

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL APPEAL NO. 18 OF 2024
IN
INTERIM APPLICATION (L) NO. 31678 OF 2023
IN
COMMERCIAL SUIT (L) NO 31639 OF 2023

Qatar National Bank Alahli ...Appellant
Versus
Man Industries (India) Limited & Ors. ...Respondents

Mr. Nikhil Sakhardande, Sr. Adv. a/w Ms. Vatsala Rai, Ms. Nafisa Khandeparkar, Ms. Sushrut Garg, Ms. Devanshi Jhaveri i/by AZB & Partners for Appellant.

Mr. Ashish Kamat, Sr. Adv. a/w Mr. Kunal Mehta, Mr. Jay Zaveri, Ms. Tavleen Saini, i/by Crawford Bayley Co. for Respondent No.1.

Mr. Ankit Tiwari i/b V. B. Tiwari & Co. for Respondent No.2 – State Bank of India.

CORAM: G. S. KULKARNI &
ADVAIT M. SETHNA, JJ.

DATE: 23 JANUARY 2025

Oral Judgment: (Per G. S. Kulkarni, J.)

1. This appeal is directed against an *ex parte* order dated 9 February 2023 passed by the learned Single Judge on interim application (L) No.31678 of 2023 filed in the Commercial Suit in question. By the impugned order, the learned Single Judge has granted an *ex parte* injunction in terms of prayer

clause (a) and (b) of this application. The relief as granted by the impugned order in terms of prayer clause (a) and (b) is required to be noted which reads thus:

“(a) That this Hon’ble Court be pleased to pass appropriate orders granting ex-parte stay on the invocation by respondent no. 1 dated 7 November, 2023 of the Bid Bond/Performance Guarantee (Exhibit X).

b) That the Hon’ble Court be pleased to pass an ex-parte order of temporary injunction restraining the respondent no. 2 by themselves and/or through their branches or howsoever otherwise in any manner whatsoever from making payment on the Bid Bond/Performance Guarantee and/or cause further costs and expenses to be incurred by the applicant.”

2. At the outset, we may observe that a coordinate Bench of this Court considering the fact that the impugned order was an *ex parte* order by its order dated 9 February 2024 disposed of this appeal, considering that it would be appropriate for the appellant to move the learned Single Judge for vacating of the *ex parte* order as permissible in law, on the premise that the suit was yet to be transferred to the City Civil Court. The said order passed by this Court read thus:

“1. The impugned Order dated 9th November, 2023 passed by the learned Single Judge is admittedly an ex-parte Order passed in the Suit in question. The proper course of action for the Appellant would be to move an application for vacating of such order, on the contentions which are sought to be raised by the Appellant in the present Appeal.

2. We accordingly dispose of this Appeal, with liberty to the Appellant to move the learned Single Judge, if the proceedings of the Suit are yet to be transferred to the City Civil Court.

3. All contentions of the parties on such Application are expressly kept open.

4. In view of the disposal of the Appeal, Interim Application (L) No. 2705 of 2024 does not survive, it would stand disposed of.”

3. However the appellant assailed the aforesaid order before the Supreme Court in the proceedings of petition for Special Leave to Appeal No. 9747 of 2024, on which the Supreme Court passed an order on 17 May, 2024. Considering the fact that the commercial suit has stood transferred to the City Civil Court, it was observed that it would be appropriate for this Court to decide the present appeal on merits. Accordingly this Commercial Appeal was restored to the file of the Court for expeditious disposal, as it pertained to an injunction on the invocation of bank guarantee. We, accordingly, adjudicate the present appeal, as ordered by the Supreme Court.

4. The Commercial Suit in question was filed by respondent No.1- Plaintiff against four defendants, Fayum Gas Company - defendant No.1 (for short ‘**Fayum Gas**’), State Bank of India, Overseas Branch, defendant No.2 (for short ‘**SBI**’), Qatar National Bank Alahli – defendant No.3 (**Appellant**) and Central Bank of Egypt - defendant No.4.

