O.A.Nos.94 and 95 of 2023

KRISHNAN RAMASAMY, J.

The application in O.A.No.94 of 2023 was filed to pass an order restraining the 2nd respondent from en cashing or releasing payment for the Bank Guarantees described in the Schedule of the application and the application in O.A.No.95 of 2023 was filed to pass an interim order restraining the 1st respondent, their agents, servants or anybody claiming through or under it from invoking the Bank Guarantees described in the Schedule of the application. The Schedule mentioned in both the applications is extracted hereunder:

BG Reference Number	Start Date	Date of expiry	Real Currency Amount (INR)	Type of Guarantee
797BGG1800718	07.06.2018	31.03.2023	4,18,80,000	Advance
797BGG1901353	21.11.2019	31.03.2023	1,39,60,000	Advance

2. The applicant is one of the world's leading suppliers of technology services offering end to end engineering, IT and business solutions. The first respondent is a Company engaged in the design and the manufacture of oil seals, hoses, gear boxes, geared motors, molded rubber products, etc., and

the second respondent is a banking company providing various banking and related services.

3. The applicant vide its proposal to the first respondent dated 01.08.2017 suggested a process for the “to be” condition in the new line of improvement for the automation procedure. The applicant also provided description of the functions to be performed in each of the three zones which are enumerated below:-

(i) **Zone 1** includes the extruder, conveyor controls and building station to produce the raw belt;

(ii) **Zone 2** includes the bias cutter and the fabric wrapping machine with necessary controls to produce the green belt; and

(iii) **Zone 3** includes the assembly station and the curing station along with the accessories under controls. It is at this stage that the final product is received.

4. The applicant's proposal was accepted by the respondent and the Letter of Intent (LOI) dated 08.01.2018 was issued to the applicant by the respondent. Subsequently, the parties entered into a Master Supply

Agreement dated 16.04.2018 (MSA) setting out in detail the terms and conditions of the supply of the equipment as also the scope of work against the contract between the parties. The total contract price was agreed to a sum of Rs.13,96,00,000/- exclusive of Goods and Services Tax (GST). The terms and conditions of the payment as mentioned in the LOI was to be made in the following manner:

> (i) 30% of the value of the order to be paid against the submission of the Advance Bank Guarantee by the applicant;
>
> (ii) 10% payment to be released by the 20th week against Bank Guarantee after reviewing the progress of the project;
>
> (iii) 40% payment to be made after successful trials by the applicant and dispatch clearance by the 1st respondent; and
>
> (iv) Balance 20% of the value of the order plus applicable taxes to be paid against the submission of Performance Bank Guarantee for 10% and after successful try-out, commissioning and handover of line at the 1st respondent's facility at Madurai.

5. In compliance of the Clause (i) and (ii) of the above terms, the applicant furnished an Advanced Bank Guarantee dated 07.06.2018 for a sum of Rs.4,18,80,000/- and another Advanced Bank Guarantee dated

21.11.2019 for a sum of Rs.1,39,60,000/-, which is 10% of the value of LOI. Both the Bank Guarantees were executed to secure the advance payment.

6. Mr.Satish Parasaran, learned Senior counsel appearing for the applicant would submit that after entering the MSA, the first respondent issued a purchase order dated 16.05.2018. The implementation of the project was subject to a stipulated schedule and was divided into various steps *inter alia* POC design and manufacturing, Design in Principal Approval (DAP) documentation and release for manufacturing at the premises of the first respondent, factory acceptance test and installation and commissioning. The applicant continued to work on the project activities for the three zones as per the agreed scope of work, however, there were several modifications and revisions that were suggested by the first respondent on several occasions.

