IN THE HIGH COURT OF JUDICATURE AT MADRAS
RESERVED ON : 22.10.2021
PRONOUNCED ON : 01.11.2021
CORAM:

THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

C.M.A. No. 1773 of 2021
and
C.M.P. No. 9469 of 2021

Chennai Metro Rail Limited
Administrative Building
Chennai Metro Rail Depot
Poonamalle High Road,
Koyambedu,
Chennai - 600 107. ...Appellant/ Respondent

Vs

M/s. Transtonnelstroy - Afcons (JV)
Comprising of
1. M/s. Transtonnelstroy Ltd.,
4/1, Lunganskaya Street,
Moscow, 115583, Russia

2. M/s. Afcons Infrastructure Ltd.,
Afcons House, 16, Shah Industrial Estate,
Veera Desai Road, Azad Nagar (P.O.)
Post Box No.11978, Andheri (W)
Mumbai 400 053.
Represented by Mr. S. Sivamani
...Respondents/Claimants

Civil Miscellaneous Appeal filed under Section 37 (2) (b) of the Arbitration and Conciliation Act, 1996 against the Impugned Order dated 09/06/2021 of the Hon'ble Arbitral Tribunal (under Reference No.3).

For Appellant : Mr.Yashod Vardhan
Senior Advocate
for M/s. S. Arjun Suresh
For Respondents : Mr.G. Masilamani
Senior Advocate
for Mr. D. Balaraman

JUDGMENT

This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 raises the issue under what circumstances an injunction can be granted against the invocation of a Bank Guarantee. This Court in this appeal will have to decide whether the respondents have satisfied the legal requirements for grant of injunction against the invocation of the Bank Guarantee by the Appellant. Under the impugned order dated 09.06.2021 passed under Section 17 of the Arbitration and Conciliation Act, the Arbitral Tribunal has granted an order in favour of the respondents restraining the Appellant from encashing the Bank Guarantee of Rs.117.5 Crores given by the respondents in favour of the Appellant, who is the beneficiary under the said Bank Guarantee.

2. The case of the respondents before the Arbitral Tribunal as seen from the affidavit filed in support of its application under Section 17 of the Arbitration and Conciliation Act is that the Appellant through a speculative claim is attempting to invoke the Bank Guarantee given by the respondents for a sum of Rs.117.5 crores, which will amount to egregious fraud and it is their case that in case of encashment of the Bank Guarantee by the Appellant, the respondents will suffer irretrievable injustice. It is also the case of the respondents that though the Bank Guarantee is an independent contract between the Banker and the Beneficiary viz., the Appellant herein, the subject Bank Guarantee given by the respondents is not an unconditional Bank Guarantee and is subject to the fulfilment of the terms and conditions contained therein which has to be strictly adhered to by the Appellant. According to the respondents even without proper estimate and crystallization of the losses alleged to have been suffered by the Appellant, they have attempted to fraudulently invoke the Bank Guarantee. It is also their case that the deficiencies pointed out by the Appellant on the execution of the work by the respondents are too trivial in nature and have been made only to fraudulently and illegally encash the Bank Guarantee given by the respondents for a sum of Rs.117.5 Crores. According to the respondents having satisfied the legal requirements for obtaining an order of injunction against the Appellant from encashment of the Bank Guarantee, the Arbitral Tribunal exercising its discretionary power under Section 17 of the Arbitration and Conciliation Act has rightly granted the relief sought for by the respondents.

3. However, it is the contention of the Appellant that the respondents have committed breach of contract by not completing the work in accordance with the terms and conditions of the contract entered into between the Appellant and the Respondents. According to the Appellant, there was an enormous delay in the completion of the project by the

respondents and there were several deficiencies in service committed by the respondents which have been intimated to the respondents prior to the invocation of the Bank Guarantee. It is their case that the Bank Guarantee given by the respondents is an unconditional Bank Guarantee as seen from the terms and conditions of the Bank Guarantee. According to them as seen from the Bank Guarantee, without demur, the Bank will have to permit the Appellant to encash the Bank Guarantee. It is their case that they have suffered losses to the extent of Rs.900 Crores on account of the delay in completion of the project by the respondents and on account of the deficiencies in service and sub standard work on the part of the respondents and therefore, only in accordance with the terms and conditions of the contract, the Appellant has invoked the Bank Guarantee. It is also their contention that the Bank Guarantee being an independent contract between the Banker and the Beneficiary and the said Bank Guarantee also being an unconditional and an irrevocable one, the respondents have got no locus-standi to obtain an order of injunction restraining the Appellant from invoking the Bank Guarantee.

