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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Decision: 18th September, 2023

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O.M.P.(I) (COMM.) 215/2023

EIT SERVICES INDIA PRIVATE LIMITED Petitioner

Through: Mr. Parag P. Tripathi and
Mr. Dayan Krishnan, Senior Advocates with
Ms. Sneha Janakiraman, Mr. Madhav
Khosla and Ms. Saloni Gupta, Advocates.

versus

INDIA POST PAYMENTS BANK LIMITED & ANR.

..... Respondents

Through: Mr. Rajesh Kumar Gautam,
Mr. Anant Gautam, Ms. Anani Achumi,
Ms. Shivani Sagar, Mr. Sumit Sharma and
Mr. Dinesh Sharma, Advocates for R-1.
Mr. Ateev Mathur and Mr. Shreshth
Beniwal, Advocates for R-2.

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

JUDGEMENT

JYOTI SINGH, J.

1. This petition has been filed by the Petitioner under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') for restraining Respondent No.1/India Post Payments Bank Limited from invoking and/or encashing Performance Bank Guarantee ('PBG') No. LG/6216/GT013210/17 dated 11.09.2017, as amended on 30.05.2023. An order of restraint is also sought against Respondent No.2/Bank of America NA, from encashing or transmitting sums



proposed to be encashed by Respondent No.1 under the said PBG, till adjudication of interim reliefs by the Arbitral Tribunal and/or till such time the disputes are finally resolved by the parties.

2. Factual score as captured in the petition is that Petitioner is a private company incorporated under the Companies Act, 1956 and is a leading Indian information technology company, operating on Systems Applications and Products in Data Processing ('SAP') solutions market for 10 years and providing *inter alia* consulting, application maintenance and project development services. Petitioner is the Indian counterpart of DXC Technology, an American multinational information technology services company headquartered in Virginia, USA. Respondent No.1 is a public limited company wholly owned by the Government of India as a payments bank under the Department of Posts, Ministry of Communications and offers services in rural, semi-urban and urban areas through doorstep banking services, powered by a network of postman/global distribution system. Respondent No.2 is an American multinational investment bank and financial services holding company headquartered in USA and operating through its branches in India.

3. The genesis of the dispute lies in a Request for Proposal ('RFP') issued on 17.10.2016 by Respondent No.1 for selection of a System Integrator ('SI') for the purpose of inviting bids for development, supply and installation of applications and systems, necessary central hardware, deployment, training and maintenance of such solution with the ultimate objective of providing various payment services and direct benefits to the population in an efficient, transparent and convenient manner.



4. Petitioner submitted its proposal in response to the RFP, which was accepted on 27.07.2017 and Petitioner was selected as the successful bidder to undertake the project as per the scope of work detailed in the RFP read with Technical Submissions dated 08.12.2016. Petitioner and Respondent No.1 entered into a Master Services Agreement ('MSA') dated 14.08.2017 and simultaneously also executed a Service Level Agreement ('SLA') dated 14.08.2017 in terms of Clause 3.1.5 of MSA, for operating and maintaining service level requirements ('SLR') under the MSA.

5. In terms of Clause 2.1.6(a) and 2.2.1 of MSA read with Clause 6.5 of Volume II of RFP, a PBG dated 11.09.2017 was issued by Respondent No.2 on behalf of the Petitioner to Respondent No.1 for a cumulative amount of Rs.68,92,59,908/-. PBG was to originally remain in force upto 30.05.2023 with the claim expiry date being 30.05.2024, however, pursuant to Respondent No.1's letter dated 30.05.2023, addressed to Respondent No.2, seeking invocation of PBG, in the event it was not extended, the PBG was extended upto 09.09.2023 with the claim period upto 30.05.2024.

6. In terms of MSA, Scope of Work provided for 4 "Releases" being Release 1, Release 2, Release 3 and Release 4, each of which was a separate milestone under the MSA. According to the Petitioner, timelines provided under the Agreements and the RFP could not be strictly adhered to on account of variety of factors attributable to Respondent No.1. Beginning June, 2021, Respondent No.1 withheld due payments against Petitioner's invoices amounting to roughly Rs.163,70,86,384/- and deducted an amount of Rs.68,11,68,770/- alleging delay and defects in completion of the services rendered.



7. The Agreements provide for payment of liquidated damages ('LD') by the Petitioner to Respondent No.1 under Clause 6.3 of MSA, in the event of breach of the provisions of the Agreements. Notably, Clause 6.3 provides that LD may be levied for any failure to comply with terms of the MSA and SLA including SLRs and any levy may be a sum specified in SLRs for particular product/system/services and may be either from sums due to the Petitioner or from PBG and total LD that could be levied was capped at maximum 10% of the contract value being an amount of Rs.68,92,59,908/-. Therefore, regardless of whether such levy is sought through deduction from amounts due to the Petitioner or from PBG, it would be subject to a maximum limit of Rs.68,92,59,908/-.

8. Consequently, Petitioner was surprised to learn that Respondent No.1 by its letter dated 30.05.2023 addressed to Respondent No.2, attempted to invoke and encash the PBG in the event of the validity period not being extended, claiming breaches of MSA and SLA. Petitioner was constraint to extend the PBG till 09.09.2023, with claim expiry period remaining till 30.05.2024.

9. Given that the term of MSA was due to expire on 11.07.2023 and parties were in advance discussions concerning the Exit Management Process to be followed for handover of the assets, Petitioner was dedicatedly working on all available resources to achieve the process of closure of the Exit Process, as smoothly as possible. However, on 30.06.2023, during the midst of Exit Management Process, Respondent No.1 issued notice to the Petitioner, purporting to be a cure notice, alleging breaches and expressing an intention to terminate the Agreement and encash the PBG, in the event



the alleged breaches were not cured within the 'cure period' of 02 days. This notice was against the contractual provisions which provided uniform 15 or 30 days' cure periods depending on the obligations in respect of which the cure periods were instituted and therefore, even assuming there were any breaches by the Petitioner, the 02 days' cure period was neither adequate to address any meaningful change nor meet the requirements under the Agreement.

10. Petitioner responded to the notice on 02.07.2023, outlining the material breaches allegedly committed by Respondent No.1 in respect of unjustified levy of LD as retention of money from Petitioner's unpaid invoices to the tune of roughly Rs.62 crores; failure to pay cumulative amount of roughly Rs.163 crores allegedly due under invoices raised by the Petitioner and providing brief responses to the alleged breaches sought to be attributed to the Petitioner. Right was reserved by the Petitioner to furnish a further and more detailed response.

11. In the interim, Petitioner continued to provide Exit Management Services to Respondent No.1 but to the utter shock of the Petitioner, on 10.07.2023 i.e. one day prior to the expiry of Exit Management Period, Respondent No.1 issued a notice to terminate the MSA and SLA with immediate effect and invoke the PBG, setting out certain specific 'critical' deliverables allegedly not delivered by the Petitioner. Petitioner was also informed that Respondent No.1 had issued a letter dated 10.07.2023 to Respondent No.2 seeking invocation of the PBG. Invocation letter reflects that Respondent No.1 had levied maximum penalty as per SLA, terminated the Agreement and was invoking PBG in respect of the same breaches for which



penalty deductions under LD clause, upto ceiling limit had been made. The timing of the issuance of the invocation letter and termination notice, one day prior to the expiry of Exit Management Period makes it clear that the impugned action is *malafide* and wrongful. It is this invocation letter which triggered the filing of the present petition.

SUBMISSIONS ON BEHALF OF THE PETITIONER:

12. In terms of clauses 2.1.1 and 2.1.2 of Volume I of RFP, each of the Releases required to be delivered by the Petitioner encompassed a certain scope at the time when MSA was entered into. Release 1 comprised of ‘Attendance, Leave & Payroll Management’ and ‘Corporate Email’ architecture building blocks; Release 2 was a subset of ABBs in target state architecture and included 71 ABBs, comprising of single consolidated delivery including *inter alia* micro ATM, merchant app, mobile banking, SMS, UPI, cards management et al; Release 3 comprised ABBs pertaining to *inter alia* fraud management, payment gateway, HRMS, CRM, analytics, BI & DW, internet banking, finance & accounts and licenses and AMCs; while Release 4 comprised of ABBs pertaining to *inter alia* locker management, financial planning system, etc. Timelines for completion of the 4 Releases respectively, were provided in Clause 2.13.2 of Volume I of RFP, as per which Release 1 was to be completed by 23.02.2017, Release 2 by 24.08.2017, Release 3 by January, 2018 and Release 4 by July, 2018. Release 1 was fully delivered and Release 2 was delivered to the extent of 92.76%.

13. Delay in rollout of Release 2 was caused due to various factors attributable to Respondent No.1 such as failure to close dependencies in a timely manner, constant deviations and changes demanded by



Respondent No.1 from the agreed timelines, failure of Respondent No.1 to provide all information and cooperation. Extensive correspondence and documentation demonstrates that Respondent No.1 was in breach of the terms of MSA, preventing the Petitioner from performing its obligations in the manner originally envisioned. Despite being at fault, Respondent No.1 did not release the outstanding amounts due to the Petitioner to the tune of Rs.163,70,86,384/- invoiced by the Petitioner for services rendered under the Agreements. On 21.02.2022, Petitioner sent a preliminary response to the penalty deductions levied and pointed out that penalties could only be levied if delay was solely attributable to the Petitioner under Clause 5.2 of Volume I of RFP and Clause 7.10 of MSA provided that no responsibility could be fixed on the Petitioner for failure of any service, if the failure was due to reasons attributable to Respondent No.1. Several emails were exchanged between the parties in February, 2022, wherein Petitioner had questioned the unilateral deductions in Petitioner's invoices. Petitioner also sent demand letters to Respondent No.1, between 24.11.2022 to 18.05.2023, demanding legitimate payments due to it for various services rendered under the Agreements, also highlighting delays, failure to close dependencies and unilateral changes in the scope of works attributable to Respondent No.1.

14. To add to the woes of the Petitioner, Respondent No.1 started insisting on extending the validity period of the PBG, despite knowing that the claim period was till 30.05.2024. On 12.04.2023, Respondent No.1 issued a letter alleging breach by the Petitioner of the obligations under the MSA and put the Petitioner to notice under Clause 6.1.1 of



MSA to cure the alleged breaches within 15 days, failing which Respondent No.1 would have the right to terminate the MSA. Petitioner was also called upon to submit an exit management plan within 02 days. Petitioner refuted all allegations through various letters, which are on record and finally on 29.05.2023 and 30.05.2023, after multiple e-mails were exchanged between the parties, Petitioner was coerced into extending the validity of the PBG till 09.09.2023.

15. Under the terms of Clauses 2.1.6(a) and 2.2.1 of MSA read with Clause 6.5 of Volume II of RFP, PBG was issued by Respondent No.2 for a cumulative amount of Rs.68,92,59,908/- i.e. 10% of the Agreement value. Clause 6.3 of MSA provides that in the event Petitioner fails to comply with the terms of the MSA and the SLA including SLRs, Respondent No.1 may levy LD and recover the same either: (i) from the PBG 'or' (ii) from any payments due to the Petitioner subject to a cap of 10% of the Agreement value. Respondent No.1 has already exercised option (ii) *albeit* wrongfully and unilaterally, by deducting money pertaining to the Deployment SLR penalty from Petitioner's invoices, which is evident from its letter dated 05.12.2022. It is admitted in the letter *inter alia* that Respondent No.1 has adjusted deployment penalty as per Deployment SLR to the tune of Rs.76,62,39,884.53 from invoices for services provided between January, 2021 and June, 2022 and a further sum of Rs.1,99,80,179.50 was adjusted against the deployment penalty for invoices raised for the period 01.07.2020 to 31.12.2020. Subsequently, vide notice dated 10.07.2023 terminating the MSA and SLA, Respondent No.1 has also stated that it has imposed Rs.62,29,61,731/-



as penalty upon the Petitioner as per the SLA and is imposing penalty of Rs.6,62,98,177/- under Deployment SLR. Accordingly, the total penalty already imposed is equivalent to 10% of contract value. Respondent No.1 has also relied on a 'Note' appended to point 8 of SLR, which reads '....*The contract is liable to be cancelled in case the total SLA violations lead to a cumulative penalty of 10% of the total contract value*'. Significantly in the same letter, Respondent No.1 states that bank has levied the maximum penalty as per SLA resulting in the termination of the contract. It is apparent that Respondent No.1 has invoked the PBG in its entirety for the same breaches, in respect of which it has levied the maximum LD, which is impermissible in law. This also contravenes Clause 6.3 of MSA and makes the invocation inequitable and unconscionable.

16. It is a settled law that when a contract prescribes a Liquidated Damages clause, the sum designated as LD represents the ceiling or upper limit beyond which damages cannot be levied or awarded. ***[Ref.: Kailash Nath Associates v. Delhi Development Authority and Another, (2015) 4 SCC 136; Mahanagar Telephone Nigam Limited v. Tata Communications Limited, (2019) 5 SCC 341; Bharathi Knitting Company v. DHL Worldwide Express Courier Division of Airfreight Ltd., (1996) 4 SCC 704; and Indian Potash Ltd. v. Emmsons Gulf DMCC, 2023 SCC OnLine Del 3928]***. Therefore, even assuming, without conceding, that Respondent No.1 was, in some measure entitled to deduct LD for Petitioner's alleged failure to perform under the Agreements, having deducted the maximum LD leviable under Clause 6.3, it is not open to Respondent No.1 to recover further, in the garb of invoking the PBG.



