OD-4

AP 455 OF 2022

IN THE HIGH COURT AT CALCUTTA

ORDINARY ORIGINAL CIVIL JURISDICTION

ORIGINAL SIDE

SKIPPERSEIL LTD.

Vs.

SPML INFRA LTD & ANR.

BEFORE :

The Hon'ble JUSTICE KRISHNA RAO

Date: 29th June, 2022.

Appearance:

Mr. Ratnanko Banerjee, Sr. Adv.

Mr. D.N. Sharma, Adv.

.....For the petitioner

Mr. Anirban Ray, Adv.

Mr. Snehashis Sen, Adv.

Mr. Abhishek Banerjee, Adv.

.....For the Respondent no.1.

ORDER

The petitioner has filed the instant application under Section 9 of the Arbitration and Conciliation Act, 1996 praying for stay of the operation of the communication/ letter dt. 16th July, 2022 issued by the respondent no. 1.

On 2nd March, 2020 a Letter of Intent was issued by the respondent no. 1 in favour of the petitioner for supply and delivery of 50 MVA Power Transformers along with equipment and accessories. The Letter of Intent followed by a formal purchase order containing terms and conditions but for the purpose of adjudication of the instant application the following conditions are necessary:

> Contract Performance Bank Guarantee –*"Bank Guarantee towards performance of contract shall be submitted equal to 5 % of contract value. The Bank guarantee shall be valid till successful inspection of last lot of ordered material. The Bank guarantee shall be progressively reducible based on the supply of transformer at site."*

The supply order dt. 6th June, 2020 was initially for supply of 12 Nos. of 50 MVA Power Transformers but subsequently it was increased to 13 Nos. in quantity vide purchase order dt. 2nd April, 2021. As per the purchase order the aggregate value of the supplies was enhanced to Rs. 33,36,30,830/-. In terms of the Letter of Intent and purchase order, the petitioner has submitted Contract Performance Bank Guarantee dt. 20th May, 2020 for an amount of Rs. 1,52,99,999/- which was valid up till 31st October, 2020.

In the month of April, 2021 the purchase order was amended and the quantity of supply of Power Transformers was increased from 12 to 13 in number and out of which the petitioner had supplied 10 transformers out of 13 which was duly received by the respondent no. 1. The 10th transformer was delivered in the month of October, 2021. Based on the quantity supplied by the petitioner to the respondent the value of the contract performance Bank Guarantee was reduced to Rs. 1,01,99,999 from Rs. 1,52,99,999/- on 20th December, 2021.

As the remaining three transformers were not supplied and accordingly, the contract performance Bank Guarantee - for an amount of Rs.1,02,99,999/- was further extend up till 30th June, 2022.

On 16.06.2022, the respondent no. 1 had issued a letter to the Branch Manager, Axis Bank Limited, Gurgaon, Haryana which reads as follows:

To

The Branch Manager,

Axis Bank Ltd,

Ground Floor, Plot No. B & B-1,

Enkay Tower, Udhyog Vihar-Phase -5,

Gurgaon, Haryana-122016.

Dear (s),

Subject : Conditional claim against one number of Bank guarantee issued by you in favour of M/s. SPML Infra Limited.

The validity period of Bank Guarantee executed by you in our favour as per the below details is expiring on 30.06.2022 and has to be extended mainly by another three (3) months as the contract is not completed and the original extended BG should be dispatched in the name of SPML Infra Limited, 22, Camac Street, Block-A, 3rd Floor, Kolkata – 700016.

Bank Guarantee No.	**Issuance Date**	**Amount (Rs.)**	**Validity Date**	**Claim Date**
15270100000358	20.05.2020	1,01,99,999/-	30.06.2022	30.06.2023

In case the BG extension is not provided us before the expiry date, this may be treated as claim against the aforementioned Bank Guarantee and the proceeds of the same shall be remitted to us by way of RTGS favouring "SPML Infra Limited" bearing below mentioned details :

Bank Name – State Bank of India
Branch – CAG Branch, 2nd Floor, 34 J.L. Neheru Road, Kolkata – 700071
A/c No – 37799675506
IFSC – SBIN0009998.

It may kindly be noted that this letter will automatically become formal claim in the event of non-extension of the validity period of the aforementioned Bank Guarantee and no further claim will be lodged for realization of the proceeds.

Thanking You,

For SPML Infra Limited.