4. Heard, Mr.Yashod Vardhan, learned Senior Counsel for M/s. S. Arjun Suresh for Appellant and Mr.G. Masilamani, learned Senior counsel for Mr. D. Balaraman for respondents.

5. In support of the Appellant's contentions, Mr.Yashod Vardhan, learned Senior Counsel drew the attention of this Court to the subject Bank Guarantee dated 29.12.2010 and would submit as follows;

a) It is an unconditional Bank Guarantee;

b) On demand, without delay and demur and without reference to the contractor(respondents), the Bank will have to deliver the money required by the Appellant (Employer) immediately on demand;

c) No notice is also required to be given by the Bank to the contractor (respondents) prior to encashment of the Bank Guarantee by the Appellant;

d) The Bank Guarantee being an unconditional one, unless and until the respondents establish egregious fraud and irretrievable injustice, an injunction cannot be granted from invocation/ encashment of the Bank Guarantee. The respondents have not established fraud against the Appellant and have also not suffered irretrievable injustice.

6. Mr.Yashod Vardhan, learned Senior Counsel then drew the attention of this Court to the “Taking over certificates” issued by the Appellant in favour of the respondents in respect of particulars of the work performed by the respondents. He would point out that it is clear from the “Taking over certificates” that the respondents have committed defects in the execution of the project and there were also

minor outstanding works to be completed by the respondents. He also drew the attention of this Court to the various defects pointed out by the Appellant to the respondents in the performance of the project.

7. Mr.Yashod Vardhan, learned Senior Counsel, then drew the attention of this Court to the letter dated 06.07.2020 issued by the Appellant to the respondents intimating them that they have defaulted on certain key obligations under the contract and intimating them that failure to adhere to the completion schedules and failure to complete / fulfill certain pending obligations under the contract within a reasonable time, the Appellant would be constrained to invoke the Bank Guarantee in terms of Clause 4.2 of General Conditions of the Contract (G.C.C.).

8. Mr.Yashod Vardhan, learned Senior Counsel would submit that several letters of demand were sent by the Appellant to the respondents calling upon them to adhere to the terms of the contract and adhere to the completion schedules.

9. Mr.Yashod Vardhan, learned Senior Counsel then drew the attention of this Court to the Bank Guarantee invocation letter dated 06.07.2020 issued by the Appellant to IDBI Bank Ltd, seeking to invoke the Bank Guarantee dated 29.12.2010 for a sum of Rs.117,51,07,500/-. He also drew the attention of this Court to the e-mail dated 07.07.2020 received from IDBI Bank to the Appellant requesting the Appellant to give the details of the damages suffered by the Appellant on account of the defects and shortcomings of the respondents under the contract.

10. Mr.Yashod Vardhan, learned Senior Counsel also drew the attention of this Court to the reply dated 07.07.2020 sent by the Appellant to the Bank intimating them that the demand for encashment of Bank Guarantee is on account of shortcomings attributable to the contractor (respondents) in the performance of the contract and for indemnification of the same.

11. Mr.Yashod Vardhan, learned Senior Counsel would submit that being an unconditional Bank Guarantee and having satisfied the terms and conditions of the Bank Guarantee by giving reasons for invocation, the Bank is unconditionally obligated itself to permit encashment of the Bank Guarantee in favour of the Appellant.

12. Mr.Yashod Vardhan, learned Senior Counsel drew the attention of this Court to the Affidavit filed in support of the application filed by the respondents under Section 17 of the Arbitration and Conciliation Act before the Arbitral

Tribunal seeking for injunction from encashment of Bank Guarantee and would submit that excepting for making vague and bald allegations of egregious fraud and irretrievable injustice, the respondents have not established fraud or irretrievable injustice to enable them to get an order of injunction restraining encashment of Bank Guarantee.

13. In support of his submissions, Mr.Yashod Vardhan, learned Senior Counsel drew the attention of this Court to the following authorities;

a) BSES Ltd. (Now Reliance Energy Ltd.) v. Fenner India Ltd reported in (2006) 2 SCC 728;
b) Mahatma Gandhi Sahakra Sakkare Karkhane v. National Heavy Engg. Coop. Ltd. and Anr reported in (2007) 6 SCC 470;
c) Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co. reported in (2007) 8 SCC 110;
d) Standard Chartered Bank Ltd. v. M/s. Heavy Engineering Corporation Ltd. and Another reported in (2020) 13 SCC 574.