7. As per the terms and conditions of the MSA, 40% of the payment to be received by the applicant was related to dispatch clearance by the first

respondent. The first respondent used this consideration as a convenient and self-serving opportunity to delay the dispatch clearance thereby delaying the payments due to applicant for the given project, while the applicant continue to incur mounting cost. Due to the COVID-19 pandemic, the project was also adversely impacted which resulted in delays and increase of cost to the applicant. Even during the subsistence of the pandemic, the applicant undertook efforts to reach out to 1st respondent to provide regular updates on the progress of the project. The applicant even made hectic efforts to resume the activities at the 1st respondent's site and sought for the assistance of the 1st respondent in this regard. Under the circumstances, the amendment No.I was carried out to the MSA and the issuance of the revised purchase order. In order to revise the price and scope of the work to the extent of Rs.16,46,00,000/- i.e., with a specific stipulation that the additional value of Rs.2,50,00,000/- shall be paid by the 1st respondent to the applicant upon the successful erection and commissioning of the entire line. However, there was no change to the payment terms as specified in Clause 3 of the MSA, which were with respect to Rs.13,96,00,000/-.

8. The learned Senior counsel further submitted that the Clause 3 of MSA clearly provides for the terms of the payment. The applicant raised invoices for the works done towards the project at different periods of time, however, the 1st respondent not only derailed the successful implementation of the project but also failed to honour its obligation by not making payments to the applicant. The details of the invoices raised by the applicant are provided below:-

Zone	Invoice No.	Invoice Date	Amount (INR)
Zone 3	2010002448	14 September 2020	18,148,000
Zone 3	2010004795	5 February 2021	13,960,000
Zone 3	2010004934	25 February 2021	13,960,000
Zone 3	2110001202	6 July 2021	16,652,000
		Total	**6,27,20,000**
Zone 1	2010004685	22 January 2021	25,128,000
Zone 1	2010004790	4 February 2021	4,250,000
		Total	**29,378,000**
Zone 2	2010002585	23 September 2020	23,732,000
		Total	**23,732,000**
Zone 4	2010005043	9 March 2021	3,350,400
		Total	**3,350,400**
	Grand Total		**11,91,80,400**

9. The 1st respondent failed to make any payment for the invoices raised by the applicant, it had initiated the process of filing the patent of the manufacturing concept with the concerned authorities by making use of the design and information provided by the applicant for the project and was successful in obtaining a patent for the manufacturing concept in October 2022. Thereafter, further amendment No.II to the MSA dated 24.12.2021, was carried out where by it was mutually agreed that the 1st respondent will adjust the advance of Rs.5,58,40,000/- lying with the applicant against the invoices raised by it for a value of Rs.6,27,20,000/- for the work done towards Zone 3 machinery and return the Advance Bank Guarantee and the second Bank Guarantee issued by the applicant as Collateral for supply of entire smart line.

10. The amendment No.II to MSA 2 was mooted by the first respondent and it was accepted by the applicant. The applicant sent the signed copy of the MSA to the respondent. Therefore, he would submit that there was a written contract with regard to the amendment No.II to MSA. Under these circumstances, the 1st respondent sent two letters dated

14.12.2022 to the 2nd respondent to invoke the Advance Bank Guarantee and the Second Bank Guarantee with immediate effect on the alleged non-fulfillment of the contractual stipulations by the applicant. Pursuant to these letters, the applicant was compelled into agreeing to provide the new Bank Guarantees to the 1st respondent of the same values for an additional period of 3 months. Further, by virtue of the e-mail dated 15.12.2022, the applicant requested the 1st respondent not to invoke the Advance Bank Guarantee and the Second Bank Guarantee. By letters dated 16.12.2022, the Advance Bank Guarantee and the Second Bank Guarantee were extended by the applicant until 31.03.2023. Thereafter, the 1st respondent withdrew the letters of invocations issued to the 2nd respondent-Bank.