17. It is trite that Bank Guarantee invocation is not justified if the invoking party has failed to produce any material to substantiate it has suffered losses due to alleged breach of contract. **[Ref.: Mahanagar Telephone Nigam Ltd. v. Finolex Cables Limited, 2017 SCC OnLine Del 10497]**. Bank Guarantee cannot be invoked when there exists no outstanding claims against the party on account of LD. **[Ref.: KSE Electricals Pvt. Ltd. v. Project Director, Bangladesh Rural Electrification Board and Another, 2021 SCC OnLine Cal 2986]**.

18. While it is a categorical case of the Petitioner that PBG in question is a 'conditional' guarantee and this Court is empowered to restrain its invocation/encashment, however, even assuming that it is an unconditional BG, special equities exist in favour of the Petitioner, entitling it to an injunction. Invocation of PBG has to be in accordance with the purpose for which it was executed. Petitioner has not committed any breach of the Agreements and was prevented from adhering to the timelines due to acts and omissions of Respondent No.1. In any case, having exercised the option to deduct a sum estimated as LD from the payments due to the Petitioner, if Respondent No.1 is permitted to invoke and encash the PBG, it would be a 'double benefit' to Respondent No.1 and a 'double jeopardy' for the Petitioner, which cannot be countenanced in law. The general rule that injunctions should ordinarily not be granted against invocation of unconditional BGs admits an exception where a party pleads 'special equities' on ground of double benefit by recovering money from encashing the BG for the sums already deducted. **[Ref.: KKSPUN India Ltd. v. OFB Tech Private Limited and Others, 2022 SCC OnLine Del 3176]**



19. Respondent No.1 failed to issue requisite notice prior to the impugned action of invocation. Clause 6.5(3) of Volume II of RFP provides that the right to forfeit PBG arises only in the event of breach of contract, after providing a 15 days' notice to the Petitioner and in terms of Clause 4.1.7.5.1(14) of Volume III RFP, Respondent No.1 is obliged to provide a clear 30 days' notice before invocation. Conjoint reading of the two Clauses shows that Respondent No.1 has failed to comply with the obligations to issue prior notices. Entire correspondence between the parties would indicate that Respondent No.1 only routinely informed the Petitioner of its entitlement to invoke the PBG but never once intimated that it intended to actually exercise that right.

20. The crux of Respondent No.1's case is that it has a right to invoke PBGs, which flows from its purported right to terminate the Agreements on account of breaches by the Petitioner and therefore in order to encash the PBG, Respondent No.1 must establish that the termination is valid. Issues flagged by the Petitioner in the letter dated 11.07.2023, which was the response of the Petitioner to Respondent No.1's termination notice, show that the termination is wholly invalid, wrongful and *de hors* the terms of the Agreements. While it is true that validity of the termination will be a subject matter of the arbitral proceedings and is not within the scope of this petition under Section 9 of the Act, however, till such time the adjudication is complete before the Arbitral Tribunal and it is shown and proved that termination is valid, invocation of PBG deserves to be stayed.

21. Respondent No.1, during course of hearing, placed reliance on Clauses 6.1(2) and 6.2.2 of MSA dated 14.08.2017 and Clauses



4.1.7.1(2) and 4.1.7.2.2(1) of Volume III of RFP dated 17.10.2016 to assert its right to forfeit the PBG in the event of termination of MSA, however, these clauses are not exceptions to the LD cap under Clause 6.3 of MSA, which provides for maximum LD that may be levied for ‘all breaches’ of MSA, SLA and/or SLRs. Therefore, there are no breaches in respect of which LD may be levied, that fall outside the cap. Emphasis on the expression ‘*without prejudice to other remedies*’ in Clause 6.3 cannot aid the case of Respondent No.1 in the context of invocation of PBG since the remedies referred to in Clause 6.3 can only mean remedies such as termination of the MSA, to which recourse has already been taken by Respondent No.1. If the interpretation given by Respondent No.1 is accepted, it would amount to holding that the ceiling of 10% will not apply and this would render Clause 6.3 nugatory.

22. Respondent No.1’s contention that alleged breaches in relation to which it seeks to encash PBG are covered by indemnity obligations and/or step-in rights set out in Clauses 6.3.2.1(5), 6.3.2.1(14), 6.3.2.3.3 or 6.3.2.6 of MSA, is untenable. Clause 6.3 provides that LD cap will apply in respect of ‘any breach’ of the Agreements and even assuming that Respondent No.1 could invoke PBG for reasons other than levy of LD, by its own admission it has chosen not to do so.

SUBMISSIONS ON BEHALF OF RESPONDENT NO. 1:

23. The primordial contention of the Petitioner that under Clause 6.3 of MSA, Respondent No. 1 is entitled to LD to a maximum ceiling limit of 10% of the Agreement value, which it can deduct either from PBG or from any other payment due to the Petitioner and having



withheld the 10% amount, Respondent No.1 is not entitled to invoke/encash PBG, is wholly misconceived and is based on a standalone reading of Clause 6.3 overlooking and misreading/misinterpreting other relevant provisions of MSA dated 14.08.2017 as well as RFP dated 17.10.2016. It is a settled law that no provision of an Agreement can be read in isolation and all relevant provisions must be conjointly read.

24. Right of Respondent No. 1 to invoke or forfeit the PBG is in addition to the right to deduct LD from the PBG and this is evident from Clauses 6.1(2) and 6.2.2 of MSA and Clauses 4.1.7.1(2) and 4.1.7.2.2(I) of RFP Volume III, which read as follows:-

“6. Breach, Rectification and Termination

6.1. Breach

xxx

xxx

xxx

2. *Because time is the essence of the Agreement, in case and in the sole discretion of the Payment Bank, for reasons prima facie attributable to the SI, if there is a delay of more than four (4) weeks in the completion of a Project Implementation Phase by the SI, prior to the acceptance testing and certification stage, the Payment Bank may terminate this Agreement as per the provisions of clause 6.2.1 after affording a reasonable opportunity to the SI to explain the circumstances leading to such a delay. Subsequently, the Payment Bank may also invoke the Performance Bank Guarantee of the SI.”*

6.2. Termination

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2. *The Payment Bank may by giving a one month's written notice, terminate this Agreement if a Change Of Control of the SI has taken place and such termination shall become effective at the end of the notice period. In the event that the SI undergoes such a change of control, the Payment Bank may, as an alternative to termination, require a replacement of existing Performance Bank Guarantee furnished by the SI from a guarantor acceptable to the Payment Bank or its nominated agencies (which shall not be SI or any of its associated entities). If such a guarantee is not furnished within thirty (30) days of the Payment Bank's demand, the Payment Bank may exercise its right to terminate this Agreement in*



accordance with this Clause by giving 30 days further written notice to the SI.

RFP

4.1.7. Breach, Rectification and Termination

4.1.7.1. Breach

xxx

xxx

xxx

2. Because time is the essence of the contract, in case and in the sole discretion of the Employer, for reasons prima facie attributable to the SI, if there is a delay of more than 4 (four) weeks in the completion of a Project Implementation Phase by the SI, prior to the acceptance testing and certification stage, the Employer may terminate this Agreement after affording a reasonable opportunity to the SI to explain the circumstances leading to such a delay. Further, the Employer may also invoke the Performance Bank Guarantee of the SI.

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4.1.7.2. Termination

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4.1.7.2.2 Effects of Termination

I. In the event that the Employer terminates this Agreement pursuant to failure on the part of the SI to comply with the conditions as contained in this Clause and depending on the event of default, Performance Guarantee furnished by SI may be invoked/forfeited.”

25. Petitioner has committed material breaches of its obligations under RFP, MSA and SLA/SLR and extensive communications exchanged between the parties reveal that, from time to time, the breaches were brought to the notice of the Petitioner through letters dated 22.02.2022, 28.12.2022, 02.02.2023, 03.02.2023, 29.03.2023, 31.03.2023, 10.07.2023 etc. Petitioner was advised repeatedly to take necessary steps to remove/cure the breaches/material breaches/non-performance of the obligations. Clause 2.13.2 of Volume I RFP provided that the project should achieve the key milestone in the time specified thereunder which included SI onboarding, Release 1, Completion of IT Systems Audit, Release 2, Rollout (50 branches



live) and 10,000 customer access points, Rollout completion of 650 branches including 25,000 customer access points and 1,30,000 customer access points, Release 3 and Release 4 and the timelines were binding upon the Petitioner. Clause 3.1 provided the scope of Agreement and it was stipulated therein that SI shall strictly adhere to the Schedule for implementation of the project and Clause 1.10(1) specifically provided for SLR non-compliance penalties including Deployment SLR i.e. a delay of every 02 weeks would lead to a penalty of 0.5% of the Aggregate Release Cost for the delayed release, solely attributable to the bidder. Additionally, several other issues were flagged and brought to the notice of the Petitioner through e-mails, meetings, phone calls, such as non-adherence of timelines, pending deliverables, delayed delivery of critical components, violations of the terms of SLA etc. There were stability issues in applications, gaps in delivery of services, gaps in UAT version and despite reminders there was wilful default and negligence in carrying out the obligations.

26. Petitioner is responsible for non-delivery of critical business items such as Sanovi, AVDF, Perpetual License Details of Finacle Application, Security Certification, non-linkage of more than 1.4 crore images to accounts in DMS, backlog of which resulted in failure of uploading more than 3.5 crore records and leading to CKYC non-compliance. Due to this non-compliance, Respondent No. 1 has incurred tentatively an additional expense of Rs.455 crore. Petitioner failed to provide seamless production system which resulted in complete stoppage of account opening, NEFT/RTGS outage, IMPS outage, MB/MATM outage etc. on multiple days. The cascading



effect of delays is continuing while some projects are pending since 2019 (CF 39 etc.) and the breaches have resulted not only in revenue loss but also loss of reputation on various platforms. Respondent No. 1 was left with no other option but to penalise the Petitioner as per terms of MSA and SLR and accordingly a penalty of Rs.57,72,61,669/- was levied on the Petitioner as per the SLA.

27. Respondent No.1 has imposed an amount of Rs.62,29,61,731/- as penalty in accordance with SLA and Rs.6,62,98,177/- under Deployment SLR. The total penalty imposed is Rs.6,89,25,99,082/- i.e. 10% of the total contract value. Under 'Note' appended to Point 8 of SLR, cumulative SLR penalty that the SI can incur would be capped at 10% of the contract value, subject to Clause 9.2 of Volume III: Contractual and Legal Specifications. The contract was liable to be cancelled in case the total SLA violations led to a cumulative penalty of 10% of the total contract value. Failure of the Petitioner to provide perpetual license of Finacle as per RFP and MSA, would result in Respondent No.1 incurring an additional tentative expenditure of around Rs.170 crores in the long term i.e. approximately 25 years, which is recoverable from the Petitioner as per actuals. In addition, Respondent No. 1 has incurred operational losses due to poor delivery by the Petitioner, which are recoverable under Clause 6.3.2.3 i.e. indemnity clause of the MSA. Several notices of breach have been served by Respondent No.1 on the Petitioner, which have been filed in the Court and yet Petitioner failed to cure the defects/breaches even after passage of more than 30 days' period and termination of the contract is justified.



28. The entire petition and case of the Petitioner is predicated on misconceived interpretation of Clause 6.3, which does not deal with invocation of PBG at all and only provides for ‘deduction’ from PBG or any payment due from the Petitioner. Further, it is stipulated therein that rights available to Respondent No. 1 under the said Clause are *‘without prejudice to other remedies available to it’* and there are various other clauses in the Agreements which entitle Respondent No.1 to invoke/forfeit the PBG. Clause 6.3.2.1 dealing with ‘Representations and Warranties’ mandates the SI to ensure that it has all necessary licenses, approvals, consents of third parties and necessary technology, hardware and software to enable it to provide the services. Clause 14 thereof entitles Respondent No.1 to invoke the PBG upon termination of the Agreement as per Clause 6.2 in the event the SI is unable to meet the obligations of implementation of the project, Operations and Maintenance Services and any other related scope of work under MSA and SLA, notwithstanding anything else in the Agreement. Clause 6.2.2 of MSA provides that in the event Respondent No.1 terminates the Agreement, pursuant to SI's failure to comply with the conditions of the clause and depending on the event of default, PBG may be invoked/forfeited. Clause 6.3.2.6 concerns Step-In Rights and sub-clause (1) *inter alia* provides that if the SI/Partner/Sub-contractor fails to perform any of the ‘affected services’ that are deemed by Respondent No.1 to be critical to its business or performance of such services or performance is degraded or delayed for more than 07 days, steps can be taken by Respondent No.1 to have the breaches rectified or to act under sub-clause (6) of Clause 6.3.2.6 which permits Respondent No.1 to invoke the PBG.



29. The entire argument of the Petitioner that Respondent No.1 having withheld payment from the invoices of the Petitioner towards maximum penalty of 10% cannot invoke/encash the PBG overlooks the fact that Clause 6.3 itself provides that: (a) even after withholding maximum of 10% of the Agreement value, Petitioner will not be relieved from its obligations under the Agreement; (b) withholding of maximum 10% amount of Agreement value, itself will give cause for termination of Agreement; and (c) effects of termination under Clause 6.2.2 *inter alia* provide for invocation/forfeiture of PBG.