The said letter was also forwarded to the petitioner.

Being aggrieved with the said letter dt. 16.06.2022, the petitioner has filed the instant application praying for staying of the operation of the said communication.

Counsel for the petitioner submits that as per the terms and conditions of the purchased order the petitioner has provided performance Bank Guarantee dt. 05.05.2020 for an amount of Rs. 1,52,99,999/- being the 5 % of the contract value.

Counsel for the petitioner submits that as per the conditions of the purchased order the Bank Guarantee shall be progressively reducible based on the supply of transformer at site. In terms of the said condition and considering the receipt and verification of transformer at site and balance quantity, the respondent no. 1 allowed reduction in the value of BG for four number transformers and accordingly the BG was reduced from Rs. 1,52,99,999/- to Rs. 1,01,99,999/-.

As due to the pandemic Covid-19, the supply of total 13 numbers of transformers could not be affected and accordingly the Bank Guarantee was extended from time to time and lastly on 01.06.2022, the Bank Guarantee was extended till 30.06.2022 for an amount of Rs. 1,01,99,999/-.

On 07.06.2022, the petitioner had submitted a request to the respondent no. 1 informing that till date 10 units have been delivered at site and three units are already for lifting at our works and requested to reduce the value of the Bank Guarantee from Rs. 1,01,99,999/- to Rs. 35,30,769/- for the remaining 3 transformers. Time and again the petitioner had requested the respondent for allowing the petitioner for reducing the value of the Bank Guarantee at Rs. 35,30,769/- being the 5% cost of the 3 transformers but instead of reducing the value of the Bank Guarantee, the respondent no. 1 had issued the impugned letter dt. 16.06.2022 for extending the period of Bank Guarantee for the same amount i.e., for Rs. 1,01,99,999/- for a period of three months or in case of failure of extension before the expiry date, the Bank Guarantee amount shall be remitted in the account of the respondent no. 1.

Counsel for the petitioner submits that out of 13 numbers of transformers, 10 numbers of transformers have already delivered and 3 numbers of transformers have already inspected which has been admitted by the respondent in the communication dt. 23.06.2022 but in spite of the same the respondent has not allowed the petitioner to reduce the value of the Bank Guarantee and on the other hand the respondent requested the Bank, if the Bank Guarantee is not extended for an amount of Rs. 1,01,99,999/- for a period of three months further, the said amount will be remitted in the account of the respondent.

The Counsel for the petitioner submits that the impugned communication dt. 16.06.2022 issued by the respondent to the Bank is bad, illegal and the respondent had committed fraud of egregious upon the petitioner and thus, the same is required to be stayed.

The Counsel for the petitioner relied upon the judgment reported in (1999) 8 SCC 436 (Hindustan Construction Company Limited –Vs- State of Bihar & Ors.), (2006) SCC Online (Del) 339 (Satluj Jal Vidyut Nigam Limited –Vs- Jai Prakash Hyundai Corsortium) and (2021) SCC Online (Cal) 2986 (KSE Electricals Private Limited –Vs- Project Director, Bangladesh Rural Electrification Board & Ors.) and submits that the petitioner has satisfied to the three ingredients namely fraud, special equity and invocation not being in terms of the guarantee and the clauses in the contract demonstrate that the Bank Guarantee was furnished towards performance security.

Per contra, Ld. Counsel for the respondent submits that the petitioner has made the Axis Bank as party being respondent no.2 in the instant proceeding but the Bank cannot be a party to the instant proceeding. There is no agreement between the petitioner and the bank and there is no clause of arbitration between the petitioner and bank.

The Ld. Counsel for the petitioner submits that the contract performance Bank Guarantee is with respect of performance of contract and the petitioner has violated the terms of contract by not supplying the transformers as per schedule and till date the petitioner has not performed his contract completely.

Ld. Counsel for the respondent further submits that as per terms and conditions of the supply order, the petitioner ought to have completed the work by October, 2020 but till date the petitioner has not completed the contract work.

Ld. Counsel for the respondent relied upon the terms and condition of supply order with regard to compensation for delay (Liquidated Damages) and submits that the respondents have reserved the right to recover LD charges @ 0.25% per week, if the work is delayed beyond 31.10.2020 subject to maximum 5% of delayed portion.

