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

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Date of Decision: 06th July, 2023

+ O.M.P.(I) (COMM.) 44/2023

CENTRAL ELECTRONICS LIMITED Petitioner

Through: Mr. Jeevesh Mehta, Advocate
with Mr. Bhim Singh, Law Officer.

versus

ENERGY EFFICIENCY SERVICES LIMITED
& ANR.

..... Respondents

Through: Mr. Samdarshi Sanjay, Ms.
Monika Sharma and Mr. Ashish Kumar
Sharma, Advocates for R-1.**CORAM:****HON'BLE MS. JUSTICE JYOTI SINGH****JUDGEMENT****JYOTI SINGH, J.****I.A. 5356/2023 (Exemption)**

Allowed, subject to all just exceptions.

Application stands disposed of.

O.M.P.(I) (COMM.) 44/2023 & I.A. 5355/2023 (for modification)

1. This is a petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the '1996 Act') seeking interim injunction restraining Respondent No. 1 from invoking/ encashing Bank Guarantee ('BG') No. U7AGPGE211810041 dated 30.06.2021 for a sum of Rs.1,97,40,000/-, BG No. 161BGPR191330002 dated 08.05.2019 for a sum of Rs.1,97,40,000/-, BG No. 161BG032020 dated 11.02.2020 for a sum of Rs 1,97,40,000/- and BG No.



VP9GPGE213220093 dated 18.11.2021 amounting to Rs.5,79,344/-, pursuant to a final Default Notice dated 31.01.2023 and/or in any manner whatsoever adopting coercive measures for recovery of any sum, pursuant to the said notice.

2. Brief facts that need to be captured for deciding the present petition are that Petitioner is a Government of India enterprise under the Department of Scientific and Industrial Research ('DSIR'), Ministry of Science and Technology and was established in 1974 with an objective to commercially exploit indigenous technologies developed by National Laboratories and R&D institutions in the country. Petitioner also undertakes various projects for other Government enterprises in the field of solar power generation, security and surveillance, railway signalling etc.

3. Respondent No. 1 is promoted by Ministry of Power, Government of India as a Joint Venture of four Public Sector Undertakings i.e. NTPC Limited, Power Finance Corporation Limited, REC Limited and Powergrid Corporation of India Limited.

4. Petitioner was awarded a work contract by Respondent No. 1 vide Letter of Award ('LoA') dated 11.01.2018 for designing, engineering, supplying, constructing, erecting, testing, commissioning and Operation and Maintenance (O&M) of 120 MW Solar Power Generating Systems ('SPGS') at various sub-stations in Maharashtra under the Mukhyamantri Saur Krishi Vahini Yojana ('MSKVY') or Chief Minister's Agriculture Feeder Scheme of Government of Maharashtra.

5. Under Clause 9 of the LoA, Contract Performance Guarantee ('CPG') was to be submitted by the Petitioner for successful execution of the work under the LoA, Special Conditions of Contract ('SCC') and General Conditions of Contract ('GCC'), at the rate of 10% of the



contract value. CPG was to remain valid to cover the Delivery Period plus Warranty Period and three months Claim Period and was required to be furnished in the form of Demand Draft/Pay Order or BG for 10% of the contract value within 30 days of receipt of notification of award of the contract from Respondent No. 1. Details of CPGs furnished by the Petitioner for a total sum of Rs.597,99,344/- are as follows:-

Sl.	PBG No.	Amount of PBG (Rs.)	Bank Name	Date of Issue	Expiry date
1	161BGPR191330002	1,97,40,000	Syndicate/ Canara Bank, SBB	08-05-19	07-04-26
2	161BG032020	1,97,40,000	Syndicate/ Canara Bank, SBB	11-02-20	29-07-23
3	U7AGPGE211810041	1,97,40,000	Canara Bank, SBB	30-06-21	21-02-26
4	VP9GPGE213220093	5,79,344	Canara Bank, NV	18-11-21	05-06-24
	Total	597,99,344/-			

6. Subsequently, disputes arose between the parties and Petitioner claims that it has installed and commissioned Solar Power Plants at designated sites successfully during the period September, 2018 till February, 2022 and yet against the total value of bills raised being Rs.221.29 Crores, it has received Rs.86.18 Crores and thus an amount of Rs.24.43 Crores is outstanding, while Respondent No. 1 adopts a position that Petitioner installed and commissioned a total of 57 sites with 59.80 MWp capacities and out of the 57 sites, 23 were under complete shutdown when the Default Notice cum Termination Letter dated 27.06.2022 was issued to the Petitioner. Petitioner was also not performing the O&M work at most of the sites resulting in degradation



of system efficiency and consequent revenue loss of approximately Rs.1.67 Crore as on 08.06.2022 for shut down sites besides other defaults and lapses. When situation did not improve, Respondent No. 1 sent a final Default Notice dated 31.01.2023 to the Petitioner under Clause 42.2 of GCC for rectifying the breaches within 14 days, failing which contract shall be deemed to be terminated under Clause 22 with necessary consequences under the provisions of contract and in law.

7. This Default Notice triggered the filing of the present petition and vide order dated 14.02.2023, this Court directed the parties to maintain *status quo* till the next date of hearing. Thereafter, Respondent No. 1 filed an application being I.A. 5355/2023 dated 13.03.2023 seeking modification of the interim order to the extent that the *status quo* order shall not come in the way of termination of the contract, as according to the final Default Notice, Respondent No. 1 was at liberty to terminate the contract at the end of 14 days, if the Petitioner failed to rectify the alleged breaches. The application is pending and is being decided in the present judgement.

8. Contention on behalf of the Petitioner is that vide letter dated 26.04.2018 the initial LoA was amended and it was agreed between the parties that the Solar PV modules will be procured and supplied by Respondent No. 1 and not by the Petitioner and cost will be adjusted from the bills to be raised by the Petitioner. Most of the solar modules provided by Respondent No. 1 were not of good quality resulting in deficiency in generation of targeted energy. Modules were tested by an independent agency appointed by Respondent No. 1 and it was found that they were not of the required quality and this fact was intimated to Respondent No. 1 vide letter dated 30.08.2019 enclosing copy of the Report. Installation and commissioning of Solar Power plants at the



designated sites was successfully achieved by the Petitioner between September, 2018 and February, 2022 and despite this, a sum of Rs.24.43 Crores, is still outstanding towards the Petitioner.