30. Respondent No.1 has terminated the Agreements on account of several breaches which are mentioned in the termination letter and the letter of invocation dated 10.07.2023 viz. non-confirmation on perpetuity of licenses e.g. Infosys (EdgeVerve) Finacle Licensing Term, non-linkage of more than 1.4 crores images to accounts in DMS, backlog of which has resulted in failure to upload more than 3.5 crores records, leading to CKYC non-compliance, non-completion of commercial changes, non-delivery/delayed delivery of critical business items, non-submission of OEM support related artefacts regarding AMC/ATS Renewals/support till 11.07.2023 etc. Huge financial loss has been caused to Respondent No.1 on this score entitling it to invoke the PBG, which in any case enables recovery of amount far less in proportion to the loss suffered. It is wrong for the Petitioner to allege that termination notice is in breach of the 15 days/30 days' notice period. The record is replete with several letters/notices whereby Respondent No.1 had repeatedly pointed out material breaches by the Petitioner and the termination notice itself refers to the extensive communication. By letter dated 22.02.2023, it



was pointed out to the Petitioner that despite highlighting the non-compliance of the obligations several times and giving 15 days to cure the breaches, failing which Respondent No.1 shall exercise its right to terminate the contract, no remedial action was taken. The letter was acknowledged by the Petitioner denying the breaches, however, it cannot be argued that only 02 days' cure period was given to the Petitioner, before invoking the PBG.

31. Law on grant of injunctions with respect to unconditional bank guarantees is no longer *res integra* and only in case of egregious fraud and/or irretrievable injury/special equity, injunction may be granted. Petitioner's case does not fall under either of these exceptions. Respondent No.1 has categorically stated in the reply that no LD has been levied till date, which is evident from the fact that the notice of termination as well as the letter of invocation of PBG refer to multiple breaches of the Petitioner arising out of non-performance of obligations under the Agreements and there is no reference to Clause 6.3 of MSA. Levy of LD is only one of the remedies available to Respondent No.1 for breach of the Agreements and is without prejudice to other remedies. It is wrong for the Petitioner to contend that for all breaches, the only remedy is to penalise the Petitioner by imposing LD capped at 10% of the contract value and it is this understanding which leads to an erroneous conclusion by the Petitioner that having withheld 10% of the contract value as LD, Respondent No.1 cannot recover more money by encashing the PBG. Therefore, there is no double benefit to Respondent No.1 or consequential double jeopardy to the Petitioner, as alleged and neither a special equity is created in favour of the Petitioner nor can the action



of Respondent No.1 even remotely be termed as a case of egregious fraud.

ANALYSIS & FINDINGS:

32. This petition once again brings to fore the never ending dispute pertaining to invocation and encashment of Bank Guarantees ('BGs'). Before proceeding to examine the PBG in the present case, it would be pertinent to refer to the judicial pronouncements on invocation of Bank Guarantees, both conditional and unconditional. Insofar as unconditional Bank Guarantees are concerned, when during the course of commercial transactions, an unconditional BG is given, the beneficiary is entitled to realise the BG, irrespective of any pending disputes under the main contract. The Bank giving such a BG is bound to honour, as per the terms of the BG and is not concerned between the disputes arising between the parties to the commercial transaction, in relation to which the BG was furnished. It is trite that Courts should be slow and reluctant in injuncting the enforcement of an unconditional BG, as the BG is an independent contract between the Bank and the beneficiary. The obligation of the Bank to honour the unconditional BG on invocation is not circumscribed by any other factor but the terms of the BG.

33. It is equally settled by a catena of decisions of the Supreme Court and this Court that there are only two exceptions which have been carved out where the Courts can restrain the invocation/encashment of an unconditional BG: (a) egregious fraud, which vitiates the entire underlying transaction and of which the Bank has notice; or (b) irretrievable injury/injustice, where the irretrievable injury is of such an exceptional circumstance that it is impossible for



the guarantor to reimburse himself if he succeeds upon final adjudication of the disputes. In *BSES Ltd. (Now Reliance Energy Ltd.) v. Fenner India Ltd. and Another*, (2006) 2 SCC 728, the Supreme Court regarded ‘irretrievable injury’ or ‘irretrievable injustice’ as a specie of ‘special equities’ genus while in some other judgments both have been treated as distinct circumstances *albeit* both justify grant of injunction against invocation of an unconditional BG. It has been held by the Courts that ‘irretrievable injustice’ has to be of such a magnitude as would override the twin considerations of the express terms of the guarantee and the adverse effect, from the grant of injunction, on commercial dealings in the country. ‘Special equities’ also must be so special so as to override these two considerations, which are paramount considerations in deciding an application seeking restraint from invoking/encashing the unconditional BG.

34. In *Gujarat Maritime Board v. Larsen and Toubro Infrastructure Development Projects Limited and Another*, (2016) 10 SCC 46, the Supreme Court was examining a BG furnished by the Bank to the Appellant therein, which incorporated the following covenants:-

“(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)

35. Deliberating on the issue of invocation of the said BG, the Supreme Court held that the moment there was a written demand to the Bank from the beneficiary invoking the BG, pursuant to alleged breach of the covenant between the Appellant and the Respondent therein, Bank was bound to honour the payment under the BG, which is a separate contract and not qualified by the contract of performance of the obligations thereunder. Relevant paragraph of the judgment of the Supreme Court is 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., (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.”*

36. In ***Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineering Works (P) Ltd. and Another, (1997) 6 SCC 450***, the Supreme Court in fact deprecated the practice of the High Courts in granting injunctions restraining encashment of unconditional BGs and observed that this would mean non-compliance with the law declared by the Apex Court, amounting to judicial impropriety. Relevant paragraphs 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.”

37. It would be useful to allude to the judgment of the Supreme Court in ***Vinitec Electronics Private Ltd. v. HCL Infosystems Ltd., (2008) 1 SCC 544***, where the Supreme Court referring to the landmark decision in ***U.P. State Sugar Corporation v. Sumac International Ltd., (1997) 1 SCC 568***, and other judgments, held thus:-

“11. The law relating to invocation of bank guarantees is by now well settled by a catena of decisions of this Court. The bank guarantees which provided that they are payable by the guarantor on demand is considered to be an unconditional bank guarantee. When in the course of commercial dealings, unconditional guarantees have been given or accepted the beneficiary is entitled to realise such a bank guarantee in terms thereof irrespective of any pending disputes. In U.P. State Sugar Corpn. v. Sumac International Ltd. [(1997) 1 SCC 568] this Court observed that: (SCC p. 574, para 12)

“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 realise 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 realisation 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.”

12. *It is equally well settled in law that bank guarantee is an independent contract between bank and the beneficiary thereof. The bank is always obliged to honour its guarantee as long as it is an unconditional and irrevocable one. The dispute between the beneficiary and the party at whose instance the bank has given the guarantee is immaterial and of no consequence. In BSES Ltd. v. Fenner India Ltd. [(2006) 2 SCC 728] this Court held: (SCC pp. 733-34, para 10)*

“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 [Ed.: See e.g. U.P. State Sugar Corpn. v. Sumac International Ltd., (1997) 1 SCC 568 at pp. 574-77, paras 12-16; State of Maharashtra v. National Construction Co., (1996) 1 SCC 735 at p. 741, para 13. See also United Commercial Bank v. Bank of India, (1981) 2 SCC 766; Centax (India) Ltd. v. Vinmar Impex Inc., (1986) 4 SCC 136.] , that in U.P. State Sugar Corpn. v. Sumac International Ltd. [(1997) 1 SCC 568] (hereinafter ‘U.P. State Sugar Corpn. [(1997) 1 SCC 568]’) this Court, correctly declared that the law was ‘settled’.”

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14. *In Mahatma Gandhi Sahakra Sakkare Karkhane v. National Heavy Engg. Coop. Ltd. [(2007) 6 SCC 470] this Court observed: (SCC p. 471b-d)*



“If the bank guarantee furnished is an unconditional and irrevocable one, it is not open to the bank to raise any objection whatsoever to pay the amounts under the guarantee. The person in whose favour the guarantee is furnished by the bank cannot be prevented by way of an injunction from enforcing the guarantee on the pretext that the condition for enforcing the bank guarantee in terms of the agreement entered into between the parties has not been fulfilled. Such a course is impermissible. The seller cannot raise the dispute of whatsoever nature and prevent the purchaser from enforcing the bank guarantee by way of injunction except on the ground of fraud and irretrievable injury.

What is relevant are the terms incorporated in the guarantee executed by the bank. On careful analysis of the terms and conditions of the guarantee in the present case, it is found that the guarantee is an unconditional one. The respondent, therefore, cannot be allowed to raise any dispute and prevent the appellant from encashing the bank guarantee. The mere fact that the bank guarantee refers to the principal agreement without referring to any specific clause in the preamble of the deed of guarantee does not make the guarantee furnished by the bank to be a conditional one.”

*(Paras 22 and 28)
(emphasis supplied)*

38. In ***Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co., (2007) 8 SCC 110***, which is another important judgment in this canon, the Supreme Court elucidated six principles which govern the grant of injunction against invocation of an unconditional BG and which have been extracted above. A Co-ordinate 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 2100*** (hereinafter referred to as ‘CRSC-I’) carved out the principles that emerge from the decision of the Supreme Court in ***Vintec Electronics (supra)*** as follows:-

“26. The following principles clearly emerge from the decision in Vintec Electronics, (2008) 1 SCC 544:

(i) Bank guarantees, which are payable on demand by the guarantor, are unconditional bank guarantees.



(ii) *Unconditional bank guarantees entitled the guarantor to realisation thereof, irrespective of any pending disputes. In fact, disputes between the guarantor, and the parties, at whose instance the bank has given the guarantee, are immaterial and of no consequence. Enforcement of the guarantee cannot be enjoined on the pretext that the condition for enforcing the bank guarantee, in terms of the agreement between the parties, has not been fulfilled. What is relevant are the terms incorporated in the guarantee (and not those in the agreement between the parties). The mere fact that the bank guarantee refers to the principal agreement, without referring to any specific clause, does not make the bank guarantee conditional.*

(iii) *Courts should, therefore, be slow in enjoining realisation of unconditional bank guarantees.*

(iv) *The only exceptions, to this general rule, are where there exist/exists*

(a) fraud of an egregious nature, or

(b) irretrievable injustice resulting to the parties, at whose instance the bank gave the guarantee, were the injunction not granted, or

(c) special equities, of which the possibility of irretrievable injustice is itself one.

(v) "Irretrievable injustice", for this purpose, has to be of such an exceptional nature as would override the terms of the guarantee and the adverse effect of the grant of such injunction on commercial dealings in the country."

39. This judgment was taken up in appeal before the Division Bench of this Court. The judgment of the Division Bench reported as ***CRSC Research and Design Institute Group Co. Ltd. v. Dedicated Freight Corridor Corporation of India Limited and Others, 2020 SCC OnLine Del 1526*** (hereinafter referred to as 'CRSC-II'), upholds the judgment of the learned Single Judge but it is significant to note that the Court painfully recorded that despite the unambiguous position of law with respect to interference in encashment of unconditional BGs, time has come for confining the hearings in such matters in view of the amendments in the Arbitration Act for



expeditious disposal of the matters. The observations on merits are 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.”

40. I may also profitably refer to another judgment of the Co-ordinate Bench of this Court in ***Garg Builders, Through Shri Mohinder Pal Garg v. Hindustan Prefab Limited and Another, 2022***



SCC OnLine Del 1264, where after noting several judicial precedents, the Court held as under and this judgment is particularly relevant in the facts of this case for the reasons I shall advert to later:-

“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-crystallised 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 itemise 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 mobilisation 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, (1981) 2 SCC 766 and Hindustan Steelworks Construction Ltd. v. Tarapore & Co., (1996) 5 SCC 34, 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 (P) Ltd., 2021 SCC OnLine Del 5049, in which I have followed the Division Bench pronouncement in CRSC Research and Design Institute Group Co. Ltd. v. Dedicated Freight Corridor Corpn. of India Ltd., 2020 SCC OnLine Del 1526:*

“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. Vendant A Ltd., 2021 SCC OnLine Del 4196 has noted these exceptions and observed thus:

‘9. In cases where the bank guarantee is unconditional, the law recognises only three circumstances in which courts could enjoin 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 enjoin 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 Corpn. 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)

Additionally, in para 72 of the report in Svenska Handelsbanken 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 Ltd. v. Tarapore & Co., (1996) 5 SCC 34 held, after noticing and interpreting Svenska Handelsbanken v. Indian Charge Chrome, (1994) 1 SCC 502, that, in Svenska Handelsbanken v. Indian Charge Chrome, (1994) 1 SCC 502, 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 (P) Ltd. v. HCL Infosystems Ltd., (2008) 1 SCC 544: (2008) 1 SCC (Civ) 342 and BSES Ltd. v. Fenner India Ltd., (2006) 2 SCC 728 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.”