Ld. Counsel for the respondent submits that the petitioner has agreed to provide a contract performance guarantee for the faithful performance of the entire contract equivalent to 5% of the said value of the contract to the respondent no.1.

Ld. Counsel for the respondent submits that on 23rd June, 2022 also the respondents have requested the petitioner for providing clearance of placement of vehicle for transportation of 3 Nos. inspected transformers but till date the petitioner has not provided the same.

Ld. Counsel for the respondent submits that the petitioner has not made any serious effort to execute the purchase order as per the terms and conditions and other hand the petitioner is demanding for additional financial benefit off price variation for delayed period by not supplying the total quantity of transformer due to which the respondent is facing huge loss and losing their credibility before PGCL.

Ld. Counsel for the respondent submits that the petitioner has not performed the contract in time and had violated the terms and conditions of the contract even after grant of several extensions and thus the petitioner is liable to pay liquidated damages as per purchased order.

Ld. Counsel for the respondent submits that in the letter dt. 16.06.2022, the respondent had categorically mentioned that bank guarantee is expiring on 30.06.2022 and the same has to extended for another three months and in case extension is not provided before the expiry date, the same may be treated as claim against the said Bank Guarantee and the proceeds of the same is to be remitted to the respondent.

Ld. Counsel for the respondent relied upon the judgment reported in (2020) 13 SCC 574 (Standard Charted Bank –versus- Heavy Engineering Corporation Ltd & Ors.) and the Judgment reported in 2019 SCC Online (Cal) 2650 (State Bank of India –versus- Sun Pharmaceuticals Industries Ltd & Ors.) and submits that the petitioner has not proved the case of any fraud, irretrievable injustice and special equities and in the absence of the same this Court cannot interfere with the Bank Guarantee.

Heard the Ld. Counsel for the respective parties, considered the documents available on record and the judgment relied by the parties.

The petitioner has provided Contract Performance Bank Guarantee of Rs. 1,52,99,999/- on 20th May 2020 in favour of the Axis Bank, Gurgaon in terms of the Purchase Order dt. 1st March, 2020. The Bank Guarantee is towards performance of contract equal to 5% of the contract value and the said bank guarantee is valid till successful inspection of last lot of order material. The bank guarantee shall be progressively reducible based on the supply order of transformer at site.

As per the terms and condition of the purchase order the respondent reserve right to recover Liquidated Damages @ 0.25% per week, if the work is delayed beyond 31.10.2020, subject to max 5% of delayed portion. On receipt and verification of 4 nos. of transformers at site the respondent had allowed the petitioner for reduction of value of the Bank Guarantee from Rs. 1,52,99,999/- to Rs. 1.01,99,999/- and accordingly on 20.12.2021, the Bank Guarantee was amended and the validity of the Bank Guarantee was extended till 31.03.2022 and the claim date was extended till 31.03.2023. As the petitioner has not supplied only 10 nos of transformers and remaining 3 nos of transformers were not supplied and accordingly, the Bank Guarantee was further extended till 30.06.2022.

The petitioner has tried to make out a case of fraud on the pretext that the respondent had admitted in the communication dt. 31.03.2022 that the petitioner had delivered 10 nos. of Transformers which was completed in the month of October, 2021 but instead of reducing the value of the Bank

Guarantee, the respondent continue with Bank Guarantee value of Rs. 1.01.99,999/-. Though as per the contract performance Bank Guarantee is limited only towards 5% of the contract value and as per the terms of the purchase order the contract performance Bank Guarantee will be progressively reduced based on supply of transformers. As per the submissions made by the Counsel for the petitioner, the Bank Guarantee should be Rs. 35,30,769/- instead of Rs. 1,01,99,999/-.

The respondents have relied upon the clause of compensation for delay (Liquidated Damages) as the petitioner has not supplied the transformers in time and till date in spite of several requests the petitioner failed to supply remaining 3 nos. of transformers and thus the respondents are entitled to claim liquidated damages.

