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

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Reserved on: 17.10.2019

Pronounced on: 21.01.2020

+ **ARB. A. (COMM.) 24/2019**

KANTI BIJLEE UTPADAN NIGAM LTD Appellant

Through: Ms.Maninder Acharya, ASG with
Mr.Adarsh Tripathi, Mr.Anish
Gupta and Mr.Viplav, Advocates

versus

GSCO INFRASTRUCTURE (P) LTD Respondent

Through: Mr.Brijesh Kr. Goel, Mr.Rajeev
Kumar and Mr.Anirudh Thakur,
Advocates

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J.

1. The present appeal has been filed by the appellant under Section 37(2)(b) of the Arbitration & Conciliation Act, 1996 ('Act') challenging the order dated 16.08.2019 passed by the Arbitral Tribunal on an application of the respondent herein under Section 17 of the Act whereby the appellant has been restrained from encashing a Bank Guarantee ('BG') No. 0372BG002614 dated 13.11.2014 for a sum of Rs. 2,37,14,150/- till the pendency of the arbitration proceedings.

2. The brief facts which need to be captured herein for the purpose of adjudication of this appeal are that the respondent was awarded a Contract for "Ash Dyke Package for Muzaffarpur Thermal Power Project, Stage - II" by the appellant vide Letter of Award ('LOA') dated 23.09.2014. The detailed scope of work was provided in the Technical

Specifications, Special Conditions of Contract and other documents of the formal Contract executed on 11.12.2014.

3. The entire project was to be completed within a period of 24 months from the date of issue of LOA. As per the appellant, the respondent did not commence work even after a period of more than two months from the date of LOA and the appellant vide letter dated 25.10.2014 cautioned the respondent that the time schedule of the work was very critical. It is the case of the appellant that the respondent kept on delaying the construction at the project site on one pretext or the other and several letters in this regard were sent to the respondent. The respondent in order to further delay the completion of the Project kept on writing letters to the appellant levelling false allegations of delay on the part of the appellant. As averred in the appeal, a lot of correspondence was exchanged between the parties on the aspect of delay in completion of the Project.

4. It is the further case of the appellant that the respondent sent a letter dated 30.09.2015 raising hypothetical claims of compensation on account of idling, manpower mobilization, etc. at the Project site. The appellant refuted all the allegations vide a letter dated 10.11.2015 and subsequently advised the respondent to remobilize men and machinery and start the work. The appellant vide letter dated 17.06.2016 specifically informed the respondent that a work of only Rs. 4 Crore value, out of a total Contract value of Rs. 118.57 Crore had been carried out till that time. A number of reminder letters were sent thereafter requesting the respondent to expedite the work, at site.

5. The respondent vide its letter dated 24.09.2018 submitted its completion programme till December 2019. The appellant wrote two letters dated 26.09.2018 and 29.01.2019 advising the respondent to augment its resources and carry out the work of Lagoon-II. The case of the appellant is that to the utter shock of the appellant instead of completing the work, the respondent invoked the Arbitration Agreement vide its letter dated 05.02.2019. The appellant, however, continued to write letters to the respondent to complete the work which had been completely stopped since 20.03.2019. On 19.04.2019, further communication was sent that the respondent must perform its respective obligations notwithstanding any reference of the disputes to the Resolution Mechanism.

6. The respondent, however issued a letter dated 22.04.2019 informing that the Contract stood closed on 31.03.2019. This was without any legal notice or a valid reason. As the chronology goes, the Arbitral Tribunal was thereafter constituted and held its first procedural hearing on 27.04.2019. The matter was listed for further proceedings on 10.08.2019.

7. It is averred that left with no option, the appellant vide letter dated 31.05.2019 advised the respondent to take remedial action for resumption and completion of the entire work within seven days from the receipt of notice, failing which under clause No. 51.3.1(a) the appellant would have no other option but to terminate the Contract and execute the balance work at the risk and cost of the respondent.

8. Once the seven days' notice of termination was received by the respondent, it filed an application under Section 17 of the Act, before the

Tribunal, seeking an urgent hearing. By way of the said application, the respondent sought an interim injunction restraining the appellant herein from invoking/encashing the Bank Guarantee till the pronouncement of the Award, undertaking to extend the validity of the Bank Guarantee beyond 10.08.2019.