9. It is submitted that the delay in commissioning the project, if any, is attributable to Respondent No. 1, being a direct consequence of delay in supply of material, non-readiness of bay feeder, non-provision of ready to use land and encroachment on project sites etc. Petitioner had also represented to Respondent No. 1 that less than the desired generation of power was due to multiple reasons such as under performance of solar panels supplied by Respondent No. 1, non-replacement of damaged panels, floods, poor quality of grid, frequent tripping and therefore Petitioner cannot be blamed for the alleged defaults/lapses. Despite this Respondent No. 1 arbitrarily sought to deduct Liquidated Damages to the tune of Rs.5.62 Crores for alleged delay in commissioning of the project and Rs.14.09 Crores on account of penalty against less generation of power in the projects.

10. It is further contended that due to the illegal act of Respondent No. 1 in withholding and not releasing the outstanding amount of Rs.23.90 Crores and levying and enforcing Liquidated Damages and penalty thereon, it became difficult for the Petitioner to continue with the O&M work on few sites of the project and it was unable to retain the vendors due to cash crunch. It was owing to this that few of the project sites had to shut down forcibly. Nonetheless, it is stated by the Petitioner that as on date out of total 48 fully commissioned project sites in Maharashtra, 14 are operational, where Petitioner is keeping up its O&M commitments. Disregarding the actual fact that it is Respondent No. 1 who is responsible not only for the cash crunch of the Petitioner but also for delay, if any, in the works under the LoA, Respondent No. 1 illegally



and arbitrarily issued a final Default Notice dated 31.01.2023, calling upon the Petitioner to take remedial action within 14 days failing which the contract would terminate alongwith forfeiture of CPGs. It was also submitted that invocation/encashment of the CPGs is not only illegal but would further worsen the financial position of the Petitioner, which is a Government of India enterprise and is already running as a loss making concern. This would also amount to an unjust enrichment of Respondent No. 1.

11. *Per contra*, learned counsel for Respondent No. 1 contends that the *status quo* order passed by this Court be vacated and Respondent No. 1 should be permitted to encash the CPGs as well as proceed to terminate the contract under LoA dated 11.01.2018. Petitioner is in gross breach of the terms and conditions of the LoA and tender conditions as it has not only failed to install the awarded capacity of 120 MW Solar Power Generating Systems (SPGS) at various sub-stations in Maharashtra, but has also failed to maintain the same under the O&M contract. This has resulted in several complaints being received from MSEDCL, who are end customers with whom Respondent No. 1 has independent supply contracts. Since Petitioner failed to operate and maintain the SPGS for optimum production of clean energy on investment of over Rs.201 Crores by Respondent No. 1, several reminders were sent by e-mails dated 01.06.2022, 02.06.2022, 08.06.2022 and 10.06.2022 bringing to its notice shortfalls in daily generation reports, but there was no response. Petitioner was also put to notice of the non-working of Online Monitoring of 40 sites, however, no action was taken to rectify the faults in the systems. A meeting was convened on 02.06.2022 between Respondent No. 1 and the Petitioner to resolve the issues of shutting down of SPGS sites and failure to achieve optimum production on the



installed sites but to no avail. A Default Notice cum Termination Letter dated 27.06.2022 was also sent to the Petitioner highlighting the defaults and breaches as also the fact that it had carried out installation and commissioning of 57 sites with only 59.80 MWp capacities as also that 23 sites with total capacity of 16.73 MWp were under complete shutdown for a considerable period. Petitioner was also informed that considering that National assets cannot be allowed to remain unattended, particularly, in the high power demand scenario, Respondent No. 1 would be constrained to take actions as per contractual provisions. Despite this notice, the highlighted defaults and breaches were never cured by the Petitioner and Respondent No. 1 continued to suffer financial loss. This constrained Respondent No. 1 to issue a final Default Notice dated 31.01.2023 giving an opportunity of yet another 14 days to rectify the breach but no corrective action was taken by the Petitioner even thereafter.

12. It is contended that in the light of the breaches and defaults committed by the Petitioner, which were repeatedly brought to its notice and not cured, Respondent No. 1 had no option but to issue a final Default Notice and invoke the CPGs. Clause 2.5.4 (xiii) of Scope of Work, under the heading 'Maintenance', which is a part of the tender conditions, provides that if any jobs covered in O&M scope as per O&M plan are not carried out by the System Integrator during the O&M period, the Engineer-in-Charge can issue a notice to the System Integrator and repetition of such instances for more than two times a year may lead to termination of the O&M contract by EESI/DISCOM and forfeiture of Bank Guarantee against the same. The power to encash the CPGs also emanates from Clause 13 of SCC with respect to O&M Bank Guarantee and Clause 18 of SCC with respect to CPG.



13. It is contended that the disputes that the Petitioner seeks to raise before this Court in respect of breaches/lapses and/or proposed termination of the contract cannot be a subject matter of a petition under Section 9 of the 1996 Act and if the Petitioner is aggrieved, the same can be agitated before an appropriate forum in appropriate proceedings. It is not denied that the LoA was amended, however, it is denied that the modules supplied were not of good quality. As per amendment No. 1 in LoA, Respondent No. 1 was to transfer the modules of BHEL and TATA make, which were delivered on the sites by the module manufacturers and were accepted by the Petitioner on 'as is where is' condition, without any request to test the modules before taking delivery. The issue of quality of modules was raised by the Petitioner only after Respondent No. 1 initiated performance evaluation of site with regard to generation and levied Liquidated Damages. Insofar as the testing report is concerned, as per Clause 15 of Amendment No. 1, in case the performance of the modules was not as per power output warranty during the O&M period, then Respondent No. 1/appointed Agency was to carry out testing in any of the NABL accredited lab to evaluate the performance of the modules and thus the testing carried out by the Petitioner on its own accord has no legal sanctity. This dispute is only an afterthought as Petitioner was unable to deliver the required guaranteed generation and commission the entire awarded value of 120 MW. Insofar as the CPGs are concerned, clearly the same are irrevocable and unconditional Bank Guarantees and it is trite that any dispute relating to the contract cannot be used as a ground for restraining encashment of Bank Guarantees, which is an independent contract between the Bank and the beneficiary and is governed by its own terms. Reliance is placed on the judgments of the Supreme Court in ***Dwarikesh Sugar Industries***



Ltd. v. Prem Heavy Engineering Works (P) Ltd. and Another, (1997) 6 SCC 450, Gujarat Maritime Board v. Larsen and Toubro Infrastructure Development Projects Limited and Another, (2016) 10 SCC 46 and Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co., (2007) 8 SCC 110.