The judgment relied by the petitioner reported in (1999) 8 SCC 436 Paragraphs 9 and 14 which reads as follows:-

> *"**9.** What is important, therefore, is that the bank guarantee should be in unequivocal terms, unconditional and recite that the amount would be paid without demur or objection and irrespective of any dispute that might have cropped up or might have been pending between the beneficiary under the bank guarantee or the person on whose behalf the guarantee was furnished. The terms of the bank guarantee are, therefore, extremely material. Since the bank guarantee represents an independent contract between the bank and the beneficiary, both the parties would be bound by the terms thereof. The invocation, therefore, will have to be in accordance with the terms of the bank guarantee, or else, the invocation itself would be bad.*
>
> ***14.** This condition clearly refers to the original contract between the HCCL and the defendants and postulates that if the obligations, expressed in the contract, are not fulfilled by HCCL giving to the defendants the right to*

claim recovery of the whole or part of the "advance mobilisation loan", then the Bank would pay the amount due under the guarantee to the Executive Engineer. By referring specifically to Clause 9, the Bank has qualified its liability to pay the amount covered by the guarantee relating to "advance mobilisation loan" to the Executive Engineer only if the obligations under the contract were not fulfilled by HCCL or HCCL has misappropriated any portion of the "advance mobilisation loan". It is in these circumstances that the aforesaid clause would operate and the whole of the amount covered by the "mobilisation advance" would become payable on demand. The bank guarantee thus could be invoked only in the circumstances referred to in clause 9 whereunder the amount would become payable only if the obligations are not fulfilled or there is misappropriation. That being so, the bank guarantee could not be said to be unconditional or unequivocal in terms so that the defendants could be said to have had an unfettered right to invoke that guarantee and demand immediate payment thereof from the Bank. This aspect of the matter was wholly ignored by the High Court and it unnecessarily interfered with the order of injunction, granted by the Single Judge, by which the defendants were restrained from invoking the bank guarantee."

In the above mentioned case the Hon'ble Supreme Court has held that special equities are wholly in favour of HCCL but in the present case the petitioner has taken the specific ground of fraud and even the petitioner has not proved either the ground of fraud or special equities and thus the judgment referred by the petitioner is not applicable in the instant case.

The petitioner also relied upon the judgment reported in (2006) SCC Online (Del) 339 Paragraph 26 which reads as follows:-

*"**26.** In our considered opinion, a performance guarantee which was to be invoked in terms of the contract of guarantee but the same is being sought to be invoked not in terms of the agreement but for something which is alien to the agreement would be unconscionable and would lack in bona fides. The sum and substance of the argument of the learned counsel for the respondent was that the call was made in bad faith. We agree with the submission. Hence, we uphold the impugned order to the extent it relates*

to passing of the injunction order in favor of contractor and against the department against encashment of bank guarantees in question."

In the instant case the respondent has granted liberty to the petitioner for extension of the bank guarantee for a further period of three months as the contract is not completed but the petitioner do not intent to extend the bank guarantee for a sum of Rs. 1,01,99,999/- and thus the judgment referred by the petitioner is not applicable in the instant case.

Ld. Counsel for the petitioner further relied upon the judgment reported in (2021) SCC Online (Cal) 2986 Paragraphs 25 and 26 which reads as follows:-

*"**25.** Courts are usually slow to interfere with the transaction between a bank and the beneficiary which is seen as being independent of the underlying contract between the lender and the supplier unless conditions call for such interference. The three conditions, as accepted in several decisions, are fraud of an egregious nature; special equalities or the invocation not being in terms of the bank guarantee. It is sufficient if a party seeking a restraint on the invocation is able to establish any one of the three requirements. The test of special equity or irrevocable injustice is a matter of an assessment by a court on the particular facts presented to it for stay on a notice of invocation. The injury or injustice must be irrevocable, irremediable and irreversible : Refer : State Bank of India v. Sun Pharmaceuticals Industries Ltd. : AIR 2019 Cal 385. The party seeking an order for restraint must to show that the invocation and consequent payment by the bank to the intended beneficiary would set the party back-irreversibly– in monetary terms which may not be recovered in the foreseeable future.*

***26.** In the present case, the petitioner has satisfied two of the three ingredients, namely special equity and the invocation not being in terms of the guarantee. The clauses in the contract and more particularly the GCC clearly demonstrate that the bank guarantee was furnished towards performance security. There can be no issue with regard to performance since the petitioner has already received 90 % of the contract price as discussed above. The invocation letter also demonstrates that there cannot be any performance issue with regard to the supplies effected by the* *petitioner. The invocation letter does not contain any allegation of a breach of performance obligations by the petitioner. The special equity also stands satisfied by reason of the petitioner facing an immediate and irreversible financial loss if the payment is made by the Citibank NA, Dhaka to the respondent No. 1 in terms of the Letter of Invocation. The submission made on behalf of the respondent no. 2 that Citibank NA, Dhaka may already have made payment to the respondent no. 1 thereby rendering the present application infructuous, is not a factor which would deter this court to permit the order of injunction to be subverted by errant parties. If Citibank NA, Dhaka has temerity to frustrate the orders of injunction passed against the respondents, it must also bear the risk and consequence of such action."*