14. Per Contra, Mr.G. Masilamani, learned Senior Counsel for the respondents would submit that the claim of the Appellant is an afterthought and a speculative one. He would submit that at the time of the invocation of Bank Guarantee on 06.07.2020, the Appellant has not indicated to the Bank the actual loss in terms of money suffered by them. He would submit that only in the Counter Affidavit filed in the Section 9 application filed before the learned Single Judge of this Court after the invocation of Bank Guarantee, the Appellant has arbitrarily estimated the loss at Rs.900 crores without any supporting evidence in its counter affidavit filed in the said Section 9 application. He drew the attention of this Court to the performance Security Guarantee dated 29.12.2010 issued by IDBI Bank Ltd and in particular he referred to Clause 5 and Clause 6 contained therein and would submit that the term ''Indemnify'' means compensation and therefore even without crystallisation of the actual amount of compensation, the Appellant has invoked the Bank Guarantee by their letter dated 06.07.2020 which is a clear case of fraud and will amount to irretrievable injustice caused to the respondents. He also drew the attention of this Court to the “Taking over certificates” issued by the Appellant in favour of the respondents and would submit that the respondents have completed the project as per the schedule and have also handed over the same to the Appellant who is now generating substantial revenue after completion of the project by the respondents. Learned Senior Counsel for the respondents drew the attention of this Court to the Bank Guarantee invocation letter dated 06.07.2020 sent by the Appellant to the Bank for invoking the Bank Guarantee and would submit that even though the terms and conditions of the performance Security Guarantee dated 29.12.2010 makes it clear that the Appellant can invoke

the Bank Guarantee only after intimating the Bank the defects or shortcomings of the respondents(contractor), the Appellant has invoked the Bank Guarantee by a bald and vague letter without even crystallizing / quantifying the alleged losses suffered by them. According to him, the Appellant has not satisfied the legal requirements for invocation of Bank Guarantee and therefore, the Bank was right in requesting the Appellant by their e-mail dated 07.07.2020 to give details and particulars of the defects or shortcomings committed by the respondents under the contract with the Appellant. The Learned Senior Counsel would submit that even without giving the correct particulars and without estimation of loss, the Appellant has invoked the Bank Guarantee on 06.07.2020 which is a clear case of fraud and will amount to irretrievable harm/ injustice caused to the respondents. Learned Senior Counsel for the respondents also drew the attention of this Court to Clause 6(b) of the Bank Guarantee deed executed by the Bank and would submit that as per the said Clause, since the works have been substantially completed by the respondents, which has been duly certified by the Appellant as seen from the "Taking over certificates", the demand for 7.5%(full Bank Guarantee Amount) of the total value of the contract shall cause irreparable harm/injustice to the Respondents. He would submit that such a claim is an egregious, fraudulent and a deceptive one. He would further submit that the defect liability period of the respondents ends only on 08.02.2021 and even before the expiry of the said period, the Appellant has fraudulently invoked the Bank Guarantee on 06.07.2020.

15. Learned Senior Counsel for the respondents also submitted that subsequent to the declaration of Covid-19 as a Pandemic by the World Health Organisation on 11.03.2020, the Ministry of Finance (MOF), Government of India announced economic stimulus packages of Rs.20 lakh crores to stimulate economy and to save various business sectors from financial crisis. He would further submit that the Ministry of Finance has issued an Office Memorandum dated 13.05.2020 stating that the Government Agency or department may return the performance Bank Guarantee to a contractor as is equal to the proportion of works completed by the contractor to the total value of works. In these circumstances, he would submit that the invocation of the Bank Guarantee by the Appellant to the tune of Rs.117.5 crores that too for the completed work (the appellant took over possession off U-AA-01 on 24.05.2018 - Corridor - II and 09.02.2018 - Corridor - I), it would have adverse effect and cause irretrievable harm / injustice or irreparable loss to the respondents.

16. Learned Senior Counsel for the respondents then drew the attention of this Court to the impugned order and would submit that the Arbitral Tribunal has rightly granted an order of injunction under Section 17 of the Arbitration and

Conciliation Act restraining the Appellant from encashing the Bank Guarantee.