11. Further, the learned Senior counsel would submit that under these circumstances, the 1st respondent sent a e-mail dated 06.02.2023 and called upon the applicant for an urgent meeting on 08.02.2023 on short notice. During the meeting, held on 08.02.2023, the Representatives of the parties met. The 1st respondent emphasised upon the issue that it had received the right of patent under the MSA and also sought for the disposal of the line in

a manner that it does not come in the hands of the competitors. In spite of receipt of patent, the 1st respondent unreasonably demanded that the advances paid to the applicant pursuant to the work done by the applicant under the MSA be returned or otherwise the parties would have to explore the possibility of en cashing the Bank Guarantees. Therefore, without any other option, the applicant had approached this Court for appropriate orders since the present dispute can be arbitrable as per the terms of the Clause 22 of MSA, which deals with the Arbitration Disputes among the parties. In support of his contentions, the learned Senior counsel referred to the following judgments rendered by the Hon'ble Supreme Court:

(i) ***Hindustan Construction Co. Ltd., vs. State of Bihar and Others*** reported in ***(1999) 8 SCC 436;***

(ii) ***State Trading Corporation of India Ltd., vs State Bank of India and Others*** reported in ***2013 SCC OnLine Del 935;***

12. In reply, Mr.P.S.Raman, learned Senior counsel appearing for the respondent would submit that in the present case, the applicant had alleged fraud based on the unexecuted and unsigned amendment No.II dated

24.12.2021. Since the said document was admittedly not executed by the 1st respondent, the terms and conditions contained therein will not bind on either party. Therefore, he would submit that the invocation of the Advance Bank Guarantees cannot be construed as fraud.

13. Further, the learned Senior counsel would submit that as per the terms of the MSA, only on successful installation and commissioning of the equipment, the first respondent is liable to pay the amount to the applicant. However, the work was originally completed on 15.10.2018 and hence, the project was inordinately delayed. In the result, the applicant was unable to successfully install and commission the equipment as per the requirement and specifications under the MSA. Since the applicant had failed to execute the works in terms of MSA, the 1st respondent is entitled to invoke and encash the unconditional Advance Bank Guarantee to recover the advance amount, which has been paid to the applicant. Therefore, he would contend that since the injunction sought by the applicant against the invocation and encashment of an unconditional Advance Bank Guarantees is contrary to law, the present applications are liable to be dismissed.

14. Further the learned Senior counsel vehemently opposed the execution of the amendment No.II to MSA and submit that the said amendment was signed only by one party and not by other party. He would also submit that the granting of patent itself would not be a proof for functioning execution of the works in terms of MSA. Since, the execution of the work is not up to the mark as agreed by the virtue of MSA, the respondent refused to make payment and further they are entitled to invoke the Advance Bank Guarantees. He would further submit that the Bank Guarantee is a contract between the 2nd respondent-Bank and the 1st respondent. The 2nd respondent cannot make any objection from encashing the Bank Guarantee by the 1st respondent and once if it is invoked by the 1st respondent, it has to be encashed. The encashment of the Bank Guarantee cannot be refused, even if any objection is made by the applicant. In support of his contention he has referred following judgment:

(i) ***Ansal Engineering Projects Limited vs. Tehri Hydro Development Corporation*** reported in ***(1996) 5 SCC 450***;

(ii) ***Mahatma Gandhi Sahakra Sakkare Karkhane vs. National Heavy Engineering. Coop. Ltd.,*** reported in ***(2007)***

6 SCC 470;

(iii) ***Himadri Chemicals Industries Ltd., vs. Coal Tar Refining Co.,*** reported in ***(2007) 8 SCC 110;***

(iv) ***Standard Chartered Bank vs. Heavy Engineering Corporation Limited.,*** reported in ***(2020) 13 SCC 574;***

15. Heard Mr.Satish Parasaran, learned Senior counsel appearing for the applicant and Mr.P.S.Raman, learned Senior counsel appearing for the respondent and also perused the materials available on record.

