards costs is also pending adjudication before the

Arbitral Tribunal. In such view of the matter, this Court finds that the likelihood of the applicant suffering irreparable injury is very remote.

24.14.It is the further contention of the learned Senior Counsel for the applicant that, on account of Covid-19 pandemic, several guidelines have been issued by the Government of India from time to time to protect the interests of the contractors. In an Official Memorandum, issued by the Deputy Secretary to Government of India, Ministry of Finance, dated 13.05.2020, it is stated that the contractors who have fulfilled their contractual obligations are facing liquidity problems impacting their future performance and in such case, the Departments are permitted for return of the value of Performance Security. Though such an Official Memorandum has been issued by the Government of India, the guidelines therein are applicable only to the contractors who are not in violation of the contractual obligations. If there is any violation of contractual obligations, such concession cannot be extended to those contractors.

24.15.Moreover, except arguments advanced on the side of the applicant in respect of the alleged fraud, this Court finds no other material on record to infer any fraud relating to the execution of Bank Guarantees. These applications, in fact, are bereft of any material to prove the alleged fraud.

24.16.In view of the above discussion, this Court is the opinion that the invocation of Bank Guarantees by the 1st respondent in the present case is valid in the eye of law.

25.In the light of the narrative *supra*, this Court is of the opinion that the applicant has not made out, a *prime facie* case for grant of injunction and even the balance of convenience is not in their favour. Further as already indicated in para 24.13 applicant suffering irreparable injury is also very remote. Hence, this Court is of the view that the injunctions as prayed for by the applicant in these applications cannot be granted.

26.As a result, these applications are dismissed.

27.After the orders were pronounced, the learned Senior Counsel appearing for the applicant sought one week time to enable them to file an appeal before the Division Bench. Therefore, this Court instructs the learned Senior Counsel for the respondents / bank to maintain the status *quo* till 21.08.2020. If, the appeal is not filed within that time, it is open for the respondents / bank to encash the amount.

14.08.2020

mkn

Internet : Yes
Index : Yes / No
Speaking order / Nonspeaking order

To

M/s. Chennai Metro Rail Limited,
Administrative Building,
Chennai Metro Rail Depot,
Poonamallee High Road,
Koyambedu, Chennai – 600 107.

N.SATHISH KUMAR, J.

mkn

Pre-delivery Common Order in O.A.Nos.246 and 247 of 2020

14.08.2020