17. Mr.G. Masilamani, learned Senior Counsel would further submit that the discretion exercised by the Arbitral Tribunal under the impugned order has been exercised judiciously on sound legal principles and therefore this Court under Section 37 of the Arbitration and Conciliation Act cannot interfere with the impugned order. He would submit that the respondents have made out a prima-facie case and the balance of convenience is also in their favour and irreparable injury will be caused to them if the injunction is not granted from encashment of Bank Guarantee. In support of his submissions learned Senior Counsel drew the attention of this Court to the following authorities :

a) Standard Chartered Bank Ltd. Vs. Heavy Engineering Corporation Ltd. and Another reported in (2019) SCC Online SC 1638;
b) Hindustan Construction Co. Ltd. Vs. State of Bihar reported in (1999) 8 SCC 436;
c) M/s. GammonOJSC – Mosmetrostroy JV Vs. M/s. Chennai Metro Rail Ltd reported in (2015) SCC Online Mad 8193;
d) M/s/ Chennai Metro Rail Ltd. Vs. M/s. GammonOJSC – Mosmetrostroy JV reported in OSA Nos.192, 193 & 194 of 2015;
e) Oriental Insurance Co. Ltd. Vs. Smt. Raj Kumari & Others reported in (2007) 12 SCC 768;
f) Mohinder Singh Gill Vs. The Chief Election Commissioner, New Delhi reported in (1978) 1 SCC 405;
g) M/s. Texmaco Rail Engineers Ltd Vs. M/s. Chennai Metro Rail Ltd reported in O.A. Nos. 25 and 27 of 2021;

h) Olympia Opaline Flat Owners Association Vs. Olympia Infratech reported in (2021) SCC Online Mad 5310;
i) P. Krishnan Vs. M. Ramachandran and Another reported in (2021) SCC Online Mad 5130.

Discussion:

18. The respondents are the claimants and the appellants are the respondents in the Arbitration. The respondents were awarded the work of “Design and construction of under ground stations at Washermanpet, Mannadi, High Court, Chennai Central and Egmore and Associated Tunnels-contract member UAA-01” by the Appellant and the Contract price was Rs.INR 1566,81,00,000 under the contract dated 31.01.2011. There arose disputes between the respondents and the Appellant under the contract and the dispute was referred to Arbitration.

19. As seen from the pleadings of both the parties, the following are the undisputed facts :

a) The respondents who are the contractors have already handed over possession of their completed works to the Appellant, who is the employer, though according to the Appellant it is only a partial completion.

b) "Taking over certificates" dated 24.05.2018, 09.02.2019 and 03.12.2019 have also been issued by the Appellant in favour of the respondents for the part of the works completed by the respondents.

c) Under the "Taking over certificates", the Appellant has not mentioned the value of the balance work to be done by the respondents in terms of money. In the "Taking over certificates", the Appellant has also confirmed that substantial part of the work for which "Taking over certificates" were issued have been completed by the respondents.

d) In the invocation of the Bank Guarantee letter dated 06.07.2020 issued by the Appellant to IDBI Bank seeking invocation of Bank Guarantee given by the respondents, the Appellant has not mentioned the value of the loss suffered by them on account of the alleged breach of contract committed by the respondents. Even after the requests made by IDBI Bank in their reply dated 07.07.2020, the Appellant has not informed IDBI Bank the details of the actual losses suffered by them for the purpose of invoking the Bank Guarantee. The actual nature of the defects / deficiencies or shortcomings in the work of the respondents have also not been disclosed though the appellant has verbatim reproduced the sentence "shortcomings attributable to the contractor in the performance of contract and for indemnification of the same" though the said verbatim reproduction was also made only after the reply dated 07.07.2020 sent by IDBI Bank

e) The performance Bank Guarantee for Rs.117.5 crores (7.5% of the total value of the contract) which is the subject matter of this appeal was executed on 29.10.2010, which has been kept alive by the respondents periodically till date. The date of invocation of the Bank Guarantee by the Appellant is on 06.07.2020 after ten years and by that time substantial part of the work may have been completed by the respondents. This Court can take judicial notice of the same.

20. Under the terms and conditions of the Bank Guarantee, dated 29.12.2010, the Bank is obligated to pay the Appellant (Beneficiary) to the extent of Rs.117,51,75,000/- based upon a written order from the Appellant to indemnify the Appellant towards damages suffered by them resulting from any defects or shortcomings of the respondents (contractor) or

the debts they may have incurred to any parties involved in the contract between the Appellant and the respondents. Clause 5 of the Bank guarantee dated 29.12.2010 which is the relevant clause reads as follows :-

> 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 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.

