IN THE HIGH COURT AT CALCUTTA

CIVIL APPELLATE JURISDICTION

ORIGINAL SIDE

COMMERCIAL DIVISION

Present:

THE HON'BLE JUSTICE HARISH TANDON
&
THE HON'BLE JUSTICE PRASENJIT BISWAS

APO 13 of 2022
with
AP 242 of 2021
Bharat Heavy Electricals Ltd. Electronics Division
Vs.
West Bengal State Electricity Distribution Company Ltd. & Anr.

and

APO 14 of 2022
with
AP 244 of 2021
Bharat Heavy Electricals Ltd. Electronics Division
Vs.
West Bengal State Electricity Distribution Company Ltd. & Anr.

and

APO 16 of 2022
with
AP 243 of 2021
Bharat Heavy Electricals Ltd. Electronics Division
Vs.
West Bengal State Electricity Distribution Company Ltd. & Anr.

Appearance:

For the Appellants : **Mr. Jishnu Saha, Sr. Adv.**

Mr. Tauseef. A. Khan, Adv.

Mr. Ishan Saha, Adv.

Mr. Arindam Paul, Adv.

		Ms. Parna Mukherjee, Adv.
For the Respondent	:	**Mr. Partha Sarathi Bhattacharjee, Adv..**
(W.B.S.E.D.C)		**Mr. Sujit Sankar Koley, Adv.**

Judgment On : **30.03.2023**

<u>Harish Tandon, J.:</u>

The instant appeal arises from a judgment and order dated 20th January, 2022 passed by the Single Bench in AP 242 of 2021 in relation to an application under Section 9 of the Arbitration and Conciliation Act, 1996. By the impugned order the aforesaid proceeding is dismissed upon refusal to pass any interim order or order of restraint against the respondent herein to invoke the performance bank guarantee submitted by the appellant in relation to a contract.

Shorn of unnecessary details, the salient facts emerged from the pleading of the respective parties are adumbrated hereinafter. By a virtue of a notice inviting tender issued by the Respondent no. 1 for work of design, engineering, manufacturing, supply, installation, testing and commissioning including the warrantee, obligation and maintenance of 10 MW Solar PV Power Project at Mejia, the appellant was declared successful bidder and a letter of intent dated 30th July, 2016 was issued in its favour. Pursuant to the said letter of intent, the Letter of Award dated 6th September, 2016 was issued containing an exhaustive terms and conditions relating to commissioning, setting up and operationalise the said 10 MW Solar PV Power Project. One of the terms and conditions incorporated in the said

Letter of Award (LOA) obligated the appellant to furnish a performance guarantee through bank for due performance of the contract and the obligations imposed upon the appellant. Pursuant to such obligation, the bank guarantee to the tune of Rs. 5,60,62,267/- being the 10 per cent of the value of the contract was furnished by the appellant.

The genesis of the litigation ensued when the said bank guarantee was invoked by the Respondent no. 1 on 24.5.2021. The application under Section 9 of the Arbitration and Conciliation Act, 1996 was filed by the appellant seeking an order of restraint upon the Respondent no. 1 herein from invoking the said bank guarantee as well as the Respondent no. 2 to honour the said bank guarantee.

The contention of the petitioner is evidently based upon the nature of the bank guarantee discerned from the language employed therein and the conduct of the parties in relation to the commissioning of the said project. According to the appellant, the intention of the parties can be gathered from the expressions and/or the languages used in the said bank guarantee being suggestive of the fact that it is conditional and depends upon the happening of the events and cannot be regarded as an unconditional or irrevocable. The Trial Court held that the bank guarantee is unconditional and irrevocable and does not depend upon any conditions or the events and therefore, the moment the invocation is made, it is obligatory on the part of the bank to honour the promise or the commitment under the said bank guarantee.

The only point involved in the instant appeal and in fact, has been argued by the respective Counsels is based upon the aforesaid aspect namely whether the bank guarantee is conditional and irrevocable on the happening of the events mentioned therein or can be regarded as unconditional and irrevocable as held by the Single Bench.