9. The Tribunal heard the application on 06.06.2019 and after hearing the parties, passed an interim order directing that the Bank Guarantee shall not be encashed, till the next date of hearing in the Arbitration proceedings, which was 10.08.2019. The respondent was directed to extend the Bank Guarantee for a period of one month, seven days prior to the expiry of its validity.

10. On 30.07.2019, the appellant filed its reply to the application under Section 17 of the Act. The Statement of Claim was filed by the respondent during the hearing on 06.06.2019 itself. The appellant filed its Statement of Defence on 06.08.2019.

11. The matter was heard by the Tribunal on 10.08.2019 and after hearing the arguments of the parties, the order was reserved. Vide order dated 16.08.2019, the Tribunal restrained the appellant from encashing the Bank Guarantee, till the pendency of the Arbitration proceedings.

12. The appellant vide letter dated 17.08.2019 communicated to the respondent on 19.08.2019 that it had terminated the Contract with the respondent.

13. Learned ASG on behalf of the appellant contends that the Arbitral Tribunal lacked jurisdiction to even adjudicate on the invocation of Bank Guarantee. Elaborating the argument, it is submitted that in the present case, the disputes in relation to the Agreement dated 11.12.2014, were

referred to the Arbitral Tribunal, pursuant to the notice of invocation of Arbitration Agreement dated 05.02.2019, sent by the respondent. The respondent filed its Statement of Claim on 06.06.2019 wherein it raised 10 claims. The dispute with respect to the invocation or encashment of the Bank Guarantee or whether the appellant was entitled to recover the Bank Guarantee was not a subject matter of reference before the Tribunal. Bare reading of Section 17 of the Act shows that the interim protection has to be confined to the subject matter of the dispute which is being adjudicated by the Arbitral Tribunal. In fact, the very basis of filing the application by the respondent before the Tribunal was a seven days' notice of termination dated 31.05.2019, which was beyond the term of reference and much beyond even the date of reference to the Arbitral Tribunal. The Tribunal thus could not have gone into the validity of the said demand or invocation and encashment of the Bank Guarantee. Reliance is placed by the learned ASG on the judgment of this Court in the case of *NHPC Ltd. vs. HCC Ltd. 2018 SCC OnLine Del 11469* wherein a Coordinate Bench of this Court held that the jurisdiction of the Tribunal is not so wide so as to pass interim orders of protection even where the dispute is not a subject matter of reference before it.

14. The next contention of the learned ASG to assail the impugned order is that the appellant even otherwise has a right to encash the Bank Guarantee as the Bank Guarantee is an independent Contract between the Bank and the beneficiary thereof. It is irrespective of any dispute between the beneficiary and the party at whose instance, the Bank has given the Guarantee. Once the Bank Guarantee is un-conditional and irrevocable, the Bank is obliged to honour its Guarantee as soon as it is

invoked by the beneficiary. She further contends that there are only two exceptions when the Court may injunct a party from invoking or encashing the Bank Guarantee in question. The two exceptions are when there is a clear fraud of which Bank has notice and the fraud is of an egregious nature, so as to vitiate the entire underlying transaction and secondly when the decline of the injunction would result in 'irretrievable injury/injustice'. The irretrievable injury, however, must be of an exceptional circumstance of a kind where it is impossible for the Guarantor to reimburse himself, if he ultimately succeeds in final adjudication of the disputes. Learned ASG submits that in the present case the respondent in its application under Section 17 of the Act, neither pleaded nor established any of the two exceptions. Reliance is placed on the judgment of the Supreme Court in the case of ***BSES Ltd. vs. Fenner India (2006) 2 SCC 728, Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works (P) Ltd., (1997) 6 SCC 450.***

15. Learned ASG submits that in the present case the Bank Guarantee is unconditional, unequivocal and irrevocable. Attention of the Court is drawn to para 3 of the Bank Guarantee dated 13.11.2014 to argue that the respondent had unequivocally undertaken to pay to the appellant any money demanded notwithstanding any dispute or disputes raised by the respondent in any legal proceedings. Thus, in view of the settled law, the Tribunal completely erred in restraining the appellant from invoking/encashing the unconditional Bank Guarantee.