21. By invoking the aforementioned clause, the Appellant sought for the invocation of the Bank Guarantee by its letter dated 06.07.2020 which was received by IDBI Bank Limited on 07.07.2020. The invocation of the Bank Guarantee letter dated 06.07.2020 reads as follows :-

> As per the terms of the Bank Guarantee, CMRL requests you to encash the aforementioned Bank Guarantee and treat this as Firm Demand from CMRL and credit the proceeds to CMRL's Bank Account as per the details given hereunder:

22. As seen from the aforementioned letter, the details of the defects / deficiencies and the value of the alleged losses suffered by the Appellant on account of the alleged breach of contract committed by the respondents has not been disclosed. On receipt of the invocation of the Bank Guarantee letter dated 06.7.2020, IDBI Bank by its reply dated 07.07.2020 requested the Appellant to specifically mention the amount sought to be encashed under the Bank Guarantee and the reasons for the invocation. The Appellant responded to the said letter of the bank on the same day i.e., on 07.07.2020 stating that the entire Bank Guarantee of Rs.117,51,07,500/-

may be encashed on account of the shortcomings attributable to the respondents (Contractor) in the performance of the contract. The letters of the bank dated 07.07.2020 and the response dated 07.07.2020 received from the Appellant are re-produced hereunder :-

From: Sachin Korde <sachin.korde@idbi.co.in>
Sent: 07 July 2020 14:19
To: Andal
Cc: Murali R.; R.N. Dwivedi; Sujatha Jayaraj; Vijaykumar Singh; Kannan_babu@idbi.co.in; paramita.chakraborry@idbi.co.in; kapil.shinde@idbi.co.in
Subject: RE: CMRL - Invocation of the bank guarantee submitted by M/s. Trannstonnelstroy- Afcons JV - Reg
Dear Sir....
Unquote:-
Since the Invocation letter does not specifically mentions that the amount sought is to indemnify the beneficiary for any liability of damage resulting from any defects or shortcomings of the Company, or the debts may have incurred to any parties involved in the works under the contract, you may please respond accordingly.

From: Andal
Tue 7/7/2020 3:31 PM
To: Sachin Korde <sachin.korde@idbi.co.in>
Cc: Murali R.; R.N. Dwivedi; Sujatha Jayaraj; Vijaykumar Singh; Kannan_babu@idbi.co.in; paramita.chakraborry@idbi.co.in; kapil.shinde@idbi.co.in
Dear Sir....

> With reference to your email dated 07/07/2020 in response to our letter of invocation seeking encashment of the bank guarantee amounting to Rs.117,51,07,500/-. We reiterate that we seek to invoke and encash the entire amount of Rs.117,51,07,500/- with regard the Bank Guarantee dated 29.12.2010 (ref. 10004IBGP00943). Our demand for encashment is on account of shortcomings attributable to Contractor in the performance of contract and for indemnification of the same. Further, we request you to, in terms of the Bank Guarantee, immediately deliver the entire amount of Rs.117,51,07,500/- without any delay or demur.

23. As seen from the aforementioned letters, the Appellant has not indicated the actual losses suffered by them to IDBI bank which has issued the Bank Guarantee, despite a specific request made by the bank to give the details. Though the recitals of the Bank Guarantee discloses that the bank will have to deliver the money required by the Appellant (Employer) immediately on demand without delay and demur and

without reference to the contract 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 of the damages and without it being necessary to prove to the bank, the liability of damages resulting from any defects or short comings or debts of the contractors (respondents), Clause 5 of the Bank Guarantee makes it clear that the Appellant (employer) is indemnified under the Bank Guarantee only for any liability of damages resulting from any defects or shortcomings of the respondents (contractors) or the debts the Appellant may have incurred to any parties involved in the contract entered into between the Appellant and the respondents.

24. Deficiencies have been pointed out by the Appellant in their "Taking over certificates" issued in favour of the respondents. Though the deficiencies have been pointed out, the actual value of the balance work to be done by the respondents for carrying out the defects / deficiencies have not been indicated by the Appellant in any of the letters to the respondents.

25. Clause 6(b) of the Bank Guarantee dated 29.12.2010 which is the subject matter of this appeal reads as follows :

> 6(b) In accordance with CPA Clause 7 of Volume 2, a new Guarantee may be issued for 2.5% of the Contract Price after issuance of the Taking Over Certificate, and this Guarantee shall be valid at least twenty eight (28) days longer than the anticipated date of issue of the Performance Certificate, unless the Tenderer decides to extend the Guarantee required under Item 6 a) above, for the same period.