In the aforementioned case, the Coordinate Bench of this Court held that the petitioner has satisfied two of the three ingredients, namely special equity and the invocation not being the terms of the guarantee but in the instant case, the petitioner has tried to satisfied the ingredient of fraud as well as the special equity but the petitioner has not proved either fraud or special equity and thus the case referred by the petitioner is not applicable in the instant case.

Ld. Counsel for the respondent relied upon the judgment reported in (1996) 5 SCC 450 Paragraphs 4 and 5 which reads as follows:-

*"**4.** It is settled law that bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction and the validity of the primary contract between the person at whose instance the bank guarantee was given and the beneficiary. Unless fraud or special equity exists, is pleaded and prime facie established by strong evidence as a triable issue, the beneficiary cannot be restrained from encashing the bank guarantee even if dispute between the beneficiary and the person at whose instance the bank guarantee was given by the bank, had arisen in performance of the contract or execution of the works undertaken in furtherance thereof. The bank unconditionally and irrevocably promised to pay, on demand, the*

amount of liability undertaken in the guarantee without any demur or dispute in terms of the bank guarantee. The object behind is to inculcate respect for free flow of commerce and trade and faith in the commercial banking transactions unhedged by pending disputes between the beneficiary and the contractor.

5. *It is equally settled law that in terms of the bank guarantee the beneficiary is entitled to invoke the bank guarantee and seek encashment of the amount specified in the bank guarantee. It does not depend upon the result of the decision in the dispute between the parties, in case of the breach. The underlying object is that an irrevocable commitment either in the form of bank guarantee or letters of credit solemnly given by the bank must be honoured. The Court exercising its power cannot interfere with enforcement of bank guarantee/letters of credit except only in cases where fraud or special equity is prime facie made out in the case as triable issue by strong evidence so as to prevent irretrievable injustice to the parties. The trading operation would not be jettisoned and faith of the people in the efficacy of banking transactions would not be eroded or brought to disbelief. The question therefore, is whether the petitioner had made but any case of irreparable injury by proof of special equity or fraud so as to invoke the jurisdiction of the Court by way of injunction to restrain the first respondent from encashing the bank guarantee. The High Court held that the petitioner has not made out either. We have carefully scanned the reasons given by the High Court as well as the contentions raised by the parties. On the facts, we do not find that any case of fraud has been made out. The contention is that after promise to extend time for constructing the buildings and allotment of extra houses and the term of bank guarantees was extended, the contract was terminated. It is not a case of fraud but one of acting in terms of contract. It is next contended by Shri G. Nageshwara Rao, learned counsel for the petitioner, that unless the amount due and payable is determined by a competent court or tribunal by mere invocation of bank guarantee or letter of credit pleading that the amount is due and payable by the petitioner, which was disputed, cannot be held to be due and payable in a case. The Court has yet to go into the question and until a finding after trial, or decision is given by a court or tribunal that amount is due and payable by the petitioner, it cannot be held to be due and payable. Therefore, the High Court committed manifest error of law in refusing to grant injunction as the petitioner has made out a prima facie Strong case. We find no force in the contention. All the clauses of the contract of the bank guarantee are to be read together. Bank guarantee/letters of credit is an independent contract between the bank and the beneficiary. It does not depend on the result of the dispute between the person on whose behalf the bank guarantee was given by the bank and the beneficiary. Though the question was not elaborately discussed, it was in sum answered by this Court in Hindustan Steel Workers Construction Ltd. v. G.S. Atwal & Co. (Engineers) Pvt. Ltd. (SCC at* *p. 79). This Court had held in part 6 that the entire dispute was pending before the arbitrator. Whether, and if so, what is the amount due to the appellant was to be adjudicated in the arbitration proceedings. The order of the learned Single Judge proceeds on the basis that the amounts claimed were not and cannot be said to be due and the bank has violated the understanding between the respondent and the bank in giving unconditional guarantee to the appellant. The learned Judge held that the bank had issued a guarantee in a standard form, covering a wider spectrum than agreed to between the respondent and the bank and it cannot be a reason to hold that the appellant is in any way fettered in invoking the unconditional bank guarantee. Similarly, the reasoning of the learned Single Judge that before invoking the performance guarantee the appellant should assess the quantum of loss and damages and mention the ascertained figure, cannot be put forward to restrain the appellant from invoking the unconditional guarantee. This reasoning would clearly indicate that the final adjudication is not a precondition to invoke the bank guarantee and that is not a ground to issue injunction restraining the beneficiary to enforce the bank guarantee. In Hindustan Steeworks Construction Ltd. v. Tarapore & Co., it was contended that a contractor had a counter-claim against the appellant; that disputes had been referred to the arbitrator and no amount was said to be due and payable by the contractor to the appellant till the arbitrator declared the award. It was contended therein that those were exceptional circumstances justifying interference by restraining the appellant from enforcing the bank guarantee. The High Court had issued interim injunction from enforcing the bank guarantee. Interfering with and reversing the order of the High Court, this Court has held in para 23 that a bank must honour its commitment free interference by the courts. The special circumstances or special equity pleaded in the case that there was a serious dispute on the question as to who has committed the breach of the contract and that whether the amount is due and payable by the contractor to the appellant till the arbitrator declares the award, was not sufficient to make the case an exceptional one justifying interference by restraining the appellant from enforcing the bank guarantee. The order of injunction, therefore, was reserved with certain directions with which we are not concerned in this case."*