By virtue of Clause 13 of LOA, the appellant is mandated to furnish of performance bank guarantee of an amount not less than 10 per cent of the total value of the contract, initially for a period of one year which can be extended to a total period of 5 years from the date of the first commissioning of the plant. The extract of the said bank guarantee is quoted as under:

> ***"In consideration of West Bengal State Electricity Distribution Company Ltd., (herein after referred to as the "Owner" which expression shall unless repugnant to the context or meaning thereof include its successors, administrators and assigns) having awarded to Bharat Heavy Electricals Limited with registered/Head Office at BHEL House, Siri Fort, New Delhi – 110049 (Hereinafter referred to as "Contractor" which expression shall unless repugnant to the context or meaning thereof include its successors, administrators, executors and assigns), a Contract issued by Letter of Intent Memo No. SPGD/Mejia/55/04 dated 30.7.2016 for Design & Engineering, Manufacture / Procurement, supply of Equipment and materials, testing at manufacturer's works, inspection, necessary clearance, packing and forwarding, unloading at site,***

associated civil works, services, permits, installation and incidentals, erection, testing & commissioning with warranting obligation and 5 (Five) years Comprehensive Operation and Maintenance of 10 MW Solar PV Power plant at Mejia, Bankura, West Bengal (scope of work) and the same having been acknowledged by the Contractor, resulting in a Tender ID No. 2016_WBSED_66277_1 dated 27.1.2016 Contractor having agreed o provide a Contract Performance Guarantee for the faithful performance of the entire Contract equivalent to Rs. 5,60,62,267/- (INR Five Crores Sixty Lacs Sixty Two Thousand Two Hundred Sixty Seven only) being (10%) (Ten percent) of the said value of the Contract to the owner.

We, Punjab National Bank, Gate no. 1, BHEL Campus, Deepanjali Nagar, Mysore Road, Bangalore 560026 having its Head Office at no. 7, Bhikagi Cama Place, New Delhi 110607 (hereinafter referred to as the "Bank", which expression shall, unless repugnant to the context or meaning thereof, include its successors, administrators, executors and assigns) do hereby guarantee and undertake to pay the Owner, on demand any or all monies payable by the Contractor to the extent of Rs. 5,60,62,267/- (INR Five Crores Sixty Lacs Sixty Two Thousand Two Hundred Sixty Seven only) as aforesaid at any time up to 30/10/2017 without any demur, reservation, contest, recourse or protest and/or without any reference to this Contractor.

> ***Any such demand made by the Owner on the bank shall be conclusive and binding notwithstanding any difference between the Owner and the Contractor or any dispute pending before any Court, Tribunal, Arbitrator or any other authority. The Bank undertakes not to revoke this guarantee during its currency without previous consent of the Owner and further agrees that the guarantee herein contained shall continue to be enforceable till the Owner discharges this guarantee.”***

The entire gamut of dissent is founded upon the second paragraph of the said bank guarantee as quoted above. It is contended by the appellant that the invocation of the bank guarantee can only be made when any or all money are payable by the appellant to the Respondent no. 1. It is thus contended that the moment the conditions for invocation is controlled by any condition, it cannot be regarded as unconditional and irrevocable. It is thus contended that the Respondent no. 1 after issuing the completion certificate on commissioning of the said plant in terms of the said LOA on 29.12.2017, the invocation is bad, invalid and does not satisfy the conditions enshrined therein. It is arduously submitted by the appellant that the letter dated 5.4.2021 terminating the contract would evince that the loss or the damages has not been suffered as on that date and, therefore, based upon assumption that the Respondent no. 1 may suffer, loss or damages does not satisfy the condition of the performance bank guarantee which is invokable only on the conditions when any or all monies are payable by the appellant to the extent of the said performance bank guarantee. In other words, it is contended that unless the loss or the damages is ascertained and quantified, it does not become payable by the appellant and, therefore, it cannot be construed that the said performance bank guarantee is unconditional and/or irrevocable.

To buttress the aforesaid submission, the reliance is placed upon a judgment of the Supreme Court rendered in case of **Hindustan Construction Co. Ltd. vs. State of Bihar & Ors., reported in (1999) 8 SCC 436** which is relied in a subsequent decision rendered by the Delhi High Court in case of ***Basic Tele Services Ltd. vs. Union of India & Anr., reported in (2009) SCC Online Delhi 1657*** and by this Court in AP 230 of 2021 ***(M/s. KSE Electricals Pvt. Ltd. vs. The Project Director, Bangladesh Rural Electrification Board & Anr.*** passed on 23.11.2021**)**.