26. As seen from Clause 6(b) of the Bank Guarantee, once "Taking over certificates" have been issued a new Bank Guarantee can also be substituted for 2.5% of the contract price in lieu of the existing Bank Guarantee which is the subject matter of this appeal for 7.5% of the contract price. It is the case of the respondents that substantial work has been completed under the contract and therefore, the value of the Bank Guarantee has to be reduced to 2.5% of the contract value instead of 7.5%. However, the Appellant has invoked the Bank Guarantee which was given by the respondents for 7.5% of the contract value without even crystallizing its claim against the respondents. Whether, the Bank Guarantee value has to be reduced to 2.5% or whether it has to remain at 7.5% of the contract value will have to be decided in the arbitration.

27. Proportionality also constitutes a special

equity exception against invocation or encashment of unconditional Bank Guarantee. In the case on hand, the total contract value is INR 1566,81,00,000 and the subject Bank Guarantee was given for 7.5% of the contract value for Rs.117,51,07,500. The case of the respondents is that they have not committed breach of contract and it is only the Appellant who have committed breach of contract, for which they have initiated arbitration against the Appellant. Even without crystallizing its claim against the respondents, the Appellant has invoked the Bank Guarantee. In case, in the final decision of the Arbitral Tribunal, it is found that the respondents do not owe any money to the Appellant or if it is found that the respondents are liable to pay only a much lesser sum than the Bank Guarantee value, which is Rs.117.5 crores, it would amount to irretrievable injustice. Since the Bank Guarantee amount is huge, proportionality of the claim will certainly play a role in deciding as to whether injunction can be granted against the invocation of Bank Guarantee. This Court is of the considered view that proportionality is also one of the special equities falling within the principle of "irretrievable injustice" for the purpose of granting an order of injunction from invocation of Bank Guarantee. In case, the Appellant is allowed to encash the Bank Guarantee for Rs.117.5 Crores and later on it is found by the Arbitral Tribunal that no money is due by the respondents to the Appellant or a much lesser money is due by the respondents when compared to the Bank Guarantee value, the respondents will find it difficult to recover the unjust enrichment made by the Appellant as the amount involved is a huge sum. A balancing act will have to be done in this case as admittedly the Appellant has not crystallized its losses and there is no break-up details given by it for its alleged losses and there is also no prima-facie evidence to show that the respondents owe the Appellant the Bank Guarantee value. In the case on hand, the Arbitral Tribunal has rightly applied the test of balance of convenience and has granted the order of injunction restraining the Appellant from invoking the Bank Guarantee and at the same time protected the interest of the Appellant too by directing the respondents to keep the Bank Guarantee alive till the disposal of the Arbitration.

28. Only in the counter affidavit filed by the Appellant in the Section 9 application filed by the respondents before a learned Single Judge of this Court much later to the invocation of the Bank Guarantee, the Appellant's have revealed that Rs.900 crores is the value of the loss suffered by them due to the alleged breach of contract committed by the respondents. The break-up details of alleged losses amounting to Rs.900 crores have also not been disclosed by the Appellant in the counter affidavit filed by them in the Section 9 application filed by the respondents seeking for an injunction restraining the Appellants from

encashing the Bank Guarantee.

29. The respondents have pleaded egregious fraud and irretrievable injustice in the application filed by them under Section 17 of the Arbitration and Conciliation Act before the Arbitral Tribunal. According to them, they have not committed any breach of contract and they have delivered possession of the project sites to the Appellant on completion and the Appellant is also getting benefit of the works done by the respondents and the Metro rail is in operation generating substantial revenue to the Appellant.

30. Admittedly, till date, no counter claim has also not been made by the Appellant against the respondents before the Arbitral Tribunal for the purpose of recovering the alleged losses from the respondents on account of the alleged breach of contract though the learned Senior Counsel for the Appellant would submit that the Appellant will be making a counter claim soon.

31. Bank Guarantees are instruments primarily used by business entities to strengthen and/or secure an obligation under their contract. The party who requests that the guarantee is to be issued applies to its bank for a bank guarantee to be issued in favor of the beneficiary, i.e, the party who will receive the guarantee. Bank guarantees provide better negotiating position in business conclusions and helps in securing own claims and performance of the other party to the transaction. Generally, bank guarantees can be classified into two types; a conditional bank guarantee and an unconditional bank guarantee. For invoking a conditional bank guarantee, it is mandatory that the conditions specified for invocation of such a guarantee are met and only then the guarantee can be encashed.

> On the other hand, for invocation of unconditional guarantee no specific conditions are required to be satisfied. As long as the invocation itself is legal, the bank is bound to honour such an invocation.