In the above referred case the Hon'ble Court held that all the clauses of the contract of the bank guarantee are to be read together. Bank Guarantee/letter of credit is an independent contract between the bank and beneficiary. It does not depend on the result of the dispute between the person on whose behalf the bank guarantee was given by the bank and the beneficiary.

The Hon'ble Court further held that the special circumstances or special equity pleaded in the case that there was a serious dispute on the question as to who has committed the breach of the contract and that whether the amount is due and payable by the contractor to the appellant till the arbitrator declares the award, was not sufficient to make out the case of exceptional one to justifying interference by restraining the appellant from enforcing the bank guarantee.

The above referred judgment is equally applicable in the instant case as the petitioner is claiming that the petitioner has supplied 10 transformers but the respondents are claiming liquidated damages for delay in delivery and till date remaining three transformers were not supplied and thus there are disputed question of facts which cannot be decided in the instant application.

Ld. Counsel for the respondent relied upon the judgment reported in 2019 SCC Online (Cal) 2650 Paragraphs 28 and 49 which reads as follows:-

*"**28.** A cautionary note:*

I am of the view that matters such as this, i.e. bank guarantee injunctions, are fodder for any Interlocutory or Commercial Court. They are filed a dime a dozen across the country. The main attempt in a bank guarantee matter is of trying to be "in pocket or to prevent from being out of pocket". A person who provides a bank guarantee gains several advantages: a) He is not required to make advance payment in case of a bank guarantee so his funds can be utilized more effectively; b) His status as a reliable partner to do commerce with increases multifolds; c) He *generally obtains benefits from various opportunities and is able to demand more beneficial conditions from the beneficiary; and d) He is entitled to pay a commission fee for obtaining a bank guarantee which varies from banks to financial institutions but he does not have to be immediately out of pocket for the entire amount. The parties involved in the bank guarantees are neither poor nor illiterate nor uneducated nor minors. They generally include, a bank or a financial institution and seasoned businessmen, whether the beneficiary or the principal debtor. The decision to provide a bank guarantee is more often than not a well considered business decision which is deliberate, intentional and conscious. The plea of counsel notwithstanding, there is no question of showing any charity or benevolence to any of these parties. It is not the role of this Court to be charitable or benevolent at the expense of somebody else. There is no question of showing any sympathy or compassion to any of the parties involved in a bank guarantee case. This is purely a commercial matter. The law may appear to be harsh but there is sound rationale behind the law. The law has been settled for more than half a century and even as it stands today, there is a restrictive approach which every Court ought to follow before interfering with the working of a bank guarantee unless there is fraud or irretrievable injury or a proved case of special equity. This is not to suggest that, there can be no injunction against a bank guarantee. The law as it is on bank guarantees permits the well-known exceptions of fraud, irretrievable injury and special equities. But, it must be that extraordinary case. Otherwise bank guarantees ought not to be toyed with or tinkered with or interdicted in casual circumstances. RSPL Limited vs. Simplex Infrastructures Limited, AIR 2019 Cal 203 at para 18, Bridge & Roof Co.(I) Ltd. Vs. SKP Buildeon Pvt. Ltd. [2017 SCC OnLine Cal 17051].*