16. There is no denial on the aspect of execution of the Advance Payment Bank Guarantees to an extent of 40% of the total contract value. The respondent paid the 40% advance to the applicant against the supply of products. To secure the said advance, the Bank Guarantees were executed by the applicant in favour of the 1st respondent. The relevant Clauses of Advance Payment Bank Guarantee, which was executed for a sum of Rs.4,18,80,000/- on 07.06.2018 and was renewed the from time to time until 31.03.2023, reads as follows:

> *"............In terms of the said Contract, the Supplier is required to obtain and furnish a bank guarantee in your favour*

for mobilization advance payment under the said Contract amounting to Rs.4,18,80,000.00 (Four Crore Eighteen Lakhs Eighty Thousand Only) being 30% (30 percent) of the value of the Letter of Intent as per payment terms.

Now, therefore, we, the Bank, hereby unconditionally and irrevocably undertake and guarantee to pay to the Beneficiary under this Advance Bank Guarantee any amount up to an aggregate value of Rs.4,18,80,000.00 (Four Crore Eighteen Lakhs Eighty Thousand Only) against any loss, damage, costs, charges and expenses caused to or suffered or to be suffered by the Beneficiary by reason of breach of the Contract and/or in relation to the advance payment made to the Supplier pursuant to the terms and conditions of the said contract without any contestation, demur or protest and without questioning the legal relation subsisting between the Beneficiary and the Supplier upon receipt of a simple written demand from the Beneficiary received by the Bank on or before 30.08.2018 (Claim date).”

17. A similar clause was also available for the Advance Bank Guarantee, which was executed for a sum of Rs.1,39,60,000/- on 21.11.2019 and extended from time to time until 31.03.2023. The said clause is extracted hereunder:

“...........In terms of the said Contract, the Supplier is

required to obtain and furnish a bank guarantee in your favour for mobilization advance payment under the said Contract amounting to Rs.1,39,60,000.00 (Rupees One Crore Thirty Nine Lakhs Sixty Thousand Only) being 10% (10 percent) of the value of the Letter of Intent as per payment terms.

Now, therefore, we, the Bank, hereby unconditionally and irrevocably undertake and guarantee to pay to the Beneficiary under this Advance Bank Guarantee any amount up to an aggregate value of Rs.1,39,60,000.00 (Rupees One Crore Thirty Nine Lakhs Sixty Thousand Only) against any loss, damage, costs, charges and expenses caused to or suffered or to be suffered by the Beneficiary by reason of breach of the Contract and/or in relation to the advance payment made to the Supplier pursuant to the terms and conditions of the said contract without any contestation, demur or protest and without questioning the legal relation subsisting between the Beneficiary and the Supplier upon receipt of a simple written demand from the Beneficiary received by the Bank on or before 31.03.2020."

18. A reading of the above clauses would show that the Bank Guarantees were furnished in favour of the 1st respondent for payment of the mobilization advance to the applicant. To secure the said advance, the Advance Bank Guarantees were executed until the completion of the supply

to an extent of 40% i.e., advance amount paid by the 1st respondent to the applicant. Further, the Clauses in both the Advance Payment Bank Guarantees referred above also states as follows:

> *"The value of the said Bank Guarantees can be reduced to the extent of the supplies made as per the terms of contract and against a confirmation issued by the beneficiary. The reduction is to be by way of an amendment to the Bank Guarantee that can be issued on half yearly basis, if applicable."*

19. A reading of the above Clause would shows that the Bank Guarantees issued in favour of the 1st respondent had to be reduced to an extent of the supplies made by the applicant. Based on the supplies made, the Bank Guarantees had to be amended in half yearly basis. In the present case, it appears that the applicant had raised 8 invoices against the respondent for a sum of Rs.11,91,18,400/-. These are all the admitted facts.