41. From the above conspectus of the judgments, it is palpably clear that invocation/encashment of unconditional BGs is not interdicted as a general rule and Courts must be extremely slow and reluctant in granting injunction, save and except, in case of judicially recognized exceptions i.e. fraud of an egregious nature, irretrievable injustice to parties at whose instance Bank had furnished the guarantee, if the injunction is not granted and special equities of which irretrievable injustice is a specie. The discussion on this aspect will be incomplete without reference to the judgment of the Supreme Court in ***Mahatma Gandhi Sahakra Sakkare Karkhane v. National Heavy Engg. Coop. Ltd. and Another*, (2007) 6 SCC 470**, relevant paragraphs of which are as under:-

“22. In our considered opinion if the bank guarantee furnished is an unconditional and irrevocable one, it is not open to the bank to raise any objection whatsoever to pay the amounts under the guarantee. The person in whose favour the guarantee is furnished by the bank cannot be prevented by way of an injunction in enforcing the guarantee on the pretext that the condition for enforcing the bank guarantee in terms of the agreement entered between the parties has not been fulfilled. Such a course is impermissible. The seller cannot raise the dispute of whatsoever nature and prevent the purchaser from enforcing the bank guarantee by way of injunction except on the ground of fraud and irretrievable injury.



28. *The learned counsel in support of his submission relied upon the decision of this Court in Hindustan Construction Co. Ltd. v. State of Bihar [(1999) 8 SCC 436] . This Court in Hindustan Construction Co. [(1999) 8 SCC 436] having referred to the terms of Clause (9) of principal contract between the parties therein came to the conclusion that the bank guarantee specifically refers to the original contract and postulates that if the obligations expressed in the contract, are not fulfilled by HCCL, the right to claim recovery of the whole or part of the “advance mobilisation” then alone the bank was liable to pay the amount due under the guarantee to the Executive Engineer. The Court found that the bank guarantee specifically refers to Clause (9) of the principal agreement and it is under those circumstances it came to the conclusion that the amount covered by the bank guarantee becomes payable and the same could be invoked only in the circumstances referred to in Clause (9) of the principal agreement. The bank guarantee executed by the bank in the instant case in favour of the appellant herein does not contain any such clause. Mere fact that the bank guarantee refers to the principal agreement without referring to any specific clause in the preamble of the deed of guarantee does not make the guarantee furnished by the bank to be a conditional one. In the very said judgment this Court observed that: (SCC p. 442, para 9)*

“9. What is important, therefore, is that the bank guarantee should be in unequivocal terms, unconditional and recite that the amount would be paid without demur or objection and irrespective of any dispute that might have cropped up or might have been pending between the beneficiary under the bank guarantee or the person on whose behalf the guarantee was furnished. The terms of the bank guarantee are, therefore, extremely material. Since the bank guarantee represents an independent contract between the bank and the beneficiary, both the parties would be bound by the terms thereof. The invocation, therefore, will have to be in accordance with the terms of the bank guarantee, or else, the invocation itself would be bad.”

(emphasis supplied)

What is relevant, therefore, is the terms incorporated in the guarantee executed by the bank. On careful analysis of the terms and conditions of the guarantee, we find the guarantee to be an unconditional one. The respondent, therefore, cannot be allowed to raise any dispute and prevent the appellant from encashing the bank guarantee.”

42. Therefore, the principles that can be culled out from the judgments are that BG is an independent contract between the Bank



and the beneficiary and the invocation is not conditional on the disputes between the parties under the main contract, save and except, if those conditions are pre-conditions of the invocation of the BG. Bank is not concerned with the *inter se* disputes between the parties to the contract and is bound to honour the obligation when the beneficiary invokes the BG, else the purpose of giving the BG will be defeated. Law recognizes only few exceptions to the general rule that Courts should be reluctant and slow in injunctioning the invocation of an unconditional BG and these are egregious fraud, irretrievable harm or injustice and special equity. Courts have consistently formulated that the adjectives qualifying the exceptions are not without significance inasmuch as only where fraud is egregious, injustice is irretrievable and equities are special, a Court would be justified to interdict the invocation of an unconditional BG and this too with a cavil that these circumstances must not only be pleaded but established.

43. ‘Fraud’ as understood in the legal parlance is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a cheating or deception intended to gain an advantage at the cost of other party’s loss. Without multiplying judgments and to avoid prolixity, I may refer to **CRSC-I** (*supra*), wherein various facets of ‘fraud’ have been brought forth, based on judicial pronouncements and dictionaries and relevant passages are as follows:-

“44. Apparently aware of the above legal position, the petitioner has, specifically, averred, in the petition, the existence of egregious fraud, irretrievable injustice and special equities, in so many words. The question, however, is not whether the petitioner has pleaded the existence of the circumstances, but whether they do, in fact, exist.

45. “Fraud”, in all its complexities and contours, has been subjected to judicial analysis, ad nauseam, by courts in this country,

O.M.P.(I) (COMM.) 215/2023

Page 37 of 72



as well as across the world, to the extent that every skein of the fabric may be said to have been unraveled. An exhaustive analysis of the various judicial pronouncements on the issue may result in this judgment never coming to an end, and reference, to some authoritative pronouncements would, therefore, suffice. In *Commissioner of Customs (Preventive) v. Aafloat Textiles India Pvt. Ltd.*, (2009) 11 SCC 18, one finds the following searching analysis:

“9. “Fraud” means an intention to deceive; whether it is from any expectation of advantage to the party himself or from the ill will towards the other is immaterial. The expression “fraud” involves two elements, deceit and injury to the person deceived. Injury is something other than economic loss, that is, deprivation of property, whether movable or immovable or of money and it will include and any harm whatever caused to any person in body, mind, reputation or such others. In short, it is a non-economic or non-pecuniary loss. A benefit or advantage to the deceiver, will almost always call loss or detriment to the deceived. Even in those rare cases where there is a benefit or advantage to the deceiver, but no corresponding loss to the deceived, the second condition is satisfied. See *Dr. Vimla v. Delhi Administration*, 1963 Supp (2) SCR 585 and *Indian Bank v. Satyam Fibers (India) Pvt. Ltd.*, (1996) 5 SCC 550: AIR 1996 SC 2592.

10. A “fraud” is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. See *S.P. Changalvaraya Naidu v. Jagannath*, (1994) 1 SCC 1: AIR 1994 SC 853.

11. “Fraud” as is well known vitiates every solemn act. Fraud and justice never dwell together. Fraud is a conduct either by letter or words, which includes the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations, which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous. Although in a ‘given case a deception may not amount to fraud, fraud is



anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res judicata. See Ram Chandra Singh v. Savitri Devi, (2003) 8 SCC 319.

12. “Fraud” and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence. It is a concept descriptive of human conduct. Michael Levi likens a fraudster to Milton's sorcerer, Comus, who exulted in his ability to, ‘wing me into the easy hearted man and trap him into snares’. It has been defined as an act of trickery or deceit. In Webster's Third New International Dictionary “fraud” in equity has been defined as an act or omission to act or concealment by which one person obtains an advantage against conscience over another or which equity or public policy forbids as being prejudicial to another. In Black's Legal Dictionary, “fraud” is defined as an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or surrender a legal right; a false representation of a matter of fact whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury. In Concise Oxford Dictionary, it has been defined as criminal deception, use of false representation to gain unjust advantage; dishonest artifice or trick According to Halsbury's Laws of England, a representation is deemed to have been false, and therefore a misrepresentation, if it was at the material date false in substance and in fact. Section 17 of the Indian Contract Act, 1872 defines “fraud” as act committed by a party to a contract with intent to deceive another. From dictionary meaning or even otherwise fraud arises out of deliberate active role of representator about a fact, which he knows to be untrue yet he succeeds in misleading the representee by making him believe it to be true. The representation to become fraudulent must be of fact with knowledge that it was false. In a leading English case i.e. Derry v. Peek, (1886-90) All ER 1 what constitutes “fraud” was described thus: (All ER p. 22 B-C) “fraud” is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false”. But “fraud” in public law is not the same as “fraud” in private law. Nor can the ingredients, which establish “fraud” in commercial transaction, be of assistance in determining fraud in Administrative Law. It has been aptly observed by Lord Bridge in Khawaja v. Secretary. of State for Home Deptt., (1983) 1 All ER 765, that it is dangerous to introduce maxims of common law as to effect



of fraud while determining fraud in relation of statutory law. "Fraud" in relation to statute must be a colourable transaction to evade the provisions of a statute. "If a statute has been passed for some one particular purpose, a court of law will not countenance any attempt which may be made to extend the operation of the Act to something else which is quite foreign to its object and beyond its scope. Present day concept of fraud on statute has veered round abuse of power or mala fide exercise of power. It may arise due to overstepping the limits of power or defeating the provision of statute by adopting subterfuge or the power may be exercised for extraneous or irrelevant considerations. The colour of fraud in public law or administration law, as it is developing, is assuming different shades. It arises from a deception committed by disclosure of incorrect facts knowingly and deliberately to invoke exercise of power and procure an order from an authority or tribunal. It must result in exercise of jurisdiction which otherwise would not have been exercised. The misrepresentation must be in relation to the conditions provided in a section on existence or nonexistence of which the power can be exercised. But nondisclosure of a fact not required by a statute to be disclosed may not amount to fraud. Even in commercial transactions non-disclosure of every fact does not vitiate the agreement. "In a contract every person must look for himself and ensures that he acquires the information necessary to avoid bad bargain. In public law the duty is not to deceive." See Shrisht Dhawan (Smt.) v. Shaw Brothers, (1992) 1 SCC 534: AIR 1992 SC 1555.

14. This aspect of the matter has been considered by this Court in Roshan Deen v. Preeti Lal, (2002) 1 LLJ 465 SC; Ram Preeti Yadav v. U.P. Board of High School and Intermediate Education, (2003) 8 SCC 311: AIR 2003 SC 4268; Ram Chandra Singh's case (supra) and Ashok Leyland Ltd. v. State of T.N., (2004) 3 SCC 1.

15. Suppression of a material document would also amount to a fraud on the court. see Gowrishankar v. Joshi Amba Shankar Family Trust, (1996) 2 SCR 949 and S.P. Chengalvaraya Naidu's case (supra).

16. "Fraud" is a conduct either by letter or words, which induces the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter. Although negligence is not fraud but it can be evidence on fraud; as observed in Ram Preeti Yadav's case (supra)."



44. In the context of invocation of unconditional BGs, it is no longer *res integra* that to come under the exceptions, the fraud alleged must be egregious fraud and it would be useful to allude to observations of the Supreme Court in this regard in **BSES (supra)**, as follows:-

“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 [See e.g. U.P. State Sugar Corpn. v. Sumac International Ltd., (1997) 1 SCC 568 at pp. 574-77, paras 12-16; State of Maharashtra v. National Construction Co., (1996) 1 SCC 735 at p. 741, para 13. See also United Commercial Bank v. Bank of India, (1981) 2 SCC 766; Centax (India) Ltd. v. Vinmar Impex Inc., (1986) 4 SCC 136.], that in U.P. State Sugar Corpn. v. Sumac International Ltd. [(1997) 1 SCC 568] (hereinafter “U.P. State Sugar Corpn.”) this Court, correctly declared that the law was “settled” [Ibid. at p. 574, para 12, per Sujata V. Manohar, J.]”

45. I may also usefully refer to the judgment of the Division Bench of this Court in **Consortium of Deepak Cable India Limited & Abir Infrastructure Private Limited (Dcil-Aipl) Thr Abir v. Teestavalley Power Transmission Limited, 2014 SCC OnLine Del 4741**, where the Court emphasized on the well recognized exceptions and one of them is fraud of egregious nature. Relevant passage is as follows:-

“145. ... That certain amounts have been recovered under running bills and have to be adjusted for is of no concern in matters relating to invocation of bank guarantee. That there are serious disputes on questions as to who committed the breach of the contract are no circumstances justifying granting an injunction pertaining to a bank guarantee. Plea of lack of good faith and/or enforcing the guarantee with an oblique purpose or that the bank guarantee is being invoked as a bargaining chip, a deterrent or in an abusive manner are all irrelevant and hence have to be ignored. There are only two well



recognized exceptions to the rule against permitting payment under a bank guarantee. The same are: -

A. A fraud of egregious nature;

B. Encashment of the bank guarantee would result in irretrievable harm or injustice of an irreversible kind to one of the parties.”

46. Legal position with respect to what constitutes ‘special equities’ is equally well settled. Recently, this Court in ***Hitachi Energy India Limited v. Sterlite Power Transmission Limited, 2023 SCC OnLine Del 1176***, emphasised on the precise contours and ambit of the expression ‘special equities’, re-stating that it should be of such a magnitude as would override the twin considerations of the express terms of the guarantee and the adverse effect, from the grant of injunction, on commercial dealings in the country. “Special equities”, must be so “special” so as to prevail over the two considerations, otherwise paramount, while examining a prayer for injunction against invocation of a bank guarantee. It was observed that while examining whether “special equities” exist or not, so as to justify the grant of a prayer for injuncting invocation of a bank guarantee, the Court has to tread warily, and cannot confer, on the expression “special equities”, so elastic a construction, as would snap the rule.