14. Insofar as the plea of financial crunch taken by the Petitioner is concerned, it is urged on behalf of Respondent No. 1 that financial status of a party to the contract cannot be taken as a defence against encashment of an unconditional Bank Guarantee, in view of the binding dictum of the Supreme Court in ***U.P. State Sugar Corporation v. Sumac International Ltd., (1997) 1 SCC 568***. There cannot be a debate on the issue that injunction can be granted against invocation/encashment of unconditional, irrevocable Bank Guarantees only on two grounds: (i) fraud of egregious nature; and (ii) irreparable harm or injustice to one party. None of the grounds are available to the Petitioner in the present facts and circumstances and neither has the Petitioner pleaded fraud of egregious nature nor shown any irretrievable harm that is likely to be caused if CPGs are invoked/encashed.

15. While it is true that Petitioner has invoked the arbitration clause and referred the matter to ‘Administrative Mechanism for Resolution of CPSE’s Disputes’ (AMRCD), but the same has no basis in law being pre-mature and in contravention of Clause 7 of the LoA, Clause 16 of SCC and Clause 6 of GCC, which provide the mechanism for Settlement of Disputes.

16. I have heard the learned counsels for the parties and examined their respective contentions.

17. The heart of the dispute in the present petition is whether invocation/encashment of unconditional Bank Guarantees can be



restrained by this Court. In order to answer this question it would be pertinent to closely look at the BGs in question and since all BGs are similarly worded to the extent of Banks' liabilities, one of them being BG No. 161BGPR191330002, dated 08.05.2019, is extracted hereunder, for ready reference as an illustration:-

“...

In consideration of the EESL, (hereinafter 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 M/s Central Electronics Limited, Site-IV, Industrial Area, Sallibabad-201010 with its Registered / Head office at 781 Dash Sandhu Gupta Road, Karol Bagh, New Delhi-110005 (hereinafter referred to as the 'Contractor', which expression shall unless repugnant to the context or meaning thereof, include its successors, administrators and assigns), a contract by issue of owner's Letter of Award No. EESL/06/2017:1S/Solar PV System Integrator/LOA-1718379/10951 dated 11/01/2018 and the same having been unequivocally accepted by the Contractor and the contractor for Design, Engineering, Supply, Construction, Erection, Testing Commissioning and O&M of 120MW Solar Power Generating System at various sub-stations in Maharashtra having agreed to provide a Contract Performance Guarantee for the faithful performance of the entire Contract in phased manner with 2nd lot size of 20Mwp equivalent to 10% of the said value of Rs.65.80 crore (Rs.32.90 per Watt x 20Mwp) i.e. Rs.6,58,00,000/ (Rs. Six Crore Fifty Eight Lac only) of the Contract to the owner.

*We Syndicate Bank, CEL Complex; 4- Industrial Area, Sahibabad-201010 having Its Head Office at manipal (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 all money payable by the Contractor to the extent of Rs.6,58,00,000/- (Rs. Six Crore Fifty Eight Lac only) as aforesaid at any time up to 7th Oct. 2022 without any demur, reservation, contest, recourse or protest and / or without any reference to the 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 Owner shall have the fullest liberty without affecting in any way the liability of the Bank under this guarantee from time to time to extend the time for performance of the Contract by the Contractor. The Owner shall have the fullest liberty, without affecting this guarantee, to postpone from time to time the exercise of any powers vested in them or of any right which they to enforce or to forbear to enforce any covenants, contained or implied, in the Contract between the Owner and Contractor or any other course of a remedy or security available to the owner. The Bank shall not be released of its obligations under these presents by any exercise by the owner of its liberty with reference to the matters aforesaid or any of other indulgence shown by the owner or by any other matter or thing whatsoever which under law would, but for this provision, have the effect of relieving the Bank.

The Bank also agree that the Owner at its option shall be entitled to enforce this Guarantee against the Bank as Principal debtor. In the first instance without proceeding against the Contractor and not withstanding any security or other guarantee that the owner may have in relation to the Contractor's liabilities.

Notwithstanding anything contained herein above our liability under this guarantee is restricted to Rs.6,58,00,000/- (Rs. Six Crore Fifty Eight Lac only) and it will remain in force till and including 07.10.2022 and shall be extended from time to time for such period (not exceeding one year), as may be desired by M/s. Central Electronics Ltd., on whose behalf this guarantee has been given."

18. From a reading of the aforesaid BG, it is evident that there is a specific stipulation in para 2 that the Bank undertakes and guarantees to pay to the 'Owner' (Respondent No. 1), the beneficiary, on demand the money payable by the Contractor to the extent of amount specified in the guarantee, without any demur, reservation, contest, recourse or protest and/or without any reference to the contractor. It is further stipulated that any such demand made by the owner on the Bank shall be conclusive and binding notwithstanding any difference between the owner and the contractor, (where the expression 'contractor' included the Petitioner), or any dispute pending before any Court, Tribunal, Arbitrator or any other Authority. The Bank undertook that the guarantee shall continue to be enforceable till the owner discharged the guarantee. Therefore, it is clear



that the CPGs are ‘unconditional’ and thus whether the amounts covered under them were actually due or likely to be due or whether there was any dispute between the Petitioner and Respondent No. 1 pertaining to the said amount, is irrelevant for the purpose of honouring the CPGs. All that is required is a demand by the Owner on the Bank stating that the amounts were due or likely to be due from the contractor and once the demand is raised, it is not open to the Bank to refuse to honour the Bank Guarantee by entering into the controversy as to whether there were any disputes between the Petitioner and Respondent No. 1 and/or whether the claims are right or wrong. In view of the language of the CPGs, it would be an unjustified and futile exercise to interdict the invocation of the Bank Guarantees by entering into the question as to whether the amounts are due or not, in view of the unambiguous and express covenants of the Bank Guarantees.

19. As rightly contended by the learned counsel for Respondent No. 1 the law on invocation/encashment of unconditional BGs is no more *res integra* and it is settled that injunction can be granted only in two exceptional cases: (a) in the event of egregious frauds, which vitiates the entire underline transactions and of which the Bank has notice; or (b) irretrievable injury/injustice, where the irretrievable injury must be of an exceptional circumstance of the kind where it is impossible for the guarantor to reimburse himself if he succeeds in final adjudication of the disputes. The Supreme Court in **Gujarat Maritime Board (supra)**, held as follows:-

“12. An injunction against the invocation of an absolute and an unconditional bank guarantee cannot be granted except in situations of egregious fraud or irretrievable injury to one of the parties concerned. This position also is no more res integra. In Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co. [Himadri



Chemicals Industries Ltd. v. Coal Tar Refining Co., (2007) 8 SCC 110], at para 14: (SCC pp. 117-18)

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

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

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

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

(iv) Since a bank guarantee or a letter of credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of bank guarantees or letters of credit.