32. The Hon'ble Supreme Court in the case of Himadri Chemicals Industries Ltd. vs. Coal Tar Refining Company reported in (2007) 8 SCC 110 has collated principles developed over a period of time with respect to granting of injunction against invocation of bank guarantees which are as follows:

> a) 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

realize such a Bank Guarantee or a Letter of Credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.

b) The beneficiary is entitled to realize such Bank Guarantee irrespective of any pending dispute between the parties relating to the terms of the contract.

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

d) The Courts should be slow in granting an order of injunction to restrain the realization of a Bank Guarantee or a Letter of Credit.

e) 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.

f) 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.

g) 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.

In addition to fraud and irretrievable harm, the Hon'ble Supreme Court, in the case of Hindustan Construction vs State of Bihar reported in (1999) 8 SCC 436 further stated that an unconditional bank guarantee could also be injuncted when –

a) If the unconditional bank guarantee itself imposed specific conditions on the party invoking the bank guarantee, by making reference to the principal contract, then these conditions would have to be fulfilled before the unconditional bank guarantee could be invoked.

b) Unconditional bank guarantees being independent contracts in themselves,

> would have to be invoked in accordance with the terms of the Bank Guarantee. In that case matter, the Guarantee terms stated that the guarantee could be invoked by the Chief Engineer, and an invocation of the same by the Executive Engineer was held to be unlawful.

33. In Standard Chartered Bank Ltd. Vs. Heavy Engineering Corp. reported in (2019) SCC Online SC 1638, the Hon'ble Supreme has also followed the decision in Hindustan Construction Co Ltd. Vs. State of Bihar reported in (1999) 8 SCC 436 case, referred to supra and held that the invocation of the bank guarantee will have to be in accordance with the terms of the Bank Guarantee.

34. From the aforementioned decisions, it is clear that injunction can be granted from invocation of bank guarantee only when any of the following conditions are satisfied :

a) Egregious Fraud has been established against the beneficiary under the bank guarantee.

b) Irretrievable harm / injustice will be caused if the Bank guarantee is invoked by the beneficiary.

c) The beneficiary has given a go-by to the terms of the Bank Guarantee

d) Proportionality also constitutes a special equities exception against invocation or encashment of unconditional Bank Guarantees, if there is a huge difference between the actual outstanding dues which is less and the value of the Bank Guarantee which is more.

35. Under the impugned order, the Arbitral Tribunal has given sound and justifiable reasons for allowing the application filed by the respondents under Section 17 of the Arbitration and Conciliation Act seeking for injunction restraining the Appellant from invoking the Bank Guarantee. The reasons given by the Arbitral Tribunal for allowing the application under Section 17 of the Arbitration and Conciliation Act are as follows :-

a) rights of both the parties are to be protected in terms of the contract as well as under law.

b) prima facie case of the applicant / respondents is that they have substantially completed the works for the entire purpose under the contract and the Appellant had taken over the facility, commissioned, operating the facility and generating revenue from 25.05.2018 (Corridor – II) and from 10.02.2019 (Corridor -I).

c) The Appellant has not disputed the commissioning, operating and generating revenue from the facility, however, the Appellant contends that there are serious defects and shortcomings in the work executed by the respondents and therefore, they may incur loss of damage for 120 years and hence, they are entitled to invoke the Bank Guarantee. The respondents while seriously disputing the above contention of the Appellant submitted that there are enough evidence to disprove the allegations of the Appellant.

d) The invocation of the bank guarantee was made admittedly, when the defects liability period was in force and there were correspondences relating to the rectification of works between the Appellant and the respondents. The respondents have also submitted that they were carrying out the defect rectification work and they are also currently available at the project site. In none of the correspondence between the Appellant and the respondents prior to the invocation of the bank guarantee, the Appellant has not indicated the actual loss suffered by them due to the alleged breach of contract committed by the respondents.

e) The alleged defects committed by the respondents is not reflected in the Bank Guarantee invocation letter issued by the Appellant dated 06.07.2020. The alleged loss of Rs.900 crores to the Appellant was raised only in the counter affidavit filed before the High court in the Section 9 application filed by the respondents.

f) Even according to the Appellant, it is only expected to incur loss for the next 120 years (i.e. 7.5 crores per year x 120 years). Even presuming the Appellant would incur Rs.7.5 crores per year, there is no reason to invoke the entire amount at this stage itself.

36. After recording the aforementioned reasons, the Arbitral Tribunal has directed the respondents to keep the bank guarantee alive without prejudice to the respondents rights. The Arbitral Tribunal has also recorded the statement of respondents that apart from the subject bank guarantee the respondents have provided retention money bank guarantees to the tune of Rs.44 Crores which is available with the Appellant.