47. It is pertinent to note that law recognises distinction between an unconditional and a conditional BG. In ***Vinitec Electronics (supra)***, the Supreme Court was examining two distinct clauses, one in the initial BG and the other in the amended BG, where the former clause read *‘therefore, we, the Bank, hereby affirm that we are guarantors and responsible on behalf of the supplier up to a total of Rs.16,81,238.50 (Rupees Sixteen lakhs eighty-one thousand two hundred thirty-eight and paise fifty only) and we undertake to pay any*



sum or sums within the limit of Rs.16,81,238.50 (Rupees Sixteen lakhs eighty-one thousand two hundred thirty-eight and paise fifty only) as aforesaid upon receipt of written demand from the purchaser and Company within the validity of this bank guarantee establishing the supplier to be in default for the performance of their warranty obligations under the contract.' The said clause was substituted by another clause in the amended BG and the substituted portion read as '*... upon receipt of written demand from the Company within the validity of this bank guarantee.'* The Supreme Court observed that in the unamended BG the bank affirmed that they are guarantors and responsible on behalf of the supplier upto the amount guaranteed therein and had undertaken to pay any sum or sums within that limit upon receipt of written demand from the purchaser within the validity of the BG provided it was established that the supplier be in default for the performance of their warranty obligations under the contract. The Supreme Court further observed that it was abundantly clear that what was furnished was a conditional BG and bankers were liable to pay the amounts only upon establishing the fact that supplier was in default of warranty obligations under the contract. But by a subsequent letter, when the relevant clause was amended, Bank undertook to pay upon receipt of the written demand from the company within the validity of the Bank Guarantee and the amended clause made it abundantly clear that the Bank had undertaken to pay the amounts upto the limits mentioned in the BG. The condition that the amounts shall be paid only upon establishing the supplier to be in default for the performance of their warranty obligation under the contract had been specifically deleted making the BG an unconditional



one and the Bankers were bound to honour and pay the amounts at once upon receipt of written demand from the beneficiary. From a reading of the judgment, it is evident and lucidly illustrated that where the terms of the BG disclose a condition for invocation, it is conditional and if the conditions are not met or fulfilled, injunction against invocation and encashment may follow, however, in case of an unconditional BG, injunction will only be granted when any/or all the exceptions exist and are established by some evidence.

48. In light of these judgments, it becomes necessary, before moving forward, to examine whether the PBG in question in the present case is conditional or unconditional. For ready reference, relevant covenants of the Performance Bank Guarantee, furnished by Respondent No. 2 dated 11.09.2017, are extracted hereunder:-

"WHEREAS EIT SERVICES INDIA PRIVATE LIMITED, (formerly known as Hewlett Packard Global Soft Private Limited) (CIN U72300KA2000PTC026968), a company registered under the Companies Act, 2013 having its registered office at Digital Park, 39/40 Electronics City, Phase II Hosur Road, Bangalore 560100 and having place of business amongst other places, at Level V, Building No.7, Cyber Greens, DLF Phase-11, Gurgaon (hereinafter referred to as System Integrator" or "the Bidder as the case may be, which expression, unless excluded or the context otherwise-required hereof includes its successors, administrators and permitted assigns) has undertaken, in pursuance of Agreement dated 14 August 2017 to act as Systems Integrator for setting up of India Post Payments Bank Limited (herein after called "the Contract").

AND WHEREAS it has been stipulated by you in the said contract that the Bidder shall furnish you, atting through India Post Payments Bank Limited, a public limited company wholly owned by the Government of India set up under the Companies Act, 2013, and the Banking Regulation Act, 1949 as a payments bank under the Department of Posts, Govt of India and in line with relevant guidelines of the Reserve Bank of India, having its Registered Office at Post Office, Speed Post Centre Building, Market Road, New Delhi - 110001 and having a corporate office at Post Office Building, Malcha Marg Market, Chanakyapuri New Delhi 110021 with Corporate Identification Number (CIN) U74999DL2016GQ1304551, (hereinafter referred to as the



"Payment Barik", which expression shall unless repugnant to the context thereof, include its successors, assigns) with a bank guarantee by a Scheduled Commercial Bank recognized by you for the sum specified therein as security for compliance with its obligations in accordance with the contract;

AND WHEREAS we, Bank of America, N.A. having its Head Office at Charlotte, U.S.A. and acting through its branch office at I Ficor, DLF Centre, Sansad Marg, New Delhi-110001 (the " Guarantor Bank") has agreed to give the Bidder such a bank guarantee;

*NOW THEREFORE we hereby agree and affirm that we are the guarantor and responsible to you, on behalf of the Bidder, up to a total of **Rs. 68,92,59,908/- (Rupees Sixty Eight Crores Ninety Two Lakhs Fifty Nine Thousand Nine Hundred and Eight only)** (hereinafter referred to as the **Guarantee**") and we, Bank of America N.A, agree and undertake to pay you, acting through the Payment Bank, **upon your first written demand declaring the Bidder to be in default under the contract and without any demur, cavil or argument, any sum or sums within the limits of (amount of the Guarantee) as aforesaid, without your needing to prove or to show grounds or reasons for your demand or the sum specified therein.***

(emphasis supplied)

We, Bank of America N.A., hereby waive the necessity of your demanding the said debt from the Bidder before presenting us with the demand.

We, Bank of America N.A., further agree that no change or addition to or other modification of the terms of the Contract to be performed thereunder or of any of the Contract documents which may be made between you and the Bidder shall in any way release us from any liability under this Guarantee and we hereby waive notice of any such change, addition or modification.

This Guarantee shall be interpreted in accordance with the laws of India.

The Guarantor Bank represents that this Guarantee has been established in such form and with such content that is fully enforceable in accordance with its terms as against the Guarantor Bank in the manner provided herein

This Guarantee shall not be affected in any manner by reason of merger, amalgamation, restructuring or any other change in the constitution of the Guarantor Bank.

The Guarantor Bank further agrees and undertakes not to revoke this Guarantee during its currency except with the previous express content of the Payment Bank, in writing.



The Guarantor Bank declares that it has power to issue this Guarantee and discharge the obligations contemplated herein, the undersigned is duly authorized and has full power to execute this Guarantee for and on behalf of the Guarantor Bank The Guarantor Bank further declares and confirms that This Guarantee shall remain in force up to and Including Sixty(60) Days after the period of the Contract ie, 30th May 2023(the "Expiry Date") and any demand in respect thereof should reach the Guarantor Bank not later than the claim expiry date i.e., 30th May 2024.

This guarantee shall be valid until the 30th day of May, 2023.

Notwithstanding anything to the contrary contained herein-

- 1. Our liability under this Guarantee shall not exceed Rs. 68,92,59,908/- (Rupees Sixty Eight Crores Ninety Two Lakhs Fifty Nine Thousand Nine Hundred and Eight only)*
- 2. This Bank Guarantee shall be valid up to 30-May-2023 (being the date of expiry of the guarantee);*
- 3. We are liable to pay up to the guarantee amount only and only if we receive from you a written claim or demand no later than 12 months from the said expiry date i.e., 30 May-2023. (Date of expiry of guarantee). Unless a written claim or demand under this Guarantee is received by us on or before 12 months from the date of expiry of the guarantee, ie., 30-May-2024 (claim expiry date) all your rights under this Bank Guarantee shall be extinguished and we shall be relieved and discharged from all liabilities thereunder, irrespective of return of original Bank Guarantee."*

49. From a plain reading of the covenants of the PBG, it is clear that the obligation of Respondent No. 2 to remit the amount covered under the PBG to Respondent No. 1, the beneficiary, arises forthwith: (a) upon first written demand declaring the Bidder to be in default under the contract; (b) without any demur, cavil or argument; (c) any sum or sums within the limits of the guarantee; and (d) without needing to prove or to show grounds or reasons for the demand or the sum specified therein. The liability is absolute and unequivocal. Therefore, there is no room for doubt that on a mere demand by the beneficiary i.e. Respondent No. 1, Respondent No. 2 is bound to honour the PBG, without any demur and the only requirement is to



state in the invocation letter that there is a default under the contract. Inclusion of the words ‘without your needing to prove or to show grounds or reasons for your demand or the sums specified therein’, is further evidence and reflection of the fact that parties intended the obligation under the PBG to be outside the disputes between the Petitioner and Respondent No. 1 under the Agreements between them. In my view, therefore, the PBG being unconditional casts an onerous obligation on Respondent No. 2 to honour it on a mere demand by Respondent No. 1, without reference to and insulated from the *inter se* disputes under the MSA and SLA including SLRs. This Court is fortified in its view by the observations of the Co-ordinate Bench in ***SMS Limited v. Oil & Natural Gas Limited, MANU/DE/0041/2021:-***

“72. A bare reading of para 2 of the Bank Guarantees makes it clear that the bank has obligated itself to pay, to ONGC, the amounts covered by the Bank Guarantees,

- (i) “immediately on first demand in writing”,*
- (ii) “without any demur, reservation, contest or protest”,*
- (iii) “without any reference to the Contractor”, and has further covenanted that any such demand served, on the bank by ONGC by a written notice*
- (i) “shall be conclusive and binding, without any proof”,*
- (ii) “notwithstanding any dispute/disputes pending before any Court, Tribunal, Arbitrator or any other authority and/or any other matter or things whatsoever”,*

and that the liability of the bank in that regard is absolute and unequivocal.

*73. In the face of this recital, to which SMS has been a willing signatory, it can hardly be contended that the Bank Guarantees are conditional. The only conditions, subject to which the banks are required to honour the Bank Guarantees, as is contained in para 2, have already been set out hereinabove. The specific stipulation to the effect that the Bank Guarantees would be honoured “without any reference to the Contractor” is particularly reflective of the intent, of the Bank Guarantees, to remain totally aloof from the *inter se* dispute between ONGC and SMS.*



74. *The recital, at the conclusion of para 1 of the Bank Guarantees, to the effect that guarantees were being furnished by SMS to cover the liquidated damages, as per Clauses 6.3.2 and 6.3.3 of the contract, in my view, can, therefore, neither result in incorporation, by reference, bodily or otherwise, of the said Clauses in the Bank Guarantees, nor result in the exigencies, contemplated under the said Clauses, becoming conditions of the Bank Guarantees, fulfilment of which is necessary before the Bank Guarantees can be invoked. The Bank Guarantees furnished by SMS are therefore, in my view, absolute and unconditional, making the Bank liable to pay “immediately and on demand” by ONGC, without equivocation and “without any reference to the contractor”.*”

50. In **CRSC-I (supra)**, the Court was *in seisin* of similar issue pertaining to an almost identically worded BG. Deliberating on the covenants of the PBG dated 03.08.2016 and in the light of wealth of judicial precedent on the subject, the Court concluded that it was an unconditional bank guarantee, which the Bank was bound to honour and the beneficiary was entitled to invoke and encash the same. Relevant passages from the said judgment including the extract of the PBG in question are as follows:-

“37. These Advance Bank Guarantees were, subsequently, amended on 16th July, 2019; the amendment, however, does not impact the present proceedings, as it dealt, essentially, with the manner of crediting the advance payment into the account of Respondent No 1.

38. As against this, the relevant covenants of the Performance Bank Guarantee, dated 3rd August, 2016, issued by the Industrial and Commercial Bank of China Ltd, Mumbai Branch, read as under:

**“PERFORMANCE SECURITY
(DEMAND GUARANTEE)**

Beneficiary: Dedicated Freight Corridor Corporation of India Ltd. 5th Floor Pragati Maidan Metro Station Building Complex, New Delhi, 110001, India.

Date: 3rd Aug 2016

Performance Guarantee No. LG28501B600124

Guarantor: Industrial and Commercial Bank of China Ltd, Mumbai Branch. 8th Floor, A Wing, One BKC, Plot No. C-66, G Block of the Bandra Kurla Complex, Bandra East, Mumbai



We have been informed that Beijing National Railway Research and Design Institute of Signal and Communication Group Co. Ltd, Building No. 12, Block 1 of Advance Business Park, No. 188 Nansihuan Xilu Fengtai District, Beijing, China (hereinafter called 'The Applicant') will enter into Contract according to letter of acceptance No. HQ/S & T/EC/CP-203/BID EVAL./64/PART V dated 23.06.2016 which the beneficiary, for the execution of Contract No. CP 203 - Design, Supply, Construction, Testing and Commissioning of Signalling, Telecommunication and Associated Works of Double Track Railway Lines under Construction on Design Build lump sum basis for Mughalsarai-New Bhaupur Section of Eastern Dedicated Freight Corridor (hereinafter called 'The Contract').

Furthermore, we understand that, according to the conditions of the Contract, a Performance Guarantee is required.

At the request of the Applicant, we as Guarantor, hereby irrevocably undertake to pay the Beneficiary any sum or sums not exceeding in total an amount of INR 235,500,000.00/- (say Indian Rupees Two Hundred and Thirty Five Million Five Hundred Thousand Only), such sum being payable in the types and proportions of currencies in which the contract price is payable, upon receipt by us of the beneficiary's complying demand supported by the beneficiary's statement, whether in the demand itself or in a separate signed document accompanying or identifying the demand, stating that the Applicant is in breach of its obligation(s) under the Contract, without the Beneficiary needing to prove or to show grounds for your demand or the sum specified therein."