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

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

20. In the ***Gujarat Maritime Board (supra)***, the Supreme Court was examining the Bank Guarantee given by the Bank to the Appellant therein which had the following stipulations:

“(a) We, Yes Bank Ltd. do hereby guarantee and undertake to pay to GMB an amount not exceeding Rs 5,00,00,000 (Rupees five crores only) as against breach by the lead promoter for the development of Kachchigarh Port. The decision of GMB as to any breach having been committed and loss/damages caused or suffered shall be absolute and binding on us.

(b) We, Yes Bank Ltd., do hereby undertake to without any reference to the lead promoter or any other person and irrespective



of the fact whether any dispute is pending between GMB and the lead promoter or any court or tribunal or arbitrator relating thereto, pay the amount due and payable under this guarantee without any demur, merely on demand from GMB stating that the said lead promoter's failure to perform the covenants of the same. Any such written demand made by GMB on the Bank shall be conclusive, absolute and unequivocal as regards the amount due and payable by the Bank under this guarantee. However, Bank's liability under this guarantee shall be restricted to an amount not exceeding Rs 5,00,00,000 (Rupees five crores only)."

(emphasis supplied)

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

22. In ***Dwarikesh Sugar Industries Ltd. (supra)***, the Supreme Court deprecated the practice of the High Courts in granting injunctions restraining encashment of unconditional BGs and held that this would mean not complying with the law laid down by the Apex Court and would amount to judicial impropriety. Relevant paras of the judgment are as follows:-

"29. It is unfortunate that the High Court did not consider it necessary to refer to various judicial pronouncements of this Court in which the principles which have to be followed while examining an application for grant of interim relief have been clearly laid down. The observation of the High Court that reference to judicial decisions will not be of much importance was clearly a method adopted by it in avoiding to follow and apply the law as laid down by this Court. Yet another serious error which was committed by the High Court, in the present case, was not to examine the terms of the



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

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

23. In **Classic-KSM Bashir JV v. Rites Limited & Ors., 2018 SCC OnLine Del 8888**, this Court summarised the law of Bank Guarantees and relevant paras are as under:-

“33. The law of injunction in the case of bank guarantee is no longer *res integra*. In *Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineering Works (P) Ltd.*, (1997) 6 SCC 450, Supreme Court reiterated this law as under:

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



568] *The general principle which has been laid down by this Court has been summarised in the case of U.P. State Sugar Corpn. [(1997) 1 SCC 568] as follows : (SCC p. 574, para 12)*

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

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

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

(emphasis supplied)



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

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

34. *In Vinitec Electronics Private Ltd. v. HCL Infosystems Ltd., (2008) 1 SCC 544, the Supreme Court after relying upon various earlier judgments of the Court reiterated that the allegation with regard to the alleged breach of a contract by the respondent is not a plea of fraud of a egregious nature so as to vitiate the entire transaction. Paragraphs 24 to 28 of the Judgment are quoted herein below:*

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

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

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

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



27. Whether encashment of the bank guarantee would cause any “irretrievable injury” or “irretrievable injustice”. There is no plea of any “special equities” by the appellant in its favour. So far as the plea of “irretrievable injustice” is concerned the appellant in its petition merely stated:

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

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

35. In *Gujarat Maritime Board v. Larsen and Toubro Infrastructure Development Projects Limited*, (2016) 10 SCC 46, the Supreme Court once again cautioned that bank guarantee is a separate contract and is not qualified by the contract under which it is given. Whether the cancellation was just and proper is a question to be decided by the Arbitrator and not by this Court under Section 9 of the Act. I would only quote the relevant paragraphs of the said Judgment:

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

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11. It is contended on behalf of the first respondent that the invocation of bank guarantee depends on the cancellation of the contract and once the cancellation of the contract is not justified, the invocation of bank guarantee also is not justified. We are afraid that the contention cannot be appreciated. The bank guarantee is a separate contract and is not qualified by the



contract on performance of the obligations. No doubt, in terms of the bank guarantee also, the invocation is only against a breach of the conditions in the LoI. But between the appellant and the Bank, it has been stipulated that the decision of the appellant as to the breach shall be absolute and binding on the Bank.

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

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

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

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

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

(iv) Since a bank guarantee or a letter of credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of bank guarantees or letters of credit.

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

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



13. The guarantee given by the Bank to the appellant contains only the condition that in case of breach by the lead promoter viz. the first respondent of the conditions of LoI, the appellant is free to invoke the bank guarantee and the Bank should honour it "... without any demur, merely on a demand from GMB (appellant) stating that the said lead promoter failed to perform the covenants...". It has also been undertaken by the Bank that such written demand from the appellant on the Bank shall be "... conclusive, absolute and unequivocal as regards the amount due and payable by the Bank under this guarantee". Between the appellant and the first respondent, in the event of failure to perform the obligations under the LoI dated 6-2-2008, the appellant was entitled to cancel the LoI and invoke the bank guarantee. On being satisfied that the first respondent has failed to perform its obligations as covenanted, the appellant cancelled the LoI and resultantly invoked the bank guarantee. Whether the cancellation is legal and proper, and whether on such cancellation, the bank guarantee could have been invoked on the extreme situation of the first respondent justifying its inability to perform its obligations under the LoI, etc. are not within the purview of an inquiry under Article 226 of the Constitution of India. Between the Bank and the appellant, the moment there is a written demand for invoking the bank guarantee pursuant to breach of the covenants between the appellant and the first respondent, as satisfied by the appellant, the Bank is bound to honour the payment under the guarantee."

24. I may profitably refer to a judgment of the Division Bench of this Court in ***CRSC Research and Design Institute Group Co. Ltd. v. Dedicated Freight Corridor Corporation of India Limited and Others, 2020 SCC OnLine Del 1526***, where the Court painfully recorded that in view of the unambiguous position of law with respect to interference in encashment of unconditional BGs and considering the paucity of times with the Court, a time has come for confining the hearings in such matters in view of the amendments in the Arbitration Act for expeditious disposal of matters. In the context of invocation of unconditional BGs, the Division Bench observed as follows:-

"7. The settled law with respect to grant of an injunction which has the effect of restraining encashment of a bank guarantee, is (a) when in the course of commercial dealings an unconditional bank



guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes; (b) the Bank giving such a guarantee is bound to honour it as per its terms, irrespective of any dispute raised by its customer; (c) the very purpose of giving such a bank guarantee would otherwise be defeated; (d) the Courts should therefore be slow in granting an injunction to restrain the realization of such a bank guarantee; (e) the Courts have carved out only two exceptions i.e. (i) a fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee - if there is such a fraud of which the beneficiary seeks to take the advantage, he can be restrained from doing so; fraud has to be an established fraud which the bank knows of and the evidence must be clear, both as to the fact of fraud and as to the bank's knowledge; and, (ii) the second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned; since in most cases payment of money under such a bank guarantee would adversely effect the bank and its customers at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country; it must be proved to the satisfaction of the Court that there would be no possibility whatsoever of the recovery of the amount from the beneficiary, by way of restitution.