16. The next argument of the appellant is that the Tribunal has incorrectly based its order on the non-filing of the counter claim by the appellant. It is contended that even though the appellant may not have

filed any counter claim or raised any demand, the appellant has an absolute right to encash the Bank Guarantee. Learned ASG relies on the judgment of a Coordinate Bench of this Court in the case of ***IVCRL Ltd. vs. Rail Vikas Nigam Limited & Ors.*** 2017 SCC Online Del 12561 wherein the Court has held that even in the absence of the party/beneficiary having raised any separate claim, has a right to encash the Bank Guarantee upon termination of the Contract. The claims and counter claims would have to be adjudicated by the Tribunal in accordance with law, but in anticipation of those disputes, encashment of the Bank Guarantees cannot be enjoined.

17. The appellant contends that claiming an amount from the party in breach of the terms of the contract is one thing and invocation of BG is another thing. Neither of them is dependent on the other and are separate and distinct rights. Once in commercial transactions, a BG is furnished and the same is unconditional, the beneficiary is entitled to realize the same irrespective of any pending disputes. Claiming an amount on account of breach of the other party is the prerogative of the party alleging breach. Reliance is placed on the judgment of a Co-ordinate Bench of this Court in the case of ***Umaxe Projects Pvt.Ltd. vs. Air Force Naval Housing Board and Anr***, 2019 SCC Online Del 9126.

18. Per contra, learned counsel for the respondent defending the impugned order submits that there is no error in the impugned order. Once a Tribunal is constituted, grant of interim measures of protection is in the domain of the Arbitral Tribunal under Section 17 of the Act. It is thus not open for this Court to interfere with the order of interim

protection granted by the Tribunal, more particularly, during the pendency of the arbitration proceedings.

19. It is next contended that the respondent had invoked arbitration as per the Arbitration Clause vide notice dated 05.02.2019 for settlement of various long pending disputes relating to the Contract and no specific disputes were enumerated in the letter dated 05.02.2019 or the reminder letter dated 23.02.2019. The appellant vide its letter dated 26.03.2019 nominated its Arbitrator and again there were no specific disputes enumerated in the said letter. Both parties had agreed for adjudication of 'any dispute or difference' by the Tribunal. It is thus wrong on the part of the appellant to even contend that the Arbitral Tribunal exceeded its jurisdiction. Reliance is placed on the judgment of the Supreme Court in ***Ssangyong Engineering & Constructions Co. Ltd. Vs. NHAI 2019 SCC OnLine SC 677***, more particularly para 40, wherein the Court has reiterated the position of law decided earlier in ***State of Goa vs. Praveen Enterprises (2012) 12 SCC 581*** in paras 10 and 11 therein. It is next contended by the learned counsel for the respondent that in the Statement of Claim filed by the respondent before the Tribunal, it had raised a claim for adjudicating the financial compensation towards the Bank Guarantee extension charges and this was claim No. 8. Exhibit 5 related to the said claim No. 8, which would clearly evidence that the claim was with respect to the same Bank Guarantee whose invocation was stayed. Thus, it is clear that the said Bank Guarantee was the subject matter of adjudication before the Tribunal. It is further argued that the appellant in its reply filed before the Tribunal had not whispered even a single word on the jurisdiction issue which is being contended before this Court and

that too only by way of oral arguments and a brief note. Even in the Memorandum of Appeal and the grounds raised therein, no issue of jurisdiction had been raised. If it was the case of the appellant that the Tribunal had exceeded its jurisdiction, the appellant ought to have raised and argued the said plea before the Tribunal under Section 16 of the Act, which it consciously decided not to do.

20. Learned Counsel vehemently contends that the appellant issued the termination letter on 17.08.2019 which was one day after the Tribunal passed the interim order restraining the invocation of the Bank Guarantee. The letter was issued with a malafide intent so that the appellant could somehow cast a claim to invoke the Bank Guarantee and make the same as a ground of appeal before this Court. It is not open for the appellant to even raise any argument on the termination letter as this would be a fresh matter for adjudication before the Tribunal. Even the said document cannot be filed in the appeal or taken cognizance of once it was not filed before the Arbitral Tribunal.