(Emphasis supplied)

39. *Clearly, the Advance Bank Guarantees and the Performance Bank Guarantee, are both conditional. The condition, which is required to be fulfilled, before the Bank would honour the Bank Guarantees is, however, merely the furnishing of a statement by the beneficiary, i.e. by Respondent No. 1. Nothing more is required. In the case of the Advance Bank Guarantees, the statement, to be presented by Respondent No. 1, is required to state that the petitioner has used the Advance Payment for purposes other than the costs of mobilization in respect of the works, or has failed to repay the Advance Payment in accordance with the contract conditions, specifying the amount which the petitioner has failed to repay. The Performance Bank Guarantee, on the other hand, requires Respondent No. 1 to furnish a statement, stating that the petitioner is in breach of its obligations under the contract. The Performance Bank Guarantee makes the matter even more explicit, by stipulating that Respondent No. 1 is not required to prove or show grounds, justifying the said statement. Though such a caveat is not to be found in the covenants of the Advance Bank Guarantees, the mere fact that they only required the furnishing of a statement, by Respondent No.*



1, and nothing more, incorporates, by implication, such a covenant. In other words, be it the Advance Bank Guarantees or the Performance Bank Guarantee, if Respondent No. 1 furnishes a statement, to the effect as stipulated in the Bank Guarantee(s), the Bank is bound to honour the Bank Guarantee, and Respondent No. 1 is entitled to invoke and encash it. There is no material to indicate that Respondent No. 1 has furnished, to the concerned Bank(s), statements, as required by the Bank Guarantees, towards invocation thereof.

40. *Having noted this, the Court deems it necessary to clarify that, even if there was material to indicate that such statements had been furnished, it would not be open to the petitioner to come to the Court, seeking a restraint on the invocation of the bank guarantees, on the ground that the statements were not correct. In other words, in the case of the Performance Bank Guarantee, for example, if Respondent No. 1 were to furnish a statement, to the Bank - in that case, the Industrial and Commercial Bank of China Ltd. - that the petitioner is in breach of its obligations under the contract, the Bank would, ipso facto, be obligated to honour the Bank Guarantee, and Respondent No. 1 would be entitled to invoke it. It would not be open to the petitioner to come to the Court, questioning the correctness of the statement furnished by Respondent No. 1 to the Bank, by contending that it had not, in fact, breached its obligations under the contract, for the simple reason that the dispute between the petitioner and Respondent No. 1 is entirely foreign to the bank guarantee, and to the obligations of the Bank under the bank guarantee, which requires only furnishing of a statement by Respondent No. 1, and nothing more. The bank guarantee constitutes an independent contract between the Bank and Respondent No. 1, which has to abide by the covenants of that contract.”*

51. Having held that the PBG in the present case is an unconditional BG, which the guarantor Bank is bound to honour without any demur and cavil, the next question is whether invocation/ encashment of the PBG can be restrained. Clearly aware of the well-settled legal position on invocation/ encashment of unconditional BGs, Mr. Parag Tripathi, learned Senior Counsel argued to bring the case of the Petitioner within the recognized exceptions i.e. egregious fraud and special equities. It is thus to be seen as to what grounds have been set up by the Petitioner in the pleadings to bring its case within the



four corners of the two exceptions. With respect to the alleged fraud, the pleadings indicate that Petitioner has averred that claim for damages is not in the nature of 'money payable' unless it is either admitted or adjudicated by an Arbitrator or any Court of law and in the present case there is neither an admission nor adjudication of any sum due or payable by the Petitioner to Respondent No. 1. It is further averred that *inter alia* by its letters dated 21.02.2022 and 21.07.2022, Petitioner has intimated Respondent No. 1 that it does not agree with the penalty levied and has sought a refund and thus in the absence of any money payable/sum due *in praesenti* from the Petitioner, invocation of the PBG by Respondent No. 1 is *ex facie* fraudulent. It is pleaded that given that Respondent No. 1 has elected to levy penalties and make deductions from the running invoices of the Petitioner, which deductions are disputed, Respondent No.1's attempt to *malafidely* terminate the agreement and that too one day before the expiry of the term, is an attempt to fraudulently invoke the PBG, contrary to the terms of MSA. Further, as on date, Respondent No. 1 owes monies to the extent of Rs.1,63,70,86,384/- to the Petitioner in terms of invoices raised under MSA, which Petitioner has repeatedly called upon Respondent No. 1 to pay, but to no avail. In addition, Respondent No. 1 owes approximately Rs.88 crores towards invoices yet to be raised by the Petitioner.

52. Insofar as 'special equities' are concerned, case of the Petitioner is predicated on 'double benefit' in favour of Respondent No. 1 and 'double jeopardy' to the disadvantage of the Petitioner and this in turn is premised on Clause 6.3 of MSA which deals with 'liquidated damages'. This clause in fact is really the heart and soul of the dispute



in the present case. As per the pleadings in the petition, Petitioner's case is that PBG is a conditional BG and cannot be invoked without the conditions set out therein. Without prejudice, it is further averred that invocation of PBG has to be in accordance with the purpose for which it is executed failing which the invocation is invalid and *non est*. None of the conditions for levy of LD and/or consequent invocation/encashment of PBG have been satisfied by Respondent No.1, according to the Petitioner, before issuing the invocation letter. It is stated that under Clause 6.3 of MSA, in the event of breach of MSA by the Petitioner, which breaches are totally denied, Respondent No. 1 may either deduct from the PBG or from the payments due to the Petitioner, as agreed estimated LD, a sum as specified in SLRs, for the particular product/system/service, upto a maximum deduction of 10% of the Agreement value. In the present case, the PBG furnished by the Petitioner aggregates to a sum of Rs.68,92,59,908/-. In terms of Clause 6.3, maximum cap which can be recovered towards LD is 10% of the agreement value, which amounts to Rs.68,92,59,908/-. This amount has already been deducted by Respondent No.1 against the payments due to the Petitioner and therefore it is legally impermissible to invoke the PBG for the same alleged breaches again. This according to the Petitioner is disproportionate, unjust and inequitable. It is further averred that there is no breach on the part of the Petitioner under the relevant Agreements. Moreover, the PBG was given for the purpose of securing the performance of the Petitioner and Petitioner has substantially performed its obligations as major part of the contract is complete. In fact, sums amounting to nearly Rs.200 crores are outstanding towards the Petitioner. Permitting Respondent No.1 to



exercise the right to invoke and encash the PBG would lead to recovering money from the Petitioner twice over and that too beyond the maximum penalty of 10% of the contract value, which can be imposed under Clause 6.3. Injunction is therefore sought by claiming special equities on this score.

53. Having carefully perused the pleadings pertaining to the alleged fraudulent invocation of the PBG, I am of the view that no case is made out of fraud, much less egregious fraud on the part of Respondent No. 1. In order to establish fraud, Petitioner is required to show that Respondent No. 1 has attempted to deceive with a deliberate intent and design to secure an advantage or misrepresent in any manner. Fraud and deception are synonymous *albeit* in a given case mere deception may not amount to fraud. As per Section 17 of the Indian Contract Act, 1872, 'fraud' is an act committed by a party to a contract or by its connivance or its agent with intent to deceive the other party to the contract or its agent and the dictionary meaning connotes that fraud arises out of deliberate active role of representor about a fact, which he knows to be untrue and yet succeeds in misleading the representee by making him believe it to be true. The case of the Petitioner essentially is that no ascertained sum of money is due *in praesenti* from the Petitioner or that the election of Respondent No. 1 to levy penalties from running invoices is *malafide*, with an attempt to terminate the Agreement or that Respondent No. 1 owes money to the Petitioner to the extent of over Rs.200 crores out of which approximately Rs.88 crores are towards invoices yet to be raised. In the considered view of this Court, these averments at the highest can be said to be 'disputes' arising between the parties, in fact



and/or law, but cannot be termed as ‘fraudulent acts’, embedded in deceit and will be adjudicated before the appropriate forum. In this context, I may refer to the observations in **CRSC-I (supra)**, where similar contentions were raised by the Petitioner, seeking injunction against invocation of an unconditional BG, pitching its case on egregious fraud. Examining the ingredients of ‘fraud’, the Court negated the contention and held as follows:-

“46. “Fraud” was defined, in *Ram Preeti Yadav v. U.P. Board of High School and Intermediate Education*, (2003) 8 SCC 311 as “conduct either by letter or words, which induces the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter”. In *U.O.I. v. Chaturbhai M. Patel & Co.*, (1976) 1 SCC 747, the Supreme Court held, relying on the judgment of Lord Atkin in *A.L.N. Narayanan Chettyar v. Official Assignee, High Court, Rangoon*, AIR 1941 PC 93, that “fraud like any other charge of a criminal offence whether made in civil or criminal proceedings, must be established beyond reasonable doubt.” The aspect was clarified by holding, further, that “however suspicious may be the circumstances, however strange the coincidences, and however grave the doubt, suspicion alone can never take the place of proof.” This position was reiterated in *Kale v. Deputy Director of Consolidation*, (1976) 3 SCC 119, which held that “allegations of fraud or undue influence must first clearly be pleaded and then proved by clear and cogent evidence”. “Mere pleadings”, held the Supreme Court in *Svenska Handelsbanken v. Indian Charge Chrome*, (1994) 1 SCC 502, “do not make a strong case of prima facie fraud”, which had to be shown by “material and evidence”. More recently, the Supreme Court, in *M. Sankaranarayanan v. Deputy Commissioner, Bangalore*, (2017) 13 SCC 661, echoed the sentiment, by holding that “fraud must be pleaded and proved; it cannot be presumed”.

47. I have already set out, hereinabove, the various grounds urged by the petitioner, in support of its prayer for the stay of invocation of the bank guarantees furnished by it, and a mere glance thereat would reveal that no case, of fraud, much less egregious fraud, on the part of Respondent No. 1, can be said to have been made out. No attempt, on the part of Respondent No. 1, to deceive the petitioner, can be said to exist, on the facts as pleaded and the material adduced by the petitioner. The submissions of Mr. Nayar, as also in the written submissions filed by the petitioner before this Court, are essentially that the termination of the contract, by Respondent No. 1 was premature, the time for completion thereof, as



extended by Respondent No. 1 having not yet expired; that, by extending the time without charging delay damages, Respondent No. 1 had acknowledged that there was no default on the part of the petitioner; that there was no change of circumstances between 22nd April, 2020 and 3rd July, 2020; that a force majeure situation existed; that, when the dispute was pending before the DAB, Respondent No. 1 could not have terminated the contract; that, even if Respondent No. 1 wanted, prematurely, to discontinue the relationship with the petitioner, the proper Clause to be invoked was Clause 15.5; Clauses 15.3 and 15.4 could not be invoked, as there was no valid termination of the contract under Clause 15.2; Respondent No. 1 had not proceeded in accordance with Clause 2.5 of the contract, and there had been no a prior determination of the entitlement, of Respondent No. 1, to any amount from the petitioner, as required by Sub-Clause 4.2(d). The submissions, in my view, cannot be said to make out any case of “fraud”, much less egregious fraud, on the part of Respondent No. 1.”

54. Insofar as ‘special equities’ are concerned, which is the mainstay of Petitioner’s case, having examined the rival arguments in the light of the judicial precedents on this issue, this Court is unable to agree with the Petitioner. As noted above, special equities are claimed primarily on the ground that having once deducted the maximum amount of 10% of the contract value towards LD from the payments due to the Petitioner, Clause 6.3 of MSA bars Respondent No. 1 from deducting the same amount for same breaches by invocation of the PBG all over again. Connected and ancillary arguments have been raised that amounts have been illegally deducted from running invoices and that the Petitioner is not in breach of the terms of MSA, SLA including SLRs. Heavy reliance was placed on the judgment of the Supreme Court in *Kailash Nath (supra)* as well as other judgments on the subject, to urge that when a contract prescribes a ‘liquidated damages’ clause, the sum designated as liquidated damages represents the ceiling or the upper limit beyond which damages cannot be levied or awarded and the invocation of PBG is



thus manifestly inequitable and unconscionable. Contentions of Respondent No. 1 that PBG has been invoked exercising rights under different clauses of the Agreements including step-in rights, indemnity obligations and obligations of the Petitioner under ‘Representations and Warranties’ etc. have been vehemently denied by urging that Clause 6.3 provides that LD cap will apply in respect of ‘any breach of the Agreements’ and even assuming that Respondent No. 1 could invoke PBG for reasons other than levy of LD, it has chosen not to do so and invocation is restricted to recover LD. Without prejudice, it was also urged that the position adopted by Respondent No. 1 that since the Agreements have been terminated, the LD cap under Clause 6.3 will not apply as Clause 6.2.2 comes in and gives right to invoke PBG upon termination, is wholly misconceived. Whatever be the breaches, penalty cannot go outside and beyond the pre-estimated damages agreed between the parties in the form of 10% contract value as LD and categorically stipulated in Clause 6.3. It was also urged that the Courts have always frowned upon a party who seeks to obtain a ‘double benefit’ and have restrained invocation of bank guarantees wherever it is found that the beneficiary is attempting to claim monies, both from the bank guarantees as well as through adjustment from parallel means, as in the case of *KKSPUN (supra)* and such circumstances have been held to constitute special equities. Petitioner has also raised issues of the validity of termination of the Agreement on several grounds and has assailed invocation of PBG on the ground that in terms of Clause 6.5(3) of Volume II RFP, the right to forfeit the PBG is only in the event of breach of contract by the Petitioner, after serving a prior notice of 15 days as also that in terms of Clause



4.1.7.5.1(14) of RFP Volume III, prior to invoking the PBG, Respondent No. 1 was obliged to issue a clear 30 days' notice. Petitioner has also questioned the termination by stating that the claims of Respondent No. 1 are entirely false and incorrect towards alleged non-linkage of 1.4 crore images to accounts in DMS resulting in tentative expense of Rs.445 crore or alleged failure of the Petitioner to provide perpetual license of Finacle Application, resulting in additional tentative expense of Rs.170 crore. Details of the respective obligations have been given to underscore the point that Petitioner is not solely responsible for the breaches. Added to this was the contention that the fear of Respondent No. 1 can be assuaged by keeping the PBG alive, which in any case has a claim period upto 30.05.2024, till the reference is made to the Arbitral Tribunal, since Petitioner has invoked the Arbitration Agreement existing between the parties.