In support of the contention that mere apprehension to suffer loss or a pecuniary damages cannot invite the invocation of the performance bank guarantee unless determined and/or ascertained by the Court as held by the Supreme Court in case of ***Kailash Nath Associates vs. Delhi Development Authority & Anr., reported in (2015) 4 SCC 136*** *and* ***Gangotri Enterprises Ltd. vs. Union of India & Ors., reported in (2016) 11 SCC 720***. It is thus contended that the Single Bench has not considered the ratio laid down in the above noted judgments wherein it is held that unless the loss or the damages is ascertained and/or determined by the competent authority, the invocation to perform bank guarantee cannot be made on mere assumption of said loss or the damage to be suffered in future.

On the other hand, it is contended by the Respondent no. 1 that there is a fallacy in the submission of the appellant with regard to the issuance of the certificate which cannot be perceived as the completion or the commissioning of the project. It is further contended that the said certificate has to be read in its entirety and it is clearly evident therefrom that it is subject to the completion of the pending work in tune with LOA. It is vehemently submitted that despite several opportunities given to the appellant to redress and/or remedy the lapses so that the project can be made functional, there was a complete reluctance on their part and, therefore, if the performance has not been done strictly in terms of the various clauses of the LOA, there is no infirmity and/or illegality in invoking the performance bank guarantee which, in fact, has been done. It is further submitted that the nature of the bank guarantee can be ascertained from the expressions used therein which by no stretch of imagination would lead to a conclusion that it is conditional and dependent upon the happening of the events. The moment the bank guarantee is issued by the Respondent no. 2 which is an independent and distinct contract, the liabilities of the Respondent no. 2 is absolute and unequivocal and relied upon a judgment of the Supreme Court rendered in case of ***Ansal Engineering Projects Ltd. vs. Tehri Hydro Development Corporation Ltd. & Anr., reported in (1996) 5 SCC 450***. It is ardently submitted by the Respondent no. 1 that the Court should be slow in passing a restrained order on invocation of the bank guarantee except on a clear case of fraud within the knowledge of the bank or irretrievable injustice or on special equity as held by the Supreme Court in ***U.P. State Sugar Corporation vs. Sumac International Ltd.,***

reported in (1997) 1 SCC 568. It is thus submitted that neither the case of fraud is made out in the petition nor the other exceptions are evident from the pleading and, therefore, no interference is called for to the impugned order.

It is no longer *res integra* that the bank guarantee is separate, independent and distinct contract between the banker and the person in whose favour the bank guarantee is issued. The bank guarantee is not dependent upon the underlying contract which imposed a condition for furnishing the same. Though it is referable and/or relatable to the contract where the bank is not a party thereto yet, it is regarded as an independent and a distinct contract. Often the bank guarantees are required by a contracting parties either to secure the debt or the liability to pay the amount due in a commercial transaction, be it international or national. In relation to a Government contract involving a huge expenditures, the bank guarantee is secured for due performance of the obligations under the underlying contract and in common parlance the same is known as performance guarantee. The bank guarantee is varied term and its nomenclature changes with the performance yet, it is an obligation of the bank to honour its commitment in favour of the beneficiary, the moment the invocation is made. The expressions used in the bank guarantee either by putting a condition or not is a vital aspect in order to ascertain the nature of such guarantee and if the invocation is somewhat hindered upon certain conditions, unless such conditions are evident and imminent from the conduct of the parties as reflected while invoking the same, does not obligate the bank to honour such commitment. The position would have been different when the bank guarantee is unconditional or irrevocable not hedged with any condition; in such cases, the moment the invocation is made it is obligatory on the part of the bank to disburse the amount in favour of the beneficiary.

Often the questions are raised in a judicial proceeding on the nature of the bank guarantee and the mode of invocation by the beneficiary. The law is somewhat settled in this regard as the Court respecting the wisdom of the parties in a commercial transaction shall be slow and rigid in passing a restrain order on invocation thereof. However, the law has progressed in this regard in judicial parlance and evolved the exceptions for its interference. The *catena* of judgment cited before us have carved out exceptions for interference and passing a restrained order on invocation of the bank guarantees namely when a clear case of fraud of which the bank has a notice is of egregious nature to vitiate the underlying contract or a case of irretrievable injury that would be caused in the event the invocation is made or in case of a special equity. All these exceptions are required to be pleaded and found from the record and must be of such nature which invites the exercise of jurisdiction in this regard.