5. The reliefs which are prayed in the suit are primarily against defendant No.1 – Fayum Gas Company and defendant No.2 – State Bank of India, Overseas Branch. The prayers as made in the Suit reads thus:

“(a) That this Hon’ble Court be pleased to declare that Defendant No.1’s termination of the Purchase Order dated 18th April 2023 is null and void and not binding on the Plaintiff;

(b) That the Hon’ble Court be pleased to declare that the invoation by Defendant No.1 dated 7th November 2023 of the Bid Bond (Exhibit X) is null and void and has no effect in law;

(c) That the Hon’ble Court be pleased to declare that Defendant No.1 is not entitled to invoke the Bid Bond at this stage;

(d) That the Hon’ble Court be pleased to pass an order of permanent injunction restraining the Defendant No.2 by themselves and/or through their branches or howsoever otherwise in any manner whatsoever from making payment on the Bid Bond/ and/or cause further costs and expenses to be incurred by the Plaintiff;

(e) That this Hon’ble Court pass an order or decree directing Defendant No.1 to pay to the Plaintiff a sum of Rs.1,24,89,300/- or such additional sums as this Hon’ble Court may deem fit and proper as and by way of damages.

(f) That pending the hearing and final disposal of the suit, the Defendant No.2 be restrained by themselves and/or through their branches or howsoever otherwise in any manner whatsoever from making payment on the Bid Bond and/or cause further costs and expenses to be incurred by the Plaintiff;

(g) Ad-interim and interim reliefs in terms of prayer clause (f) above be granted to the Plaintiff.

(h) For costs of the Suit;

(i) For such further and other reliefs as the nature and circumstances of the case may require;”

6. On a plain reading of the aforesaid prayers, it is clear that no substantive prayer against the appellant - defendant No.3. Even in the prayers as made in the interim application, as noted by us hereinabove, relief is sought against only defendant Nos.1 (Fayum Gas) and defendant No.2 (SBI).

7. The nature of the relief being granted by the *ex parte* impugned order, admittedly pertains to a Counter Bank Guarantee (**CBG**) which was issued in favour of the appellant by SBI- defendant No.2.

8. For convenience, the parties are referred as they stand in the suit. Considering the settled position in law, the Counter Bank Guarantee (**CBG**) in question, issued by the SBI in favour of the appellant, would be an independent contract between the bank (SBI) and the beneficiary of the said bank guarantee namely the appellant. On such preface we proceed to note the relevant facts.

9. The case of the plaintiff in the suit is that in January 2023 Fayum Gas issued tenders, inviting offers for supplying steel pipes, under which document fees of USD 1,500 and bid bond of USD 1,50,000 being the conditions.

10. On 30 January 2023, the plaintiff (Man Industries) submitted its offer / bid with the tender document fees of USD 1,500. For the bid bond of USD 1,50,000 the plaintiff approached the SBI- Defendant No.2. On 10 February 2023 the SBI approached the appellant to issue the Bid Bond on the condition of a Counter Bank Guarantee (**CBG**) to be issued for an amount

of USD 1,50,000 in favour of the appellant. The CBG dated 10 February 2023 was accordingly issued which was valid up to 30 June 2023.

11. In view of the CBG being issued by the SBI in favour of the appellant, on 19 February 2023, the appellant issued a bid bond (BG) dated 19 February 2023 in favour of Fayum Gas which was valid up to 31 May 2023. It is on such backdrop, on 19 April 2023 Fayum Gas issued a purchase order, in favour of the plaintiff.

12. In the context of the present dispute, it is necessary to consider the nature of the Counter Bank Guarantee (CBG) issued by the SBI in favour of the appellant. On a reading of the Counter Bank Guarantee (CBG), it is clear that “the applicant” for issuance of the CBG is the plaintiff. It is issued by SBI (defendant No.2) and the beneficiary is the appellant (defendant No.3). The Counter Bank Guarantee (CBG) is for USD 1,50,000. The contents and the wordings of the Counter Bank Guarantee in the context of the dispute, become significant, which are required to be noted. The relevant extract of the CBG reads thus:

“At our risk and responsibility and our Counter Guarantee No. 0479123FG0000036 for USD 150,000.00 (USD One Hundred Fifty thousand only) and at the request of M/s. Man Industries (India) Ltd. 101 Man House, S.V. Road, Vile Parle (West), Mumbai- 400 056, India. Please issue your bid guarantee favouring of Fayum Gas Company (FCG), Address Head Office, Procurement Department, 15, Gamal Abdel Naser St. Mesalla Square, Fayum, Egypt.

In consideration of your doing so, we hereby issue our irrecoverable and unconditional Counter Guarantee in your favour and we undertake to pay to you without reservation and notwithstanding any contestation from ourselves, our principal or any third party any sum or sums not exceeding in total the amount of USD 150,000.00 (USD One Hundred Fifty Thousand only) upon receipt by us your first demand in writing or by any authenticated swift message wherein you notify us that you have been called upon to effect payment under your guarantee in accordance with its terms and in the amount you are demanding from us on or before 30.06.2023.”