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15. *We are unable to agree with the contention of the senior counsel for the appellant that this Court, when approached for the interim measure of interference with unequivocal, absolute and unconditional BGs, is required to interpret the contract and/or form a prima facie opinion whether the beneficiary of the BGs has wrongfully invoked the BGs. Such exercise, in our view, is to be done in a substantive proceeding to be initiated by the appellant for recovery of the monies of the BGs, if averred to have been wrongly taken by the respondent No. 1 by encashment of BGs. If any interim relief is also claimed in the said substantive proceedings, the need for taking a prima facie view, will arise therein; however not while dealing with an application for the interim measure of restraining invocation/encashment of BGs. In the said proceedings, no question of taking a prima facie view arises and the enquiry is confined to, whether on the basis of the documents, a case of fraud of egregious nature in the matter of obtaining/furnishing BGs, is made out. As far as the argument of the senior counsel for the appellant, of special equities is concerned, the same is but a facet of the second exception aforesaid of irretrievable harm or injustice. Needless to state that from the entire arguments of the senior counsel for the appellant, no case of fraud of egregious nature in the matter of making/obtaining*



of the BGs is made out. All that emerges is that there are disputes between the appellant and the respondent No. 1 and it is not even whispered that the respondent No. 1 built the entire charade of entering into the contract, only to obtain BGs and to profiteer from the appellant. With respect to the ground urged by the senior counsel for the appellant, of special equities, the Solicitor General has stated that the appellant is a Chinese entity and if ultimately in arbitration, which has already commenced between the parties, the monies are found due to the respondent No. 1 from the appellant, the respondent No. 1 would have no means or ways available to it for recovering the same from the appellant and/or to enforce the arbitral award in China. On the contrary, it is contended that the respondent No. 1 is a Public Sector Undertaking and the monies, if ultimately found due to the appellant from the respondent No. 1, can always be recovered by the appellant from the respondent No. 1.

16. Fraud, as an exception to the rule of non-interference with encashment of BGs, is not any fraud but a fraud of an egregious nature, going to the root i.e. to the foundation of the bank guarantee and an established fraud. The entire case of the appellant, we are afraid, fails to qualify so. The Single Judge has written at length on the subject and save for as aforesaid, we need not say more.

17. Irretrievable injustice, as an exception to the rule of non-interference with encashment of BGs, is again not a mere loss, which any person at whose instance bank guarantee is furnished, suffers on encashment thereof. It is always open to such person to sue for recovery of the amount wrongfully recovered. What has to be proved and made out to obtain an injunction against encashment, is that it will be impossible to recover the monies so wrongfully received by encashment. There is not even a whisper to this effect, neither in the pleadings nor in the arguments.”

25. A Co-ordinate Bench of this Court in **Garg Builders, Through Shri Mohinder Pal Garg v. Hindustan Prefab Ltd. and Another, 2022 SCC OnLine Del 1264**, after noting the judicial precedents on invocation/encashment of unconditional BGs held as follows:-

“34. Despite the clear enunciation of the law as above, and at least till I sat in that roster, petition after petition continued to be filed, seeking stay of invocation of unconditional irrevocable bank guarantees. In nearly every such case – including the present petitions – reliance was placed, by the petitioners, on the disputes between the parties relating to the performance/non-performance of the original contract. The fact that the petitioner, seeking stay of invocation of the bank guarantees, had a subsisting claim against the



respondent beneficiary of the bank guarantees is also inevitably taken as a ground for seeking stay of invocation.

35. *In view of the well crystallized law on the subject, any reference to the original dispute between the parties, relating to the performance of the contract, is completely irrelevant, insofar as the issue of stay of invocation of the bank guarantees is concerned. That dispute has necessarily to form substratum of an entirely different proceeding, to be resolved either by arbitration or by adjudication by a Court. While I have recorded the submissions of learned Senior Counsel for the petitioner regarding the petitioner's substantive grievances against HPL, I do not, in view of the law that stands settled in that regard, propose to deal with the said contentions here.*

36. *With these prefatory observations, I deem it appropriate, before applying the law to the facts of the present case, to itemize the basic principles relating to bank guarantees, their invocation and the interdiction of such invocation, thus:*

(i) Commercial contracts often contain clauses requiring the contractor to furnish bank guarantees.

(ii) These bank guarantees are, principally, either bank guarantees provided towards security, for having been awarded the contract, or performance bank guarantees, to guarantee performance of the contract, though, on occasion, other bank guarantees such as bank guarantees towards mobilization advance etc. may also be required to be provided.

(iii) The contract, in such cases, also provides for the circumstances in which the bank guarantees could be invoked, as well as the purpose for requiring the bank guarantees to be provided in the first place.

(iv) No bank guarantees payment to anyone gratis. Every bank guarantee is of necessity issued by a bank on instructions. In case of a commercial contract, such as the contract in the present petition, the instruction to the bank, to provide a bank guarantee, is given by the person to whom the contract is awarded; in the present case, the petitioner. The party to whom the contract is awarded, in other words, instructs the bank, in lieu of having been awarded the contract, to issue a bank guarantee in favour of the person awarding the contract. In the present case, as required by the agreements between the petitioner and the HPL, and that the petitioner's instance, bank guarantees were issued by the bank in favour of HPL which, therefore, is the beneficiary of the bank guarantee.

(v) These bank guarantees are, however, bilateral contracts between the bank and the beneficiary, i.e. HPL, even if they were issued at the instance of the petitioner. The petitioner is not a party to the bank guarantees. It is, therefore, legally a



stranger to the contract, insofar as the bank guarantees are concerned.

(vi) Like all independent commercial contracts, every bank guarantee has to abide strictly by its terms. Honour and compliance of a bank guarantee, as per its terms, is, therefore, mandatory. In the case of bank guarantees, especially, the Supreme Court has stressed this aspect, as there is an overwhelming element of public interest involved in requiring banks to honor their commitments towards customers and clients. If a bank is to be interdicted, at the instance of a third party, who is a stranger to the bank guarantee between the bank and the beneficiary, from honouring the bank guarantee, the Supreme Court has held in United Commercial Bank v. Bank of India and Hindustan Steelworks Construction Ltd. v. Tarapore & Co, that it would erode the public faith in the banking institution of the country.