20. The 1st respondent had also applied for patent for the 'manufacturing concept' provided by the applicant to the 1st respondent and the 1st respondent also obtained the patent for the said concept. After

obtaining the patent for the manufacturing concept, now the 1st respondent has come forward and stated that the entire manufacturing concept is not in accordance with the MSA. Obtaining the patent for the manufacturing concept by the first respondent would prove that in terms of MSA, the supplies are made and other terms and conditions appears to have been complied. Before granting of any patent, the inventor necessarily have to demonstrate the novelty of the manufacturing concept and its working and thereafter, the patent will be granted. The performance may vary and the same may not be up to the expectation of the first respondent, but it was qualified for the invention. The effort that are made by the applicant have been proved by virtue of granting the patent in favour of the first respondent for the innovative manufacturing concept made by the applicant to and in favour of the first respondent. There may be defects in the performance of the contract but now the Bank Guarantees were not executed against the performance of the manufacturing concept. But it was made only to secure the advances against the supplies. The advance payment was made to an extent of 40% of the project. To secure the said advance until the completion of the supply of 40% by the applicant to the 1st respondent, this Advanced

Bank Guarantee was executed and would continues. It is not in dispute about the completion of the 40% of the supply. In fact, the invoices have been raised for the entire 100% of the execution of new manufacturing concept but no payment has been made. Under these circumstances, the applications were filed against the invocation of the Bank Guarantees.

21. Even the Clauses stated above would clearly provide that the Bank Guarantees had to be reduced to an extent of the supplies made. The said supplies have been effected. Hence, once if it is effected in terms of the above clause, the Bank Guarantees have to be reduced. However, no amendment has been made against the Bank Guarantee, even after effecting 100% of supply as per the terms of MSA.

22. The Advance Payment Bank Guarantees also provides that the losses mentioned in the breach of contract is only to an extent of any loss, damage, costs, charges and expenses caused to or suffered or to be suffered by the Beneficiary by reason of breach of the Contract and/or in relation to the advance payment made to the Supplier pursuant to the terms and

conditions of the said contract without any contestation, demur or protest and without questioning the legal relation subsisting between the Beneficiary and the Supplier upon receipt of a simple written demand from the Beneficiary received by the Bank on or before 31.03.2020 and now extended up to 31.03.2023.

23. A conjoint reading of the above paragraph No.22 with the clause which states that *"the value of the said Bank Guarantees can be reduced to the extent of the supplies made as per the terms of contract and against a confirmation issued by the beneficiary. The reduction is to be by way of an amendment to the Bank Guarantee that can be issued on half yearly basis, if applicable."* would refer only in the course of the supply of the 40% of supply and not otherwise. The case of the respondent is only that the manufacturing concept is not up to the expectation of the respondent and workable. But it is not that the 40% of the supply is not made and thereby the respondent incur loss, damage, costs, charges and expenses, etc. As long as the respondent is not disputing with regard to 40% of the supply made to them and thereby incurred the loss, etc., as stated in the Bank Guarantee, citing a reason that the manufacturing concept is not working up to the

expectation of the respondent, that too after the registration of the patent, is not at all acceptable.

24. The contention of the learned counsel for the respondent was that since the applicant had failed to execute the work in terms of MSA, they are entitled to invoke and encash the Advance Bank Guarantees to recover the advance amount. As far as this contention is concerned, as referred above, the Advance Bank Guarantee has to be reduced to the extent of supply made and at the point of 40% of the Contract value of supplies are made, it has to be reduced and that was the object of executing the Advance Bank Guarantee against the advance payment for supply. Therefore, once 40% supplies are made, thereafter there is no requirement to keep the advance bank guarantee alive. The patent for the manufacturing concept was also obtained by the respondent. The learned Senior counsel for the respondent made objections with regard to the defects in the 40%. As far as this Court is concerned, it was the manufacturing concept made by the applicant and hence, the erection and construction has to be made by the applicant based on his new improvement in the manufacturing concept. Whether the supplies made in accordance with the terms and conditions of the MSA or not, can be

known only after the completion of execution of 100% of work. In the present case, the respondent admitted only after 100% of execution, that the product is not working in terms of the MSA, and thereby the disputes of 40% supply as well. It is nobodies case that the 40% supply was made and due to which the loss, damages, costs, charge and expenses, etc., occurred as stated in the Performance Bank Guarantee. Therefore, this Court feels that as far as execution of the 40% of the work is concerned, there is no *bona fide* on the part of the respondent, to dispute the same.