55. Respondent No. 1 in its detailed reply has refuted the submissions and contentions of the Petitioner, most importantly, the alleged LD cap under Clause 6.3 in respect of any breach of the Agreements. In a nutshell, the argument of Respondent No. 1, without prejudice to its prime contention that adjudication of disputes on merits is beyond the remit of this Court, is that Clause 6.3 is not a standalone clause and cannot be read in isolation and bereft of the obligations and rights of the parties under various other clauses of the Agreements. Respondent No. 1 has asserted its rights to invoke PBG under Clause 6.3.2.6 as step-in rights; Clause 6.2.2 pertaining to effect of termination depending on the event of default; Clause 14 of Representations & Warranties; Clause 6.3.2.6.6 concerning the right



to get the breaches rectified and invoke PBG for Affected Services etc. The alleged LD cap under Clause 6.3 is seriously disputed *inter alia* on the grounds that the clause does not deal with invocation of BG and only provides for deduction from PBG/any payments due from the Petitioner and secondly, the rights available to Respondent No. 1 are without prejudice to other remedies under different clauses to invoke PBG.

56. Having given a thoughtful consideration to the argument on special equities, this Court cannot subscribe to the stand of the Petitioner. The averments pertaining to double benefit, ceiling of LD limit, validity of termination, failure to give cure notice, exercise of rights of step-in, indemnity clause etc. underscore and highlight the disputes which have arisen between the parties and have the potential of being referred for adjudication before an appropriate forum, but cannot be read as special equities arising in favour of the Petitioner, justifying an injunction against invocation of the unconditional PBG. In this context, I may extract hereunder a few passages from ***CRSC-I (supra)***, where a similar issue arose before the Court:-

“48. On the second aspect, of the likelihood of irretrievable injustice occurring to the petitioner, were stay of invocation of the bank guarantee not granted, the petitioner seeks to liken the situation to that which was obtained in Itak Corpn, 566 Fed Supp 1210 (1983) to plead that “even if the petitioner succeeds in the arbitration proceedings, it may not be able to recover the award amount from Respondent No 1”. The contention, in my view, is wholly without merit. Itak Corpn, 566 Fed Supp 1210 (1983) involved a situation in which an exporter, in USA, entered into an agreement with the Government of Iran. Certain letters of credit, issued by an American Bank, in favour of an Iranian Bank, constituted part of the contract. The USA exporter sought an order terminating its liability, consequent on the said letters of credit. This, in turn, was sought as, consequent on hostilities between the US and the Iraqi government, all Iranian assets, within the jurisdiction of the US, were blocked by the US government, which also cancelled the



export contract. In these circumstances the Court upheld the contention of the US exporter that any claim for damages, against the Iranian purchaser, even if decreed by the Courts in the US, would not be executable in Iran. In these circumstances, as realisation of the letters of credit would result in irreparable harm to the American plaintiff, relief as sought, was granted. There is no parallel, whatsoever, between that case and this. Here, if the plaintiff is to succeed in arbitration, there is no reason why it would not be able to enforce the award against Respondent No. 1 - which, as the learned Solicitor General correctly submits, is a reputed Indian Company - in India. The two cases are as alike as chalk and cheese.

49. *Which leaves us with the third circumstance, in which stay of invocation of an unconditional bank guarantee can be legitimately directed by the court, i.e. the existence of special equities. Again, the petitioner has, undoubtedly, averred, in the petition, that such “special equities” do exist; the justifiability of the averment, however, requires to be examined.*

50. *Without extracting the specific references, to the existence of “special equities”, as made in the petition, suffice it to state that the only ground, on which the petitioner has urged the existence of such “special equities”, is its averment that its claim, against Respondent No. 1, is far in excess of the amounts of the bank guarantees. There is no other ground, on which the existence of “special equities” has been pleaded.*

51. *Can a mere claim, of the petitioner, against the respondent - the sustainability of which is yet to be adjudicated - constitute “special equities”, so as to justify injuncting the invocation of unconditional bank guarantees, issued by the bank, at the petitioner's instance, in favour of Respondent No. 1, even if such a claim is in excess of the amount covered by the bank guarantees? In my considered opinion, it cannot.*

52. *Extrapolating from the principle enunciated in Fenner India Ltd. in the context of irretrievable injury, I have already opined, hereinbefore, that “special equities” must be so special as to override the twin considerations of the sanctity of the terms of the bank guarantee, and the deleterious effect which the grant of injunction, against honouring of unconditional bank guarantees, would have on the commercially transacting public. The Supreme Court has held, in Meet Singh v. State of Punjab, that the word “special” means “distinguished by some unusual quality, peculiar or out of the ordinary” and that it “has to be understood in contradistinction to the word ‘general’ or ‘ordinary’.” Viewed in this background, Respondent No. 1 is entitled, on the express terms of the bank guarantees, to their invocation in its favour, subject to Respondent No. 1 submitting the required signed statements. The Performance Guarantee goes so far as to specifically stipulate that*



Respondent No. 1 was not required to prove or establish the breach of contract, on the part of the petitioner, before being entitled to the invocation of the bank guarantee. These are strong equities in favour of Respondent No. 1, and the sanctity attached to bank guarantees, and to the credibility of the banking system which provides such guarantees, serves to augment the equities. Can these equities be offset by the mere fact that the petitioner may have a yet to be established claim, against Respondent No. 1, so as to justify restraining the Bank from honouring the covenants of the bank guarantees? The answer, in my opinion, has necessarily to be in the negative.”

57. This issue also came up before this Court in ***Wig Brothers Construction Private Limited v. Indiabulls Constructions Limited***, **2017 SCC OnLine Del 7374**. Invoking the exceptions recognized by Courts to the well accepted position of law that invocation of unconditional bank guarantees ought not be restrained, it was urged by the Petitioner in the said case that from the bills raised by the Petitioner, it was apparent that one part of the mobilization advance already stood adjusted against the bills submitted in the past and the entire mobilization advance stood recovered from the Petitioner and therefore, the action of the Respondent in proceeding to encash the BGs for the same advance amounted to fraud, attracting the exception to the general rule. In order to adjudicate on this controversy, the Court took note of the legal position regarding the power of the Court to interdict encashment of bank guarantee, especially the judgment of the Division Bench of this Court in ***Consortium of Deepak Cable (supra)***, relevant passages of which have been extracted above and in which it was held that whether certain amounts have been recovered under running bills and have to be adjusted for, is of no concern in matters relating to invocation of unconditional BG. Serious disputes on questions as to who committed the breach are no circumstances



justifying an injunction and the plea of lack of good faith or enforcing the guarantee with an oblique purpose is also irrelevant. Based on these observations as well as the judgments of the Supreme Court on the issue of invocation of unconditional BGs, this Court in **Wig Brothers (supra)** held as follows:-

“21. From the facts pleaded in the present petition, it could at the highest bring the case of the Petitioner under the category of a wrong invocation of a BG for which the remedy lies in claiming damages. The Court is also not satisfied that the facts of the present case are similar to the facts in Gangotri Enterprises Limited v. Union of India (supra) where, in para 42, the Supreme Court highlighted the circumstances that persuaded it to proceed to grant an injunction.

22. The wording of the BGs in the present case is unambiguous. The bank has no option but to honour the BGs upon invocation in terms thereof by ICL. In General Electric Technical Services Company Inc. v. Punj Sons (P) Ltd. (1991) 4 SCC 230 and as reiterated in BSES Limited v. Fenner India Limited (supra), “the liability of the Bank remained intact irrespective of the recovery of mobilisation advance or the non-payment under the running bills. The failure on the part of (the Beneficiary) to specify the remaining mobilisation advance in the letter for encashment of bank guarantee is of little consequence to the liability of the bank under the guarantee.”

23. Recently, in TRF Ltd. v. Energo Engineering Projects Ltd. (decision dated 17th February, 2017 in OMP (I) (Comm.) 66/2017), this Court observed as under:

“50. ... the fact that the beneficiary may have already recovered much of the amounts secured by the BG are not relevant in deciding whether an injunction should be granted against invocation of such BG, particularly when it is unconditional. In other words, an unconditional BG has always been considered on a different footing by the Court. Even where a BG is wrongly invoked and encashed by a party, the remedy for the other party where the BG is unconditional is only to seek to make a claim against such allegedly unlawful invocation and encashment of the BG. It may not be a good ground to require the Court to injunct the encashment of the BG.”

24. The Court is also not satisfied that there are any special equities in favour of the Petitioner at this stage which could persuade the Court to hold that irretrievable injustice would be



caused to the Petitioner if BGs in question were permitted to be encashed by ICL.”

58. The judgment of this Court in ***SMS Limited (supra)*** is also applicable to the present case to the extent of the position of law reiterated therein. In the said case, Clause 6.3.2 was the liquidated damages clause, permitting ONGC to recover from the contractor ascertained and agreed liquidated damages, a sum equivalent to ½% of the total contract price for each week’s delay subject to maximum of 10% in case of delay beyond the scheduled completion date. Clause 6.3.2.2 entitled ONGC to accept the BG from the Petitioner towards maximum LD. On disputes having arisen between the parties, ONGC issued the impugned communication to pay the demanded amount and also wrote to the concerned Bank to honour the BG. Conscious of the law on invocation of unconditional BGs, the argument of the Petitioner was that it was agreed between the parties that contractor shall furnish to ONGC a bank guarantee to cover the amount of LD as per Clauses 6.3.2 and 6.3.3 of the contract, which resulted in incorporation by reference, these clauses into the BGs. Simply understood, the stand was that by incorporation of these clauses of LD into the BGs, resulted in the exigencies contemplated in these clauses being transmuted as conditions for invocation of BGs, which therefore became unconditional in nature and could not be invoked. Examining the BGs in question, the Court came to a conclusion that the BGs were unconditional and the Bank was bound to honour without reference to and notwithstanding any disputes between the parties, on a mere demand in writing, without any demur or protest. It was thereafter held that BGs are essentially contracts between the Bank and the beneficiary and their invocation cannot be conditional on merits of the



disputes in the main contract unless those conditions are incorporated as pre-conditions. On this touchstone, dealing with the contention of the Petitioner, the Court made certain observations, which are relevant for the present case and are that the BGs being unconditional, ONGC had a right to invoke if the demanded amount was not paid by the Petitioner and there can be no restraint against invocation. If the BGs were invoked without due justification, remedy of the Petitioner would be to seek relief in arbitral proceedings or otherwise in accordance with law and not to seek injunction against invocation of BGs. Whether the Petitioner is or is not, bound to pay the amount claimed by ONGC was not an issue which the Court could adjudicate in a petition under Section 9 of the Act, being a claim for money.

59. In *Garg Builders (supra)*, tenders were awarded to the Petitioner by HPL for carrying out construction activities and each of the agreements required the Petitioner to provide BGs towards security deposit as well as PBGs, which were furnished by HDFC Bank. Disputes having arisen, Petitioner filed a petition under Section 9 before this Court seeking pre-arbitral interim reliefs. One of the contentions before the Court, as captured in the judgment, was that a communication dated 17.08.2021 from HPL to the Petitioner in the opening paragraph recorded the approval of the competent authority for withholding an amount of Rs.25 lakhs from the bills raised by the Petitioner towards LD for alleged delay by the Petitioner in carrying out obligations under the Agreements. This amount was in fact recovered subsequently. The case of the Petitioner was that there was no justification for HPL seeking, all over again, to effect further recovery by invocation of the BGs. It was also urged that BGs have



been renewed and no prejudice would be caused to HPL if till the resolution of disputes by arbitration, status quo was directed to be maintained with respect to the BGs.

60. The Court observed that in view of the well crystallised law on the subject, any reference to the original dispute between the parties, relating to performance of the contract, was completely irrelevant to the issue of stay of invocation of BGs. It was held that the dispute has necessarily to form substratum of an entirely different proceeding, to be resolved either by arbitration or adjudication by a Court. With these prefatory observations, the Court first itemized the basic principles relating to BGs, their invocation and interdiction of such invocation, which has been extracted in the earlier part of the judgment. The Court further held that though the opening preambular recital identifies the purpose for providing the BG by a contractor as ensuring compliance of its obligations under the Agreement, the only condition requiring fulfilment entitling HPL to invoke the guarantee is '*a demand.... stating that the amount claimed (was) required to meet the recoveries due or likely to be due from*' the Petitioner. Significantly, the Court further observed that whether these amounts were actually due or likely to be due was an issue completely irrelevant for the purposes of the BGs and all that was required a statement from HPL to the Bank that the amounts were due or likely to be due from the Petitioner and once such a statement was made, neither could the Bank refuse to honour the BG by going behind the statement or seeking to verify whether the statement was right or wrong and nor could the Court interdict the invocation. An extremely relevant observation in the judgment to the present case is that if the grievance of the Petitioner



was that invocation by HPL was contrary to the covenants in the parent agreement, remedy was to proceed against HPL to recover the monies from HPL and not to interdict the invocation, which was a matter between the Bank and HPL and to which Petitioner was a complete stranger. The grievance between Petitioner and HPL being relatable not to the covenants of the BG but to the Agreement between Petitioner and HPL, would have to be decided on the basis of appropriate protocol in that regard; if arbitrable then by arbitration else by judicial adjudication. Relevant paragraphs are as follows:-

“41. It is a important to note the specific stipulation, in the bank guarantee, that the only requirement to be met by HPL was raising of a demand on the bank, stating that the amount claimed was required to meet recoveries due or likely to be due from the petitioner. Whether these amounts were actually due or likely to be due is, for the purposes of the bank guarantees forming subject-matter of the present petition, completely irrelevant. What was required was a statement from HPL to the bank, stating that these amounts were due or likely to be due from the petitioner.