The reference can be made to the Two-Judge Bench decision rendered in case of ***U.P. State Sugar Corporation Ltd. (Supra)*** wherein the Apex Court held:-

"12. * * * * * * * * * * * * * * * * * *

The bank must pay according to the tenor of its guarantee on demand without proof or condition. There are only two

exceptions to this rule. The first exception is a case when there is a clear fraud of which the bank has notice. The fraud must be of an egregious nature as to vitiate the entire underlying transaction. Explaining the kind of fraud that may absolve a bank from honouring its guarantee, this Court in the above case quoted with approval the observations of Sir John Donaldson, M.R. in Bolivinter Oil SA vs. Chase Manhattan Bank (All ER at p. 352): (at SCC p. 197).

> ***'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 charged.'***

This Court set aside an injunction granted by the High Court to restrain the realisation of the bank guarantee.

13. The same question came up for consideration before this Court in Svenska Handelsbanken vs. Indian Charge Chrome. This Court once again reiterated that a confirmed bank

guarantee/irrevocable letter of credit cannot be interfered with unless there is established fraud or irretrievable injustice involved in the case. Irretrievable injury has to be of the nature noticed in the case of Itek Corpn. Vs. First National Bank of Boston. On the question of fraud this Court confirmed the observations made in the case of U.P. Coop. Federation Ltd. and stated that the fraud must be that of the beneficiary and not the fraud of anyone else.

14. On the question of irretrievable injury which is the second exception to the rule against granting of injunctions when unconditional bank guarantees are sought to be realised the Court said in the above case that the irretrievable injury must be of the kind which was the subject matter of the decision in the Itek Corpn. case. In the case an exporter in USA entered into an agreement with the Imperial Government of Iran and sought an order terminating its liability on strand by letters of credit issued by an American Bank in favour of an Iranian Bank as part of the contract. The relief sought on account of the situation created after the Iranian revolution when the American Government cancelled export licenses in relation to Iran and the Iranian Government had forcibly taken 52 American citizens as hostages. The US Government had blocked all Iranian assets under the jurisdiction of United States and had cancelled the export contract. The Court upheld the contention of the exporter that any claim for damages against

the purchaser if decreed by the American Courts would not be executable in Iran under these circumstances and realisation of the bank guarantee/letters of credit would cause irreparable harm to the plaintiff. This contention was upheld. To avail of this exception, therefore, exceptional circumstances which make it impossible for the guarantor to reimburse himself if he ultimately succeeds, will have to be decisively established. Clearly a mere apprehension that the other party will not be able to pay, is not enough. In Itek case there was a certainty on this issue. Secondly, there was good reason, in that case for the Court to be prima facie satisfied that the guarantors i.e. the bank and its customer would be found entitled to receive the amount paid under the guarantee."

There is no quarrel to the proposition that the Court should not ordinarily pass the restrained order on invocation of bank guarantee unless the exceptions indicated above are satisfied and a prima facie case is made out in the pleading. Normally the Court should not interfere with the enforcement of the bank guarantee except in case of an exception as indicated above as such interference shall have impact on the faith of the people in the banking transaction. The faith and reposing confidence on the efficacy of the banking transaction in the commercial world cannot be permitted to be lost nor to inculcate the sense of disbelief into such system.

In the backdrop of the above the question which requires an answer in the instant appeal is whether the performance bank guarantee is conditional or unconditional. We had extracted the relevant excerpts from the bank guarantee which would evince that the same was given for faithful performance of the entire contract and the Respondent no. 1 guarantees and undertakes to pay the amount mentioned therein to the beneficiary termed as 'Owner' therein on demand any or all monies payable by the appellant to such extent without any demur, reservations, contest, recourse or protest and/or without any reference to the appellant. The third paragraph of the performance bank guarantee conveys that any demand made by the Respondent no. 1 shall be conclusive and binding notwithstanding any differences between the respondents herein for any dispute pending before any Court, Tribunal, arbitrator or any other authority. The argument is advanced on the expressions "any or all monies payable by the contractor" to mean that such money becomes payable only upon ascertainment or the determination of the sum and should not be construed to include unascertained sum. It is contended that unless the sum is quantified the invocation is bad.