THE ISSUER BANK OF THE COUNTER GUARANTEE IS OBLIGATED TO PAY QNBAEGCX REGARDLESS WHETHER THE APPLICANT OR ANY THIRD PARTY RAISES OR SUBMITS AN OBJECTION TO LIQUIDATION OR SUSPENSION OF LIQUIDATION BEFORE COURTS

.....

II. THIS COUNTER GUARANTEE SHALL BE VALID UP TO 30.06.2023.

.... .

44H. Governing Law and/or Place of Jurisdiction. IN.

.....”

(emphasis supplied)

13. Thus from the reading of the aforesaid clauses of the CBG it is clear that CBG is an irrevocable and unconditional counter guarantee issued in favour of the appellant, under which the SBI undertook to pay to the appellant without reservation and notwithstanding any contestation by the SBI or principal or any third party, a sum not exceeding USD 1,50,000, on receipt by the SBI from the appellants first demand in writing or by any authenticated telex message, wherein the appellant would notify the SBI that the appellant have been called upon to effect payment under the bank guarantee issued by the appellant in favour of Fayum Gas, in accordance with its terms and the amount thereunder being demanded by the appellant from

the SBI. It was also guaranteed that the SBI was obligated to pay the appellant regardless, whether the plaintiff (applicant of bank guarantee) or any third party raises or submits an objection to its liquidation before courts.

14. Clause 44H of Counter Bank Guarantee (CBG) provides for the “Governing law and / or for Place of Jurisdiction” as agreed between parties, in which originally it was indicated to be ‘IN’ i.e. India. Later on clause 44H was amended in terms of the communication as exchanged between the SBI and the appellant, for Clause 44H to be read to the effect that the “Governing law and / or Place of Jurisdiction” to be the “Egyptian law” instead of existing “IN” (India). The said communication is required to be noted which reads thus:

“With reference to our Counter Guarantee No. 0479123FG0000036 dated 10.02.2023 for USD 150,000.00 please read the 44H as the Bank Guarantee is governed by Egyptian Law instead of existing.”

Please hand over the copy of this Bank Guarantee Haidy Momtaz Mofid Contact No. 20001007402282, ID No. 29101152405421 or Ahmed Hamdy Abdelaal, Contact No. 91210202047, ID No. 29107011407895.

Regards
Bank Guarantee”

(emphasis supplied)

15. It so happened that some time between April and June 2023 disputes and differences had arisen between the plaintiff and Fayum Gas as the plaintiff was unable to issue the net itemized proforma invoice, as per the

conditions of the purchase order, issued to it by Fayum Gas. The proforma invoice, as per the agreement was to be issued in Egyptian pound and/or issued in US Dollars. There was correspondence between 28 May 2023 to 21 September 2023 *inter alia* between the SBI, and the appellant and Fayum Gas, under which the validity of the CBG in question was extended till 31 December 2023, by the SBI in favour of the appellant while the validity of the Original bank guarantee (issued by appellant in favour of Fayum Gas) was extended till 30 November 2023.

16. On 5 November 2023 Faiyum Gas terminated the purchase orders issued in favour of the plaintiff and immediately on the next day i.e. on 6 November 2023 Faiyum Gas invoked the bank guarantee issued by the appellant, and furnished at the behest of the plaintiff. Further as the arrangement under the CBG was a back-to-back arrangement, as agreed under the terms and conditions of the CBG entered between the appellant and the SBI, on Faiyum Gas invoking the bank guarantee as issued by the appellant, the appellant in turn invoked the CBG issued in its favour by the State Bank of India. However, before the proceeds of the CBG could be received by the appellant, on 9 November 2023 the Commercial Suit in question was filed by the plaintiff, in which the interim application in question was filed, on which the impugned *ex party* order was passed injunctioning the SBI from honouring the CBG in appellant's favour.

17. Mr. Sakhardande, learned senior counsel for the appellant has drawn our attention to the various documents on record of the commercial suit. He contends that the impugned order has seriously prejudiced the rights of the appellant to the benefits of the CBG as issued by SBI when the same was invoked lawfully, and that too passed by the learned Single Judge at the behest of the plaintiff, who could never, have a quarrel on the terms of the bank guarantee as issued by the SBI in favour of the appellant. It is submitted that once the CBG issued by the SBI in the appellant's favour was itself an independent contract, between the appellant and the SBI, conferring unconditional entitlement on the appellant to invoke the CBG, the nature of it being irrevocable and unconditional, there was no question of an injunction being passed on its invocation.