***49**. Interference of the court with invocation of bank guarantee as laid down in several judgments including the judgments relied upon and referred to by the parties is limited. The courts have consistently held that unconditional bank guarantee has to be honoured as an unconditional bank guarantee or an irrevocable letter of credit is the life blood of international commerce. The agreement between the bank and the beneficiary, unless vitiated by fraud, has to be respected. The court can interfere with invocation of bank guarantee if it is found that the contract is vitiated by fraud and the bank guarantee has been obtained fraudulently. The fraud, as observed in Reliance Salt Limited vs. Cosmos Enterprises reported at (2006) 13 SCC 599, "must have a nexus with the acts of the parties prior to entering into the contract. In G. S. Atwal & Co. (Engineers) Pvt. Ltd. reported at (1995) 6 SCC 76, it was observed that "in case of confirmed bank guarantees and irrevocable letters of credit, the Court will not interfere with the same unless there is fraud and irretrievable damages are involved in the case and fraud has to be an established fraud." The nature of the fraud that the courts talk about is fraud of an "egregious nature to vitiate the entire underlying transaction. This is the* *view in U.P. Cooperative Federation Ltd. vs. Singh Consultants and Engineers (P) Ltd. reported at (1998) 1 SCC 174."*

In the aforementioned case, the Hon'ble Court held that unconditional bank guarantee has to be honoured as an unconditional bank guarantee or an irrevocable letter of credit is the life blood of international commerce. The agreement between the bank and the beneficiary, unless vitiated by fraud, has to be respected. The court can interfere with the invocation of bank guarantee if it is found that the contract is vitiated by fraud and then bank guarantee has been obtain fraudulently.

In the present case though the petitioner has tried to make out the case of fraud but the same has not been proved.

Ld. Counsel for the respondent relied by the judgment reported in (2020) 13 SCC 574 Paragraphs 23, 24 and 26 which reads 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.*

***24.** The guarantees in the instant case were unconditional, specific in nature and limited in amount. The terms of the guarantee categorically covered money which the 1st respondent had advanced against supply of the plant and equipment by SCIL. The said guarantees covered any loss and damage caused to or suffered by the 1st respondent-plaintiff in due* *performance of the contract for supply of plant and equipment. The guarantee documents dated 16-2-1983 and 29-8-1984, as a whole and clause 2 of the guarantee document in particular cover the advance which had been paid by the 1st respondent-plaintiff by reason of any breach or failure by SCIL in due performance of the aforesaid contracts i.e. against the contract for supply of plant and equipment.*

***26.** In our considered view, once the demand was made in due compliance with 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 is what has been observed by the Division Bench of the High Court in the impugned judgment and that reflected the correct legal position."*

In the said case the Hon'ble Supreme Court held that the demand once made would obliged 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 fraud, irretrievable injustice and special equities. In the 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.

In the present case, the time period of contract is extended from time to time as the petitioner has not supplied the full quantity transformers and accordingly the Performance Contract of Bank Guarantee was also extended from time to time and lastly the bank guarantee was extended till 30.06.2022 but the petitioner has not completed the supply of the transformers till date and the respondent have issued the impugned letter to the Bank with the condition that Bank Guarantee is required to be extended for a further period of three months as the contract is not completed. In case extension is not provided the proceed shall be remitted to the account of the respondent. From the impugned letter dt. 16.06.2022, it is clear that the respondent has given opportunity to the petitioner for extension of the Bank Guarantee for a further period of three months for completion of the work. In the matters relating to Bank Guarantee the court is not concern with the matrix of the contract. The ground on which the court can grant injunction against unconditional Bank Guarantee are whether there are elements of fraud or irretrievable injury or special equity. On the basis of pleading and materials on record I find that the petitioner has not able to make out any case of fraud, special equity or special circumstances justifying the interference by this court.

In view of the above circumstances, this court find that no injunction can be passed as prayed for by the petitioner is this instant application.

AP 455 of 2022 is thus dismissed.

(KRISHNA RAO, J.)

p.d