21. It is next argued that the appellant does not even have any regard for the orders of the Tribunal or the Courts. The Tribunal had vide order dated 06.06.2019 passed an interim order restraining the appellant from invoking the Bank Guarantee till the next date of hearing which was 10.08.2019. Despite the said order, and to overreach the order of the Tribunal, the appellant issued an invocation letter dated 08.08.2019.

22. The respondent relies on the judgment of this Court in ***Hindustan Construction Co. Ltd. vs SJVNL, AIR 2006 Delhi 169*** on the proposition that an attempt to overreach the process of adjudication by a party to cause irreparable prejudice to the other side would be a

circumstance which would influence the decision or tilt the special equities in favour of the aggrieved party.

23. It is vehemently contended that the said letter of invocation of Bank Guarantee dated 08.08.2019 was in complete violation of the specific terms of the Bank Guarantee which states that the Bank undertakes to pay the amount under Guarantee merely on a demand from the employer stating that the amount is by reason of breach by the contractor of any terms of the agreement or his failure to perform the said agreement. A perusal of the letter dated 08.08.2019 clearly shows that the appellant has not stated a word alleging any breach by the respondent of any term or condition of the agreement or any failure to perform the said agreement. Reliance is placed on the judgment in the case of *Hindustan Construction (supra)* as well as *Continental Constructions Ltd. V. SJVNL, 2006 (1) ARB LR 321 Delhi*.

24. It is next contended that the Arbitrator has given a well-reasoned order after looking into the documents and the arguments and under Section 37 of the Act, the order requires no interference. Learned counsel relies in the case of *Gangotri Enterprises Ltd. Vs. Union of India and Ors., AIR 2016 SC 2199* to argue that in the said case the Supreme Court has held that once the Arbitral Tribunal has reached the finding that no cause of action for invocation of Bank Guarantee has arisen and restrained the encashment for encashing the same, the finding should not be interfered with.

25. The respondent has filed an additional brief note in which it is submitted that the appellant has so far preferred no claims against the respondent as is clear even from their own statement of defense filed

before the Tribunal. The Tribunal has noted the fact that the appellant has admitted that an amount of Rs. 6.18 crores are due to the respondent which is lying with the appellant as a security deposit amount, running account bill, retention money, taxes etc.

26. Learned counsel has distinguished the judgment relied upon by the appellant in the case of *NHPC (supra)* on the ground that the facts of the case were different. In the said case the jurisdiction of the Tribunal was held to have been exercise beyond the reference. In the present case, the Tribunal was called upon the adjudicate 'any dispute' referred by the parties. The case of *IVRCL Ltd. VS. Rail Vikash Nigam Ltd., 2017 SCC Online Del 12561* is distinguished on the ground that in the said case the Court held that in the absence of a claim being raised by the employer, the contract clause 15.4 provided a separate right vested with the employer to encash the Bank Guarantee upon termination of the agreement. In the present case there is no such exclusive clause providing a separate right to the appellant.

27. The judgment in the case of *Umaxe (supra)* is distinguished by arguing that in the said case it was held that the invocation was in terms of the Bank Guarantee while in the present case, there are special and exceptional equities in favour of the respondent. Responding to the reliance of the appellant on the judgment in the case of *BSES (supra)*, it is argued that in the said case, the Court held that the final contract was a wrap-around agreement and the appellant had the right to encash the guarantee for any breach in terms of the contract and that there are no special equities in favour of the respondent. In the present case, it is argued that there is an exceptional equity in favour of the respondent.

With respect to the judgment in the case of *Dwarikesh (supra)*, counsel for the respondent submits that the Court therein held that in encashment of the BG, applicability of principle of undue enrichment has no application while in the present case the appellant had raised no claim before the Arbitrator and therefore, the question of undue enrichment of the respondent does not arise.