25. The case laws produced before this Court is relating to the performance of the Bank Guarantee. No doubt that once the Bank Guarantee is executed against the performance, the invocation of the Bank Guarantees cannot be questionable, unless and otherwise if there is any egregious fraud, irretrievable injustice or special equities, exist and not otherwise.

26. Generally this Court will not interfere with the enforcement of the Bank Guarantee or letter of credit unless a case of fraud or a case of apprehension of irretrievable injustice has been made out so that either there should be a good *prima facie* case of fraud or special equities in the form of

preventing the irretrievable injustice between the parties.

27. In the 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 the letter of credit in terms thereof irrespective of any pending dispute relating to the terms of the contract.

28. The Courts have carved out only two exceptions against invocation of the Bank Guarantee, which are as follows:

> (a) The first one is a fraud in connection with such a Bank Guarantee, would vitiate the very foundation of such a Bank Guarantee. Hence, if there is such fraud on which the beneficiary seeks to take advantage, he can be restrained from doing so.
>
> (b) The second exception relates to cases where allowing the encashment of an unconditional Bank Guarantee would result in irretrievable harm or injustice to one of the parties concerned.

29. In the similar way the Hon'ble Supreme Court and the other High Courts had also held in the judgments, which were referred by both the learned Senior counsel appearing for the applicant as well as respondent.

30. However in the present case, as stated above, the Bank Guarantees were executed against the supply to extent of the 40%. There is no dispute with the regard to the 100% supply. In terms of the contract, once 40% supply have been made, the Bank Guarantees should have been reduced to full extent and that was the terms agreed by the parties at the time of executing the Advance Payment Bank Guarantees. Taking advantage that the parties have failed to make suitable amendment to the Bank Guarantee in terms of the agreed terms, now the first respondent coming forward to invoke the Advance Bank Guarantee, in spite of the supplies made, which was more than 40%.

31. However, the issue raised by the 1st respondent was that the

performance was not up to the mark or not satisfactory as per the MSA. The advance Bank Guarantee was not against the performance but it is against the 40% Advance Payment made against the supply. Once supply is made to the extent of 40%, the obligation of the applicant is completed. Hence, it has to be reduced in full extent, because the parties have failed to amend the said Bank Guarantees in spite of the supplies, which have been made more than 40%, taking advantage of the said failure of the parties to make suitable amendment to the Bank Guarantees, it is impermissible to allow the respondent to invoke the Bank Guarantees, in spite of the fulfillment of the obligation by the applicant in favour of the 1st respondent, otherwise it would amount to rendering irretrievable injustice.

32. In view of the above findings, this Court is not inclined to go into the *prima facie,* validity of the amendment No.II to MSA and also the terms and conditions stated therein.

33. In such view of the matter, this Court is of the considered view that the applicant has made out *prima facie* case and the balance of

convenience is also in favour of the applicant. If this Court does not grant the interim injunction, the applicant's interest will be affected prejudicially and that will put the applicant into great hardship. Further it will ultimately render irretrievable injustice to the applicant. Hence this Court is inclined to make the interim injunction already granted by this Court as absolute.

34. In the result, the interim injunction already granted by this Court dated 13.02.2023 is made absolute. While making the interim injunction absolute, this Court directs the applicant to extend the Bank Guarantees for a further period of three months with effect from 01.04.2023. The injunction granted by this Court shall continue until the first hearing of the arbitration proceedings. In the meantime, the parties shall take necessary steps to commence the arbitration proceedings by appointing an Arbitrator. For further extension of either bank guarantees or interim order, the parties shall seeks the same before the learned Arbitrator after the commencement of the arbitration proceedings.

35. Accordingly, these applications are disposed of.

30.03.2023

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KRISHNAN RAMASAMY, J.

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