42. Once such a statement was made, neither could the bank refuse to honour the bank guarantee by going behind the statement or seeking to verify whether the statement was right or wrong, nor could any court interdict such invocation on that ground. To repeat, what was required by the bank guarantees was a statement by HPL that the amounts in question were required to meet the recoveries due or likely to be due from the petitioner, and no more. Once such a statement was made, any interdiction against invocation of the bank guarantee by examining whether, in fact, any such amount was, or was not, due from the petitioner to HPL, would be an unjustified exercise and would also be in the teeth of the express covenants of the bank guarantee.

43. A plea for stay of invocation of a bank guarantee would be predicated either on the premise that the invocation was contrary to the terms of the agreement between the parties or contrary to the terms of the bank guarantee itself.

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.

45. If, therefore, the grievance of the petitioner is that the invocation of the bank guarantee by HPL, though otherwise in accordance with the covenants in the bank guarantee, is contrary to the covenants in the parent agreement, the remedy with the petitioner would be to proceed against HPL to recover the monies released by HPL by invocation of the bank guarantees, not to interdict such invocation, which is a matter between the bank and HPL, and to which the petitioner is a complete stranger. The grievance of the petitioner, in such an event, is vis-à-vis HPL, and not the bank. The grievance between the petitioner and HPL, being relatable not to the covenants of the bank guarantee, but to the covenants of the agreement between the petitioner and HPL, would have to be decided on the basis of the appropriate protocol in that regard; if arbitrable, by arbitration, else by judicial adjudication.

46. In the present case, the covenants in the contract, as well as the aspect of compliance/non-compliance with the contractual obligations have not been made conditions governing honouring of the bank guarantees by the bank. The bank guarantee dated 17-12-2016, merely requires HPL to demand, of the bank, the amount governed by the bank guarantee and the bank would become immediately liable to transmit the amount to HPL. The remaining three bank guarantees are a trifle more specific, in requiring the demand from HPL to state that the amount claimed was required to meet the recoveries due or likely to be due from the petitioner. Once such a demand, with such a statement, is made by HPL, the demand is conclusive regarding the amount covered thereby and operates proprio vigore, rendering the bank liable to honour the bank guarantee and to pay, to HPL, the amount covered by the bank guarantee, as demanded by it. All the four bank guarantees are equally categorical in stipulating that the demand by HPL would be conclusive regarding the liability of the bank, notwithstanding any dispute raised by the contractor i.e. the petitioner.



47. *There is no dispute that the letter dated 1-7-2021, from HPL to the bank specifically stated that the amount claimed was required to meet the recoveries due or likely to be due from the petitioner. The contractual precondition in the bank guarantees, thereby, stood completely satisfied. The bank became, thereby, bound, by law, to credit the amount covered by the bank guarantees into the account of HPL.*

48. *Applying the above principles to the fact of the present case, it is clear that no case for interdicting invocation of the subject bank guarantees, consequent on the letter of invocation dated 1-7-2021, issued by HPL to the bank, can be said to exist. As already noted, the stipulation, in the letter, to the effect that the amount claimed was required to meet the recoveries due or likely to be due from HPL satisfied the pre-invocation requirement as contained in the bank guarantee. Whether, in fact, these amounts were due or likely to be due, from the petitioner are beyond the scope of inquiry by the court and, indeed, was also beyond the scope of inquiry by the bank when approached by HPL. Once HPL made the requisite statement in terms of the concerned clauses in the bank guarantees, the matter had to address there. Subsequently, if it was found that the statement was incorrect as the petitioner would seek to contend the remedy with the petitioner would be to seek restitution in the substantive arbitral proceedings. There are several ways in which this can be done, and it is not for this Court to offer any suggestion in that regard. Suffice it to state that no case for restraining invocation of the bank guarantees, as having been invoked contrary to the terms of the bank guarantees, can be said to exist.*

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51. *The petitioner's contention that HPL owes, to the petitioner, amounts in excess of the amount covered by the bank guarantees is obviously completely tangential to the issue at hand. Any amounts owed by HPL to the petitioner would have to form subject-matter of resolution by arbitral proceedings. This Court does not require to return any finding, in the present case, regarding the petitioner's entitlements against HPL, or vice versa.*

52. *Nor can the present case be said to be one of special equities or irretrievable injustice. Indeed, the contention of learned Senior Counsel for the petitioner was essentially predicated on the irretrievable injustice principle, as learned Senior Counsel sought to contend that the financial condition of HPL was so precarious that, were the bank guarantees to be permitted to be encashed and the amounts credited into the account of HPL, there was every likelihood of HPL not being financially in a position to reconstitute the petitioner, even though the petitioner to succeed in arbitration.*



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54. *Special equities, as held by the Supreme Court in U.P. State Sugar Corpn. v. Sumac International Ltd., (1997) 1 SCC 568 and in Svenska Handelsbanken v. Indian Charge Chrome, (1994) 1 SCC 502, have to partake the character of irretrievable injustice. Even otherwise, it cannot be said that any such case of special equities has been made out by the petitioner, as would justify interdicting invocation of the subject bank guarantees. Indeed, the contentions of learned Senior Counsel for the petitioner essentially revolved around compliance with the conditions stipulated in the bank guarantee for transfer of the guaranteed amount to the credit of HPL, and on the aspect of irretrievable injustice.”*

61. Coming to the present case, as already held above, PBG in question is an unconditional Bank Guarantee, a separate contract between Respondent No.1 and Respondent No.2, to which the *inter se* disputes between the Petitioner and Respondent No.1 are completely alien and irrelevant. While Petitioner contends that the maximum penalty under the contract to the extent of 10% of the contract value, having been deducted, cannot be recovered again, Respondent No.1 has urged to the contrary, that no liquidated damages have been levied on the Petitioner till date and termination of the Agreements as well as the invocation of PBG is only for reasons of breach of terms of the Agreements on account of non-performance, non-delivery of deliverables and wilfully choosing not to cure defects, despite providing sufficient time to cure as per Clauses 6.1, 6.2 and 6.2.2 of MSA and is not under Clause 6.3 of MSA. Relevant paragraphs from the reply affidavit are as follows:-

“It is evident that the notice of termination dated 10.07.2023, was served by the Respondent Bank to the Petitioner for Termination and invoking & forfeiture of Performance bank Guarantee only for the reasons of breach of non-performance, non-delivery of deliverables and wilfully choosing not to cure those defects even after providing a sufficient time to cure those defects as per clause 6.1, 6.2 & 6.2.2 of the Master services Agreement dated 14.08.2023 and not as per clause 6.3 of the Master services Agreement dated 14.08.2023.



It is again reiterated that, no liquidated damages are levied on the Petitioner till date and the Notice of Termination dated 10.07.2023, was served by the Respondent Bank to the Petitioner for Termination and Invoking/ Forfeiture of Performance Bank Guarantee, Imposition of penalty & recovery of losses, for the reasons of breach of non-performance, non-delivery of deliverables and willfully choosing not to cure those defects even after providing a sufficient time to cure those defects as per clause 6.1, 6.2 & 6.2.2 of the Master services Agreement dated 14.08.2023 and not as per clause 6.3 of the Master services Agreement dated 14.08.2023. Even assuming though not admitting, for the sake of argument that a notice was required to be served to the Petitioner prior to Invocation of the Performance Bank Guarantee, it is submitted that numerous notices were served upon the Petitioner notifying it of the defaults and/or Breaches and/or Material Breaches categorically stating therein that the Performance Bank Gurantee shall be invoked/ forfeited on failure to cure the defects/breaches/material breaches noted therein. That the contents of Preliminary Submissions and Factual Position in Brief as well Parawise Reply to the Petition hereinabove shall also be read as part and parcel to the corresponding paras under reply as the same are not repeated herein for the sake of brevity.”

62. In light of the principles elucidated in the aforementioned judgments, stand of Respondent No.1 that LD has not been levied and invocation is not in terms of Clause 6.3 of the MSA coupled with the fact that the Bank Guarantee in question is a Performance Bank Guarantee linked to performance under the Agreements, it is neither legally permissible nor appropriate for this Court to enter into adjudication of the question whether the amount already deducted by Respondent No.1 is the maximum sum that can be recovered under the Agreements, which contain several clauses relating to performance obligations, warranties etc. and consequent rights of invocation of PBG. In the absence of this finding, which can only be arrived at in arbitral proceedings, this Court is unable to conclude that encashment of PBG is a double recovery for the same breaches, as alleged by the Petitioner. The disputes pertaining to the amounts paid or payable to



the Petitioner and/or recoverable by Respondent No.1 are also beyond the scope and ambit of a petition under Section 9 of the Act.

63. Insofar as the argument that sufficient cure period was not provided to the Petitioner is concerned, both sides have their respective stands on the issue. Respondent No.1 has placed on record several notices, by which according to it Petitioner was being repeatedly apprised of the alleged breaches with requests to cure, a position sought to be controverted by the Petitioner. This question can also be decided only during arbitral proceedings and cannot fall in the scope of this petition under Section 9 of the Act, the purpose and object of which is to enable the Court to pass interim measures *inter alia* of protection and preservation of the subject matter of the arbitration agreement. This Court is bound by the observations of the Division Bench of this Court in **CRSC-II (supra)**, where the Court held that when approached for interim measure of interference with unequivocal, absolute and unconditional BGs, the Court is not required to interpret the contract or even form a *prima facie* opinion whether the beneficiary has wrongfully invoked the BGs. Such exercise is to be done in a substantive proceeding to be initiated by the Petitioner for recovery of monies of the BGs, if averred to have been wrongly taken by encashment of BGs by the beneficiary.

64. Moreover, if the Petitioner succeeds in its claims before the appropriate forum, the amount payable under the PBG will be retrieved and restituted as it is not the case of the Petitioner that Respondent No.1 has no means to recoup or retribute the said amount and therefore, this is not a case of irretrievable injury or harm. Having considered the matter holistically, this Court is of the view that



Petitioner has been unable to make out a case of ‘egregious fraud’ or ‘special equity’ so as to come under the exceptions and thus the invocation/encashment of the PBG in question cannot be restrained.

65. For the myriad reasons given above, the judgments relied upon by the Petitioner with respect to LD are inapplicable to the present case. The law laid down in the judgments of *Kailash Nath (supra)* etc. may be relevant when the disputes between the parties are adjudicated on merits. The judgments in *Finolex Cables (supra)* and *KSE Electricals (supra)* are also inapplicable since issues pertaining to breach of contract or any amount outstanding to either party, cannot be decided in the present petition and will have to await adjudication by the Arbitral Tribunal. Insofar as the judgment in *KKSPUN (supra)* is concerned, the same again cannot aid the Petitioner. A bare reading of the judgment shows that the facts are completely distinguishable. In the said case, terms of the BGs were examined by the Court and found that there were pre-conditions expressly embedded in the BGs themselves, specifying the foundational circumstances that would govern the entitlement of the beneficiary to invoke a BG in the first place. The Court hastened to add that these foundational circumstances are not to be assessed or adjudged by the Bank, since that would make the bank the arbiter of the underlying disputes, with which the bank had no concern. However, the Court further observed that it was the concern of the bank to ensure that the foundational circumstances find mention in the invocation letters, since that is a pre-condition for invocation expressly stated in the BG itself. Having so observed, the Court in the facts of the case found that the invocation of the advance BG was not in accordance with the terms of



the guarantees themselves. As an added reason, the Court found that Plaintiff had established a case of double-benefit since as a matter of fact, Defendant No.1 therein did not deny that the mobilisation advance given to the Plaintiff had been already adjusted before invocation of the BG under the same head. In the present case, it bears repetition to state that the only requisite in the PBG is a written claim or demand from the beneficiary declaring the bidder to be in default under the contract, which pre-condition stands satisfied. Upon such an invocation, the bank without any demur, cavil or argument is bound to honour the request of Respondent No.1 to encash the PBG and this intent of the contracting parties to the PBG is strengthened from a further covenant in the PBG that the beneficiary will not need to prove or show grounds or reasons for the demand.

66. For all the aforesaid reasons, this Court finds no reason to injunct Respondent No.1 from encashing the PBG in question and the petition is dismissed being devoid of merit. It is made clear that this Court has not expressed any opinion on the merits of the disputes between the parties, which are left open to be decided in the appropriate forum.

67. Interim order dated 01.09.2023, whereby operation of the invocation letter dated 10.07.2023 was stayed, is hereby vacated.

68. Petition stands disposed of in the aforesaid terms.

JYOTI SINGH, J

SEPTEMBER 18, 2023
Kks/KA