37. After recording the aforementioned statement of the respondents, the Arbitral Tribunal has observed that since the rights of the respondents have to be adequately protected, the injunction from invoking Bank Guarantee by the Appellant has to be granted. The Arbitral Tribunal has directed the respondents to keep the performance Bank Guarantee dated 30.12.2020 for a sum of Rs.1,17,51,07,500/- alive by extending the validity of said Bank Guarantee periodically until the disposal of the Arbitral proceedings pending before the Arbitral Tribunal.

38. The reasons given by the Arbitral Tribunal for allowing the application filed by the respondents under

Section 17 of the Arbitration and Conciliation Act are sound and justifiable and legally valid. The relief under Section 17 of the Arbitration and Conciliation is a discretionary relief. If the said relief is granted by the Arbitral Tribunal by giving sound and justifiable reasons in accordance with law, this Court under Section 37 of the Arbitration and Conciliation Act, cannot interfere with an interim order of an Arbitral Tribunal.

39. The case of the respondents will certainly fall under the category of "irretrievable injustice" in case the Bank Guarantee is allowed to be encashed by the Appellant. The Bank Guarantee amount is for a substantial sum of Rs.117.5 crores, which is a very huge sum and in case on the final adjudication by the Arbitral Tribunal it is found that the respondents do not owe any money to the Appellant or owes only a much lesser sum when compared to the Bank Guarantee value, the respondents will be put to irretrievable injustice if the Bank Guarantee has been encashed as it would seriously deplete their capital reserves and will result in liquidity crisis seriously affecting their regular business. There is also a possibility of the Appellant gaining unjust enrichment in case the bank guarantee is encashed. Therefore, only after the final adjudication of the arbitral claim, it can be found that as to who owes money and by how much.

40. The respondents have made out a prima facie case and the balance of convenience is also in their favour and irreparable loss will be caused to them, in case an Arbitral Award is passed wherein, it has been found that the respondents do not owe any money to the Appellant or they owe much lesser sum when compared to the Bank Guarantee value. Only after the respondents have satisfied the legal requirements for grant of injunction, the Arbitral Tribunal has rightly allowed the application filed by the respondents under Section 17 of the Arbitration and Conciliation Act, restraining the Appellant from invoking /encashing the Bank Guarantee. Further, when the Arbitration has to be completed in a time bound manner under the Arbitration and Conciliation Act, 1996 and that too when the Arbitral Tribunal has directed the respondents to keep the Bank Guarantee alive till the completion of the Arbitral proceedings, no prejudice will be caused to the Appellant since the Arbitral proceedings has to be anyway disposed of expeditiously.

41. Admittedly, when the Bank Guarantee was invoked by the Appellant on 06.07.2020, the defect liability period under the contract was in its validity period which means it was the responsibility of the respondents to rectify the defects in the commissioning of the project till the expiry of the defect liability period. The defect liability period ended only on 08.02.2021, whereas the Bank Guarantee was

invoked by the Appellant on 06.07.2020 itself. It is an admitted fact only during the Covid pandemic time, the Appellant invoked the Bank Guarantee i.e., 06.07.2020. The respondents have also relied upon the stimulus packages introduced by the Government of India with regard to the Bank Guarantees and has submitted that if the stimulus packages are applied, the Bank Guarantee cannot be invoked by the Appellant during the lock down period. All these factors will have to be examined only in the main Arbitral claim and only then the Arbitral Tribunal can decide as to who is liable and by how much.

42. For the foregoing reasons, this Court is of the considered view that there is no merit in this appeal. However, it is made clear that as directed by the Arbitral Tribunal, the respondents shall keep the Bank Guarantee alive till the disposal of the arbitration. The renewal of the Bank Guarantee shall always be done by the respondents fifteen days in advance before the expiry date and in case it is not done, the Appellant shall invoke / encash the Bank Guarantee without notice to the respondents. Accordingly, this Civil Miscellaneous Appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Deputy Registrar(CS)

//True Copy//

Sub Assistant Registrar

vsi2
The Presiding Arbitrator,
Arbitral Tribunal,Chennai.

+2 ccs to Mr.D. Balaraman , Advocate Sr.NO.56582
+1 cc to Mr.S. Arjun Suresh ., Advocate Sr.NO. 57070

C.M.A.No. 1773 of 2021
and
C.M.P. No. 9469 of 2021

SSI(CO)
A.SK(03.12.2021)