28. I have heard the learned counsel for the parties and examined their contentions.

29. The law of injunction in the case of unconditional Bank Guarantee is now well settled. In *Dwarikesh (supra)*, the Supreme Court held as under :-

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

“The law relating to invocation of such bank guarantees is by now well settled. When in the

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

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

“... The wholly exceptional case where an injunction may be granted is where it is proved

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

(emphasis supplied)

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

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

30. In ***Gujarat Maritime Board vs. L&T Infrastructure Development Projects Ltd. And Ors.***, AIR 2016 SCC 4502, the Supreme Court clearly held that the BG is a separate contract between the bank and the beneficiary and is not qualified by the contract on performance of the obligations. It was further held that an injunction against the invocation of an unconditional and unequivocal BG cannot be granted except in situations of egregious fraud or irretrievable injury to the party concerned. In the said case, the Supreme Court placed reliance on an

earlier judgment of the Supreme Court in *Himadri Chemicals Industries Ltd. V. Coal Tar Refining Co. (2007) 8 SCC 110*, wherein principles were laid down for grant of injunction to restrain enforcement of the BG. Relevant portion of the judgment in *Gujarat Maritime Board (supra)* is as under :-

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

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11. It is contended on behalf of the first respondent that the invocation of bank guarantee depends on the cancellation of the contract and once the cancellation of the contract is not justified, the invocation of bank guarantee also is not justified. We are afraid that the contention cannot be appreciated. The bank guarantee is a separate contract and is not qualified by the contract on performance of the obligations. No doubt, in terms of the bank guarantee also, the invocation is only against a

breach of the conditions in the LoI. But between the appellant and the Bank, it has been stipulated that the decision of the appellant as to the breach shall be absolute and binding on the Bank.

12. An injunction against the invocation of an absolute and an unconditional bank guarantee cannot be granted except in situations of egregious fraud or irretrievable injury to one of the parties concerned. This position also is no more res integra. In Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co. [Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co., (2007) 8 SCC 110], at para 14: (SCC pp. 117-18)

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

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

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

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

(iv) Since a bank guarantee or a letter of credit is an independent and a separate contract and is absolute in nature, the existence of any

dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of bank guarantees or letters of credit.

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

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

This Court recently in the case of ***Larsen & Toubro Ltd. Vs. Experion Developers Pvt. Ltd. and Ors., being OMP (I) (Comm) 234/2019, decided on 03.12.2019***, while examining the issue of grant of injunction in case of unconditional BG held as under :-

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

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

cancelled the LOI and invoke the Bank Guarantee.”

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

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

“29. It is unfortunate that the High Court did not consider it necessary to refer to various judicial pronouncements of this Court in which the principles which have to be followed while examining an application for grant of interim relief have been clearly laid down. The observation of the High Court that reference to judicial decisions will not be of much importance was clearly a method adopted by it in avoiding to

follow and apply the law as laid down by this Court. Yet another serious error which was committed by the High Court, in the present case, was not to examine the terms of the bank guarantee and consider the letters of invocation which had been written by the appellant. If the High Court had taken the trouble of examining the documents on record, which had been referred to by the trial court, in its order refusing to grant injunction, the court would not have granted the interim injunction. We also do not find any justification for the High Court in invoking the alleged principle of unjust enrichment to the facts of the present case and then deny the appellant the right to encash the bank guarantee. If the High Court had taken the trouble to see the law on the point it would have been clear that in encashment of bank guarantee the applicability of the principle of undue enrichment has no application.

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

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

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

31. The issue as to whether an alleged breach of contract by the non-beneficiary of the BG could be a plea of fraud of egregious nature for the purpose of injunction against a BG came up for consideration before the Supreme Court in **Vinitec Electronics Pvt. Ltd. V. HCL Infosystems Ltd. (2008) 1 SCC 544**. The Supreme Court reiterated the settled position of law that the allegation with regard to the alleged breach by a non-beneficiary will not amount to a plea of fraud of an egregious nature so as

to bring the case within the exception to the general law of restraint against invocation of BGs. Relevant paras of the judgment are as under :-

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

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

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

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

27. Whether encashment of the bank guarantee would cause any “irretrievable injury” or “irretrievable

injustice". There is no plea of any "special equities" by the appellant in its favour. So far as the plea of "irretrievable injustice" is concerned the appellant in its petition merely stated:

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

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

32. Thus, in light of the law laid by the Supreme Court, for the purpose of deciding the present appeal, it is necessary to examine the nature of the BG involved herein. Relevant part of the BG is extracted below:-

"We, Punjab & Sind Bank, S.C.O-62, Sector-26, Chandigarh do hereby undertake to pay the amounts payable under this guarantee without any demur, reservation, contest or recourse, merely on a demand from the employer stating that the amount claimed is by reason of breach by the said contractor of any of the terms or conditions contained in the Agreement or by reason of the contractor's failure to perform the said agreement, any such demand made on the Bank shall be conclusive as regards the amount due and payable by the Bank under this guarantee. However, our liability under this Guarantee shall be restricted to an amount not exceeding Rs. 2,37,14,150/- (Rupees Two Crore Thirty Seven Lacs Fourteen Thousand and One Hundred Fifty only) and the employer need not prove or to show grounds or reasons for its demand.

We undertake to pay to the Employer any money so demanded notwithstanding any dispute or disputes raised by the Contractor/Supplier in any suit or proceeding pending before any court or Tribunal relating thereto our liability under this present being absolute and unequivocal. The payments so made by us under this Bond shall be a valid discharge of our liability for payment thereunder and the contractor/supplier shall have no claim against us for making such payment.”

33. A perusal of the paragraphs of the BG, extracted above leave no doubt that the Bank Guarantee in question is an unconditional Bank Guarantee. The Bank has undertaken to pay to the employer any money so demanded notwithstanding any dispute raised by the contractor in any legal proceeding, the liability of the Bank being absolute and unequivocal. Since the Bank Guarantee is unconditional, in view of the plethora of judgments, a few of which have been referred to above, the Arbitral Tribunal could not have enjoined the appellant from invoking or encashing the BG in question.

34. The reasoning given by the Tribunal for granting an injunction is that no amount was claimed by the appellant and hence no occasion for taking coercive action for invocation, had arisen. The BG continued to exist and the appellant's interest stood secured. The Tribunal was also influenced by the fact that the loss likely to occur to the respondent herein, by encashment of the BG would be substantial because immediately on encashment, the respondent would become a debtor of the bank and would be liable to pay interest. The financial status would be down-graded and the respondent would take several years to recover the amount from the appellant and re-establish its creditworthiness.

35. In my view, none of the reasons given by the Tribunal for granting injunction can be substantiated in law. The loss caused to a Guarantor or the down-gradation of his financial status cannot be a ground for restraining encashment of a BG, which is unconditional. It is no longer res integra that a Court cannot injunct the invocation of an unconditional BG, except for the two exceptions which have been referred to above. In the present case, the respondent had not made out a case of egregious fraud so as to come under the first exception. In so far as the second exception is concerned, the irretrievable injury alleged should be of the threshold as in the case of *Itek Corporation vs. First National Bank of Boston Etc.* 566 Fed Supp 1210 such that it would be impossible to recover. The respondent had not made out any case of irretrievable injury of the threshold required under the law.

36. As far as the finding of the Tribunal, that the appellant had not made any claim against the respondent and therefore, the stage of invocation had not arisen is concerned, suffice it would be to quote the judgment of the Co-ordinate Bench in the case of *IVRCL (supra)*. The facts of the said case are very close to the present case. In the said case, a contract was entered into between the parties. The petitioner had furnished performance, mobilization advance and material advance BGs. On account of certain alleged defaults on the part of the petitioner, the respondent issued a notice of termination. Apprehending that the respondent would invoke the BGs, the petitioner filed a petition under Section 9 of the Act in this Court. The petitioner principally contended that there was neither an admitted sum nor any sum had been adjudicated in any judicial proceedings and therefore, the BGs could not be invoked.

The respondent had argued that the BGs were separate contracts with the Banks and were unequivocal and unconditional in nature. The Court came to a finding that the BGs in question were unconditional. The Court held that though the respondent may not have raised any claim against the petitioner, however, the right to encash the BG is a separate right. Claims will be adjudicated by the Tribunal in accordance with law but in anticipation of those disputes, encashment of BGs cannot be enjoined. This issue thus stands adjudicated by the Co-ordinate Bench. De-hors any counter-claim having been raised by the beneficiary, it is entitled to invoke / encash the BG, if it is unconditional and unequivocal.