(vii) The bank is, therefore, concerned only with the terms of the bank guarantee. The elements of any dispute between the contractor and the beneficiary of the bank guarantee, or the conditions existing in the contract between the contract awardee and the beneficiary of the bank guarantee, i.e. in the present case between the petitioner and HPL, are, therefore, generally irrelevant to the aspect of invocation of the bank guarantee. Even the circumstances stipulated in the contract between the beneficiary and the contract awardee, in which the bank guarantee could be invoked, are also of no relevance insofar as the liability of the bank to honour the bank guarantee is concerned.

(viii) In order for the aspect of performance, or failure of performance, of the parent contract, by either party, to become relevant as a consideration for invocation of the bank guarantee, they have necessarily to be incorporated by express reference in the bank guarantee itself. In other words, if the bank guarantee were to stipulate that the bank would be required to make payment to the beneficiary only in the event of failure, on the part of the contract awardee, to abide by its obligations under the Contract, then the aspect of performance of the contract by the contract awardee would become a relevant consideration, while assessing the obligation of the bank to make payment to the beneficiary.

(ix) Similarly, oftentimes, a contract may stipulate the particular stage at which, or exigency in which, the bank guarantee could be invoked by the beneficiary. Such a stipulation in the contract would, however, become relevant for the bank, when called upon by the beneficiary to honour the bank guarantee, only if that stipulation figures expressly in the body of the bank guarantee itself.



(x) Else, the bank is not expected, much less required, to advert to the covenants of the original contract between the contract awardee and the beneficiary, to which the bank is a stranger – just as the contract awardee is a stranger to the bank guarantee. Nor is it required to enter into the disputes between the contract awardee and the beneficiary of the bank guarantee, or into the aspect of performance, or non-performance, of the contract. Nor, for that matter, is the bank entitled to examine whether the stage at which the contract between the parties envisages invocation, or enforcement, of the bank guarantee, has, or has not, been reached. The bank, being a stranger to the contract between the contract awardee and the beneficiary of the bank guarantee, has no authority to probe into the said contract, unless the terms of the bank guarantee expressly require it to do so. The bank has necessarily to be concerned only with the terms of the bank guarantee, to which alone it is a party.

(xi) If the invocation of the bank guarantee by the beneficiary thereof is, therefore, in terms of the bank guarantee, the Court cannot interdict the bank from honouring the bank guarantee, by referring to the covenants in the contract between the contract awardee and the beneficiary of the bank guarantee. Any such attempt by the Court would amount to directing the bank to violate the contract, with the beneficiary of the bank guarantee, to which it is a party and, therefore, to direct the bank to commit an illegality. This, quite obviously, is completely impermissible.

(xii) Equally, it is not permissible, either, for the Court to interdict the invocation of a bank guarantee on the ground that the stage for such invocation, as per the contract, has not been reached, or that the exigency in which the bank guarantee could be invoked as per the contract, does not exist, unless that stage, or that the exigency, is incorporated as a condition for invocation in the bank guarantee itself.

(xiii) Interdiction of invocation of unconditional bank guarantees would be justified, where the invocation is otherwise in terms of the covenants in the bank guarantees, only where there is found to exist egregious fraud, or special equities, or where irretrievable injustice would ensue were invocation not to be enjoined. In this regard, I deem it appropriate to reproduce, with humility, the following passages from my decision in Kuber Enterprises v. Doosan Power Systems India Pvt Ltd, in which I have followed the Division Bench pronouncement in CRSC Research and Design Institute :

“18 Admittedly, the Bank Guarantee provided by the petitioner to the respondents is unconditional. Stay of invocation of an unconditional bank guarantee can be granted only in exceptional circumstances. This Court in SES



Energy Services India Ltd. v. Vedanta Ltd has noted these exceptions and observed thus:-

“9. In cases where the bank guarantee is unconditional, the law recognizes only three circumstances in which Courts could injunct invocation or encashment of the bank guarantee. These three circumstances, essentially, dovetail into two, with the pronouncement of Courts in that regard. The three circumstances, in which the Courts may interfere, and may injunct the invocation of unconditional bank guarantees, is where there is egregious fraud, special equity exists, or where irretrievable injustice or prejudice is likely to result, if the bank guarantee is invoked or encashed. The latter two circumstances have been treated, by the Supreme Court, as well as by the Division Bench of this Court in CRSC Design to be interconnected, in that special equities would be set to exist if the invocation of the bank guarantee would result in irretrievable injustice to the opposite party. The following passage, from BSES Ltd. v. Fenner India Ltd., neatly encapsulates this position:

“10. There are, however, two exceptions to this rule. The first is when there is a clear fraud of which the bank has notice and a fraud of the beneficiary from which it seeks to benefit. The fraud must be of an egregious nature as to vitiate the entire underlying transaction. The second exception to the general rule of nonintervention is when there are 'special equities' in favour of injunction, such as when 'irretrievable injury' or 'irretrievable injustice' would occur if such an injunction were not granted. The general rule and its exceptions has been reiterated in so many judgments of this Court, that in U.P. State Sugar Corpn. v. Sumac International Ltd., that this Court, correctly declared that the law was 'settled'." " (Italics and underscoring in original) Additionally, in para 72 of the report in Svenska Handlesbaken v. Indian Charge Chrome, a bench of three Hon'ble Judges of the Supreme Court has held that mere irretrievable injustice, in the absence of established fraud, does not make out a case for injuncting invocation of an unconditional bank guarantee. Having said that, a bench of two Hon'ble Judges, in Hindustan Steelworks Construction Co. Ltd. v. Tarapore & Co. held, after noticing and interpreting Svenska Handlesbaken, that, in Svenska Handlesbaken, the Court was "not called upon to decide whether apart from the case of fraud there can be any other exceptional case wherein the Court can interfere in the matter of encashment of a bank guarantee". As such, it



was held, "not much importance" could be attached "to the use of the word 'and' in the observation that 'it cannot be interfered with unless there is fraud and irretrievable injustice involved in the case". Vinitec Electronics Private Limited v. HCL Infosystems Ltd and BSES Ltd. hold that special equities, if pleaded as ground for stay of invocation of bank guarantee, should be in the nature of irretrievable injustice."