Apart from the aforesaid three exceptions, the fourth exception which we find from the reports relied upon by the parties, is that the invocation can only be made strictly in terms of the bank guarantee and in favour of the person being the beneficiary thereof. The aforesaid exception though interlinked with the conditional bank guarantee yet, it can be reasonably inferred that even in case of an unconditional bank guarantee, the commitment has to be honoured to a person in whose favour such guarantee is given. The reliance can be placed upon the judgment of the Apex Court in ***Hindustan Construction Company Ltd. (Supra)*** where the bank guarantee was furnished to the Chief Engineer but the invocation was made by the Executive Engineer and the question that fell for consideration as to whether such invocation is justified on the face of it and whether it is obligatory on the part of the Bank to disburse the amount so guaranteed on the *ipse dixit* of the invocation thereof. On the backdrop of the aforesaid contention, the Apex Court held:

> ***"21. As pointed out above, bank guarantee constitutes a separate, distinct and independent contract. This contract is between the Bank and the defendants. It is independent of the main contract between HCCL and the defendants. Since the bank guarantee was furnished to the Chief Engineer and there is no definition of "Chief Engineer" in the bank guarantee nor is it provided therein that "Chief Engineer" would also include Executive Engineer, the bank guarantee could be invoked by none except the Chief Engineer. The invocation was thus wholly wrong and the Bank was under no obligation to pay the amount covered by the "performance guarantee" to the Executive Engineer."***

In ***Gangotri Enterprises Ltd. (Supra)*** the performance bank guarantee was submitted for construction of RCC box type minor bridges in connection with laying down of Agra-Etawah new BG rail line and construction of New Station Building (G+2) circulating area, various service buildings, construction of platform shelters with RCC column and beam, underground and overhead water storage tanks, water supply pipeline network etc. Because of the agitation of the farmers and non-supply of the specification or drawing of the various small bridges, there was a delay in completing the work and the time was also extended. Ultimately, the completion certificate for the Anand Vihar works with the defect liability period was issued by the respondents therein. After the expiry of the period of a defect liability, the appellant therein seek to release the performance bank guarantee. But subsequently the said contract was cancelled and it was indicated that the respondent therein suffered a loss of an amount indicated therein and thereafter, the respondent invoked the bank guarantee. Immediately, an arbitral proceeding was initiated and an application under Section 9 of the Act was moved for injunction on encashment of bank guarantee. A plea was taken that the said performance bank guarantee was in relation to another contract and not the subject contract which has been cancelled. It was further argued that the moment the completion certificate is issued, it is not open to the respondent therein to encash the bank guarantee. In course of the hearing a point arose whether the bank guarantee can be invoked without ascertaining the liabilities of the parties on account of damage more particularly, when there is no sum "due" or "payable" either by the appellant to the respondents and/or vice versa. In the backdrop of the above, it is held:

> ***"40. On perusal of the record of the case, we find that firstly, arbitration proceedings in relation to the contract dated 22-8-2005 are still pending. Secondly, the sum claimed by the respondents from the appellant does not relate to the contract for which the bank guarantee had been furnished but it relates***

> ***to another dated 22-8-2005 for which no bank guarantee had been furnished. Thirdly, the sum claimed by the respondents from the appellant is in the nature of damages, which is not yet adjudicated upon in arbitration proceedings. Fourthly, the sum claimed is neither a sum due in praesenti nor a sum payable. In other words, the sum claimed by the respondents is neither an admitted sum and nor a sum which stood adjudicated by any court of law in any question being in the nature of a performance guarantee furnished for execution work of contract dated 14-7-2006 (Anand Vihar Works) and the work having been completed to the satisfaction of the respondents, they had no right to encash the bank guarantee."***

The aforesaid judgment does not appear to have any assistance to the appellant as in the said case the work was completed to the satisfaction of the respondents therein and in fact the completion certificate was issued in this regard. Apart from the same, the bank guarantee was not relatable to a contract which was cancelled but was furnished in relation to another contract. In such perspective it was held that unless the loss or damages are adjudicated upon or determined, it can be said to be a sum due nor sum payable.