37. The appellant is in my view right in its contention that the invocation of the BG could not have been restrained by the Arbitral Tribunal. The impugned order is against the settled law of injunction of unconditional and irrevocable BGs and deserves to be set aside.

38. There is also merit in the contention of the appellant that the Tribunal lacked jurisdiction to even adjudicate on the invocation of BG. When the notice of invocation was sent and the matter was referred to arbitration, even the seven days' notice of termination was not in existence. The Statement of Claim filed by the respondent had 10 claims none of which related even remotely to termination of contract or invocation of BG, as none of the events had occurred at that time. The claims were on account of security amount; balance payments; retention money; differential payment on account of taxes; damages towards loss or idling or extra cost towards certain items and payment of Bank Guarantee extension charges. The Arbitral Tribunal is without any doubt bound by the terms of reference and cannot exercise its jurisdiction

beyond the same. It is an admitted case of the respondent that the notice of termination was issued during the pendency of the arbitration. The Tribunal thus in my view could not have adjudicated on the issue of invocation of the BG. I am fortified in my view by the judgment of a coordinate Bench of this Court in the case of *NHPC (supra)*. For this reason, also the impugned order deserves to be set aside. The contention of the respondent that the said objection was neither pleaded nor raised before the Tribunal and is neither pleaded in the appeal herein, has no merit. Once an Arbitral Tribunal is bound by the terms of reference, its jurisdiction to decide issues emanates from the terms of reference. Jurisdiction is an issue which goes to the root of the matter and even in a case where the party does not take an objection to the jurisdiction, it is for the Court which is approached for deciding the matter, to decide at the outset, whether it has the jurisdiction to decide a matter or not. This law applies with a greater vigour in arbitration proceedings, since the jurisdiction of a Tribunal is circumscribed by the terms of reference. The Tribunal should have therefore, at the outset, examined when the application was filed under Section 17 of the Act, as to whether the issue of BG was a part of the terms of reference or not. Therefore, it can hardly be argued by the respondent that this Court cannot enter into this controversy only because the question of jurisdiction was not pleaded.

39. The arguments for the learned counsel for the respondent with regard to the invocation being against the terms of BG also merits rejection, for the simple reason that the arguments are based on a presumption that the BG in question is a conditional BG and only once the appellant made out a case that there was any breach by the

respondent, it could invoke the BG. The said argument completely loses sight of the clear wordings of the Bank Guarantee, which is extracted above. A bare perusal of the BG indicates that it is an unconditional BG and the Bank is obliged to honour the BG on a mere demand from the employer, irrespective of any disputes between the parties. The argument also loses sight of the settled law on injunctions against encashment of unconditional BGs.

40. The judgments relied upon by the respondent in the case of *Hindustan Construction Co. (supra)* and *Satluj Jal Vidyut Nigam Limited (supra)* would not, in the opinion of this Court, apply to the present case. In the said cases, the Court had restrained the encashment of BGs on grounds of special equities. After a series of judgments referred to above have been pronounced, the law is clear that there are only two exceptions under which the Court can grant injunction of BGs being egregious fraud and irretrievable injury of a high threshold. These judgments do not help the respondent as none of the two exceptions were established in the present case.

41. Insofar as the judgment in the case of *Gangotri (supra)* is concerned, the coordinate Bench in the case of *IVRCL (supra)* has clearly distinguished the said judgment on the ground that in the said case, the BG did not relate to the Contract in question, for which in fact, no BG had been furnished. The claim was in the nature of damages which was yet to be adjudicated and it was in those circumstances that the Supreme Court found that an injunction restraining the encashment of BG therein was justified.

42. Having thus examined the various judgments referred to above, this Court is of the view that the Arbitral Tribunal by way of the impugned order could not have restrained the appellant herein from invoking/encashing the Bank Guarantee in question. The impugned order cannot be sustained in law and is hereby set aside.

43. The appeal is allowed with no order as to costs.

JANUARY 21st, 2020/rd

JYOTI SINGH, J