19. While, therefore, there appears to be some fluidity in judicial thinking on the issue of whether the "fraud" element would permeate the other two considerations of "special equities" and "irretrievable injustice", there does appear to be consensus on the position, in law, that fraud, if pleaded, has to be egregious in nature, and that special equities, if pleaded, have to be in the nature of irretrievable injustice. To that extent, therefore, these considerations, to one extent or another, juxtapose."

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44. Once, however, the beneficiary of the bank guarantee proceeds towards invocation of the bank guarantee by writing to the bank, the first argument, of the invocation being contrary to the terms of the parent contract between the parties, ceases to be available to the contractor. The reason is simple. Referring to the facts of the present case, the petitioner has instructed the bank to issue bank guarantees favouring HPL, for availing the benefit of which HPL merely had to communicate to the bank stating that the amount claimed was required to meet the recoveries due from the petitioner. Once, therefore, such a communication was made by HPL to the bank, the petitioner could not seek, thereafter, to interdict invocation of the bank guarantee by referring to the terms of the original contract. No equities could sway in favour of the petitioner in such a situation, predicated on the terms of the contract, breach of the contract, default or absence of default, etc. The petitioner cannot, in such circumstances, seek to come between the two independent contractual parties, namely the bank and HPL, in the matter of performance of the contract between those parties, to which the petitioner is a stranger."

26. The Court further observed that if the grievance of the Petitioner was that the invocation of the Bank Guarantee by the Respondent therein was contrary to the covenants in the parent Agreement, the remedy was to proceed against the Respondent to recover the monies and not interdict the invocation, which was a matter between the Bank and the



Respondent, to which the Petitioner was completely a stranger, as such a dispute was relatable not to the covenants of the Bank Guarantee but to the covenants of Agreement between the Petitioner and the Respondent. It was also observed that the aspects of breach of contractual obligation or compliance/non-compliance with them was a subject matter to be agitated before the appropriate forum, be it the Arbitral Tribunal or any other forum, but in no case invocation of the Bank Guarantees can be restrained on the ground of pendency of any disputes between the parties or the invocation being contrary to terms of the Bank Guarantee, unless the two excepted conditions of egregious fraud or irretrievable injustice exist.

27. In view of the wealth of judicial precedent, as aforementioned, this Court cannot interdict the invocation of BGs in question as they are unconditional and irrevocable Guarantees, where the Bank is required to honour them without any demur, contest or protest on demand by Respondent No. 1 and is an independent contract between the Bank and the beneficiary and the disputes sought to be raised by the Petitioner pertaining to the breaches/default of the work contract under the LoA are wholly irrelevant. In this context, I may refer to the following passages from *U.P. State Sugar Corporation (supra)*:

“11. These bank guarantees which are irrevocable in nature, in terms, provide that they are payable by the guarantor to the appellant on demand without demur. They further provide that the appellant shall be the sole judge of whether and to what extent the amount has become recoverable from the respondent or whether the respondent has committed any breach of the terms and conditions of the agreement. The bank guarantees further provide that the right of the purchaser to recover from the guarantor any amount shall not be affected or suspended by reason of any disputes that may have been raised by the respondent with regard to its liability or on the ground that proceedings are pending before any Tribunal, Arbitrator or Court with regard to such dispute. The guarantor shall immediately pay the guaranteed amount to the appellant-purchasers on demand.



12. *The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country. The two grounds are not necessarily connected, though both may coexist in some cases. In the case of U.P. Coop. Federation Ltd. v. Singh Consultants and Engineers (P) Ltd. [(1988) 1 SCC 174] which was the case of a works contract where the performance guarantee given under the contract was sought to be invoked, this Court, after referring extensively to English and Indian cases on the subject, said that the guarantee must be honoured in accordance with its terms. The bank which gives the guarantee is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contractual obligation or not, nor with the question whether the supplier is in default or not. 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 such 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 v. Chase Manhattan Bank [(1984) 1 All ER 351] (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.

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15. *Our attention was invited to a number of decisions on this issue —among them, to Larsen & Toubro Ltd. v. Maharashtra SEB [(1995) 6 SCC 68] and Hindustan Steel Workers Construction Ltd. v. G.S. Atwal & Co. (Engineers) (P) Ltd. [(1995) 6 SCC 76] as also to National Thermal Power Corpn. Ltd. v. Flowmore (P) Ltd. [(1995) 4 SCC 515] The latest decision is in the case of State of Maharashtra v. National Construction Co. [(1996) 1 SCC 735 : JT (1996) 1 SC 156] where this Court has summed up the position by stating: (SCC p. 741, para 13)*

"The rule is well established that a bank issuing a guarantee is not concerned with the underlying contract between the parties to the contract. The duty of the bank under a performance guarantee is created by the document itself. Once the documents are in order the bank giving the guarantee must honour the same and make payment ordinarily unless there is an allegation of fraud or the like. The courts will not interfere directly or indirectly to withhold payment, otherwise trust in commerce internal and international would be irreparably damaged. But that does not mean that the parties to the underlying contract cannot settle the disputes with respect to allegations of breach by resorting to litigation or arbitration as stipulated in the contract. The remedy arising ex contractu is not barred and the cause of action for the same is independent of enforcement of the guarantee."

The other recent decision is in Hindustan Steelworks Construction Ltd. v. Tarapore & Co. [(1996) 5 SCC 34 : JT (1996) 6 SC 295]

16. *Clearly, therefore, the existence of any dispute between the parties to the contract is not a ground for issuing an injunction to restrain the enforcement of bank guarantees. There must be a fraud in connection with the bank guarantee. In the present case we fail to see any such fraud. The High Court seems to have come to the conclusion that the termination of the contract by the appellant and his claim that time was of the essence of the contract, are not based on the terms of the contract and, therefore, there is a fraud in the invocation of the bank guarantee. This is an erroneous view. The disputes between the parties relating to the termination of the*



contract cannot make invocation of the bank guarantees fraudulent. The High Court has also referred to the conduct of the appellant in invoking the bank guarantees on an earlier occasion on 12-4-1992 and subsequently withdrawing such invocation. The court has used this circumstance in aid of its view that the time was not of the essence of the contract. We fail to see how an earlier invocation of the bank guarantees and subsequent withdrawal of this invocation make the bank guarantees or their invocation tainted with fraud in any manner. Under the terms of the contract it is stipulated that the respondent is required to give unconditional bank guarantees against advance payments as also a similar bank guarantee for due delivery of the contracted plant within the stipulated period. In the absence of any fraud the appellant is entitled to realise the bank guarantees.”