The distinction can be seen in the instant case where the performance bank guarantee was furnished in relation to the contract which stood cancelled and the word "Payable" has to be understood in such perspective. The word "Payable" as defined in Black's Law Dictionary to mean *" a thing* *capable of being paid, suitable to be paid; admitting or demanding payment; justly due; legally enforceable. A sum of money is said to be payable when a person is under obligation to pay it."*

What can be seen from the above that the aforesaid expression "Payable" signifies an obligation to pay at future time and, therefore, when it is used in conjunction with quantification, it would mean that the debt is payable at once which is opposed to the word "Owing". It is therefore a word of indefinite impart and a meaning can be gathered from the context in which it is used. The word "payable" is a descriptive word which would mean that it has to be paid or as due and, therefore, to be paid. Thus, it has to be understood in the context in which it is used and may sometimes be relatable to an obligation under the contract to pay ***(see J.K. Synthetics Ltd. vs. Commercial Taxes Officer (1994) 4 SCC 276)***.

The judgment of the Delhi High Court in ***Basic Tele Services Ltd. (Supra)*** is distinct on facts that in the said case the invocation of bank guarantee was made at a point of time when the process of negotiation was going on and there was no document forthcoming where the denial to a claim was ever made and, therefore, it was found to be premature. In ***Kailash Nath Associates (Supra)*** the disputes pertains to the forfeiture of the earnest money on an alleged breach of a contract and on the ground that for such breach, a loss has been suffered. The aforesaid case is not in relation to a bank guarantee or its invocation. A point arose when the contract disclosed any amount for breach of contract by way of damages then it must be restricted to the said amount and would become payable unless such damage or the loss is actually suffered. It would be profitable to quote the relevant portions from the said judgment which runs thus:

> ***"43.1 Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation.***
>
> ***44. The Division Bench has gone wrong in principle. As has been pointed out above, there has been no breach of contract by the appellant. Further, we cannot accept the view of the Division Bench that the fact that DDA made a profit from re-auction is irrelevant, as that would fly in the face of the most basic principle on the award of damages – namely, that compensation can only be given for damage or loss suffered. If damage or loss is not suffered, the law does not provide for a windfall."***

The Single Bench in case of ***M/s. KSE Electricals Pvt. Ltd. (Supra)*** applied the exception of irretrievable injury and special equity as the petitioner therein received 90 per cent of the contract price and the invocation letter does not contain any allegation of breach of performance, obligations and therefore, the invocation would bring an irreversible situation.

There is no quarrel to somewhat settled proposition of law in relation to a restrained order on invocation of a bank guarantee that normally the Court should be reluctant to pass an order of injunction against invocation of bank guarantee except on the three exceptions as indicated in the aforementioned report. We do not find any element of particulars of fraud in the instant case having made out by the appellant. The case is founded upon the interpretation of the languages and the expressions used in the bank guarantee. An interpretation is sought to be given which renders invocation impermissible. The language used in the bank guarantee, as quoted above, has been interpreted by the Single Bench as unconditional and unequivocal and not brindled with any conditions for which the invocation is founded upon. Furthermore, all those conditions as performance guarantee was given to secure the due performance under the contract and to remedy the loss or damages which a party would suffer to the extent for which the performance bank guarantee is given. In common commercial parlance, it is construed as cash kept as a security for due performance and becomes immediately payable on a breach of a loss suffered or likely to suffer. Had it been a case of a liquidated damages and the invocation is dependent upon the same, the position would have been different. But the moment the invocation is unconditional, it does not require ascertainment and/or determination of the loss or the damages. The letter of invocation issued by the respondent contained the letter of termination as a part of it wherein it has been spelt out that there has been a breach of several clauses of the contract inviting cancellation of a contract and the bank guarantee being unconditional and/or irrevocable, it is an obligation cast upon the bank to honour such commitment. The expression *"any or all monies payable"* cannot be construed as conditions because of the subsequent words or expressions used in the bank guarantee that it is payable without any demur, protest or any proceeding pending between the parties. It is thus an unconditional, unequivocal and irrevocable bank guarantee not dependent upon any conditions and, therefore, we do not find infirmity and/or illegality in the impugned order.

The appeal is thus dismissed.

No order as to costs.

Urgent Photostat certified copies of this judgment, if applied for, be made available to the parties subject to compliance with requisite formalities.

I agree. **(Harish Tandon, J.)**

(Prasenjit Biswas, J.)