28. None of the two recognized exceptions to invocation of unconditional BGs exist in the present case. There are no pleadings of fraud, save and except, a vague averment that invocation is illegal and ‘fraudulent’. Petitioner has neither pleaded nor shown any act of Respondent No.1 which can be put at the threshold of egregious fraud. The present case also cannot be said to be one of irretrievable injustice as even the special equity is predicated on the alleged financial crunch, a ground negated by the Courts in several judgments to interdict the invocation of unconditional and irrevocable BGs. In this context, I may refer to a few passages from the judgment of this Court in ***Kuber Enterprises v. Doosan Power Systems India Pvt. Ltd. and Another, 2021 SCC OnLine Del 5049***, which are as follows:-

“14. The last submission of Mr. Panda, to justify the prayer for injunction against invocation of the Bank Guarantee, is that the petitioner is in dire financial straits. He also draws attention to the financial defects being faced by his client and submits that if the Bank Guarantee is permitted to be invoked, his client would be “deoxygenated” and that several of its employees would be laid off. In the submission of Mr. Panda, the parent company of Respondent 1 is presently facing severe financial constraints, and that Respondent 1 is dependent on the parent company. In these circumstances, he submits, an additional ground for a restraint against the respondents from invoking the Bank Guarantee is that the Bank Guarantee would act as a security, in the event of an award in the arbitral proceedings favourable to the petitioner. Otherwise, he submits, if the



respondents are allowed to invoke the Bank Guarantee, there would be no security which would serve to ensure that, were the petitioner to succeed in arbitration, the award could be enforced, given the precarious financial condition of the respondents.

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17. *Re. prayer for stay of invocation of bank guarantee:*

18. *Admittedly, the Bank Guarantee provided by the petitioner to the respondents is unconditional. Stay of invocation of an unconditional bank guarantee can be granted only in exceptional circumstances. This Court in SES Energy Services India Ltd. v. Vedanta Limited, 2021 SCC OnLine Del 4196 has noted these exceptions and observed thus:—*

“9. In cases where the bank guarantee is unconditional, the law recognizes only three circumstances in which Courts could injunct invocation or encashment of the bank guarantee. These three circumstances, essentially, dovetail into two, with the pronouncement of Courts in that regard. The three circumstances, in which the Courts may interfere, and may injunct the invocation of unconditional bank guarantees, is where there is egregious fraud, special equity exists, or where irretrievable injustice or prejudice is likely to result, if the bank guarantee is invoked or encashed. The latter two circumstances have been treated, by the Supreme Court, as well as by the Division Bench of this Court in CRSC Research and Design Institute Group Co Ltd v. Dedicated Freight Corridor Corporation of India Ltd, 2020 SCC OnLine del 1526 to be interconnected, in that special equities would be set to exist if the invocation of the bank guarantee would result in irretrievable injustice to the opposite party. The following passage, from BSES Ltd. v. Fenner India Ltd., (2006) 2 SCC 728 neatly encapsulates this position:

“10. There are, however, two exceptions to this rule. The first is when there is a clear fraud of which the bank has notice and a fraud of the beneficiary from which it seeks to benefit. The fraud must be of an egregious nature as to vitiate the entire underlying transaction. The second exception to the general rule of non-intervention is when there are ‘special equities’ in favour of injunction, such as when ‘irretrievable injury’ or ‘irretrievable injustice’ would occur if such an injunction were not granted. The general rule and its exceptions has been reiterated in so many judgments of this Court, that in U.P. State Sugar Corpn. v. Sumac International Ltd., (1997) 1 SCC 568 that this Court, correctly declared that the law was ‘settled’.”

(Italics and underscoring in original)



19. Additionally, in para 72 of the report in *Svenska Handelsbaken v. Indian Charge Chrome*, (1994) 1 SCC 502, a bench of three Hon'ble Judges of the Supreme Court has held that mere irretrievable injustice, in the absence of established fraud, does not make out a case for injuncting invocation of an unconditional bank guarantee. Having said that, a bench of two Hon'ble Judges, in *Hindustan Steelworks Construction Co. Ltd. v. Tarapore & Co.*, (1996) 5 SCC 34 held, after noticing and interpreting *Svenska Handelsbaken*, that, in *Svenska Handelsbaken*, the Court was "not called upon to decide whether apart from the case of fraud there can be any other exceptional case wherein the Court can interfere in the matter of encashment of a bank guarantee". As such, it was held, "not much importance" could be attached "to the use of the word 'and' in the observation that 'it cannot be interfered with unless there is fraud and irretrievable injustice involved in the case'". *Vinitec Electronics Private Limited v. HCL Infosystems Limited*, MANU/SC/8095/2007 and *BSES Ltd.* hold that special equities, if pleaded as ground for stay of invocation of bank guarantee, should be in the nature of irretrievable injustice."

29. Therefore, the plea of financial constraint cannot be taken as a defence by the Petitioner in the present case to bring its case under the exception of irretrievable injustice/injury, where the threshold is far high. This Court does not see any egregious fraud in the invocation of the CPGs in the present case.

30. No other relief is sought in the present petition, save and except, prayer (b) by which the Petitioner seeks restraint against Respondent No. 1 from directly or indirectly and in any manner whatsoever adopting any coercive measures for recovery of any sum pursuant to or in furtherance of the letter dated 31.01.2023. This relief is co-related to prayer (a) for restraint against enforcement of the CPGs and clearly the Co-ordinate Bench in *Garg Builders (supra)* has held that where the Performance Bank Guarantees are invoked, whether or not the amounts due or likely to be due from the Petitioner are beyond the scope of enquiry by the Court or the Bank and would be a matter to seek restitution in substantive arbitral proceedings. The disputes between the parties herein



as to breaches, delays etc. are beyond the scope of this petition under Section 9 of the 1996 Act and the argument that no coercive steps be taken and invocation be indicted predicated on the terms of parent contract between the parties is not available to the Petitioner.

31. Insofar as I.A. 5355/2023 filed by Respondent No. 1 for modification of order dated 14.02.2023 is concerned, *albeit* in my view, the *status-quo* order restricted itself to the relief claimed in the petition i.e. restraint against invocation of CPGs and recovery of money from the Petitioner and was misread by Respondent No. 1, be that as it may, since this Court is dismissing the petition, no separate order is required to be passed in the application.

32. For all the aforesaid reasons, petition is hereby dismissed and the ad-interim order passed by this Court on 14.02.2023 stands vacated. It is made clear that this Court has not expressed any opinion on the merits of the disputes between the parties and the observations herein are restricted to disposal of the present petition.

JULY 06, 2023/shivam

JYOTI SINGH, J