18. It is submitted that the learned Single Judge could not have issued an *ex parte* injunction oblivious of the clear terms of the bank guarantee, as also, overlooking the settled principles of law that the CBG was part of the back-to-back arrangement and being independent contract between the SBI and the appellant, it was totally unconnected with any dispute, the plaintiff would have against the contracting party namely Fiyum Gas. It is therefore his submission that the impugned order adversely affects the legal rights of the appellant, under the CBG, hence, the same could not have been passed,

without the appellant being heard and secondly contrary to the terms and conditions of the CBG.

19. The next contention as urged by Mr. Sakhardande is insofar as the jurisdiction of the Court to grant the relief qua the CBG is concerned, when he submits that learned Single Judge ought to have taken into consideration that qua CBG the “Governing Law and / or Place of Jurisdiction” was Egypt and hence this Court lacked jurisdiction to entertain any issue qua the CBG and that too in a money suit principally between the plaintiff and a defendant No.1 - Fayum Gas.

20. Mr. Sakhardande would next submit that the principles of law on the Court granting injunction on the invocation of bank guarantee are well settled namely of an egregious fraud to the knowledge of the bank in issuance of bank guarantee and / or any irretrievable injury or injustice or special equities being the only grounds which would weigh with the Court when an injunction on the bank guarantee is prayed for. It is his submission that the interim application in the commercial suit does not make out any such ground nor any such ground is addressed by the plaintiff. It is submitted that the impugned order does not whisper of any such ground being made out, nonetheless it injuncts the invocation of the CBG.

21. On the other hand Mr. Kamat, learned counsel for respondent no.1-plaintiff has opposed this appeal. The opposition is primarily on the ground that it cannot be said that the appellant has suffered any legal injury and or is a person aggrieved to maintain the appeal, in terms of Section 13 of the Commercial Courts Act, 2015, which provides an appeal to be maintainable only at the behest of the person aggrieved. In short, it is Mr.Kamath's contention that in the context of the invocation of the CBG issued by the SBI, in favour of the appellant, although is an independent contract, as to what has happened between the plaintiff and the contracting party, namely Fayum Gas , would be relevant. It is hence, his contention that the appellant oblivious of the actions of the contracting parties, would not be correct in contending that the appellant would nonetheless consider the CBG as unconditional and irrevocable, as necessarily the actions of Fayum Gas in invoking the bank guarantee issued by the appellant in favour Fayum Gas which was at the behest of plaintiff were legal, valid and relevant considerations. For such reason it is submitted that it cannot be accepted and qua the contract between the plaintiff and Fayum Gas, the appellant, could at all be an aggrieved party. In support of such contention that the appellant is not a aggrieved party/person. Mr. Kamat has placed reliance on the decision of the Supreme Court in **ADI Pherozshah Gandhi Vs. H. M. Seervai, Advocate General of Maharashtra, Bombay¹**.

1 1970(2) SCC 484

22. The next contention of Mr. Kamat is that when under the terms and conditions of the Counter Bank Guarantee (CBG), even the appellant and the SBI agreed that the CBG would be governed by the laws of Egypt, it is not a clause conferring “exclusive jurisdiction” under the Egypt laws, hence, it was certainly open for the learned Single Judge to exercise jurisdiction, on issues in relation to the CBG. In this context, Mr. Kamat would further submit that although under the modified clause 44H, the parties agreed that the laws of Egypt to be applicable, however, insofar as jurisdiction is concerned the modification is silent and therefore, the Court's in India would continue to have jurisdiction. In contending that the Indian Court would apply the Egyptian Law, Mr. Kamat has placed reliance on the provisions of Section 45 of the Evidence Act that it would be permissible for the Court to consider any plea on the CBG as raised by the plaintiff, assuming that the law applicable is the Egyptian law.

23. The last contention of Mr. Kamat is that the Leave Petition filed by the plaintiff under Clause XII of the Letters Patent being allowed, the impugned order is a composite order, namely that it recognizes that the Bombay High Court on the Original Side had the jurisdiction to entertain the Commercial Suit, and that, such order cannot be assailed, and on the other hand the *ex parte* injunction as granted to the plaintiff by such order, is legal and valid.

24. It is Mr. Kamat's submission that although the Clause XII Leave Petition was premised on the ground that the SBI had issued the CBG at Mumbai and the same was sought to be invoked at Mumbai, and merely because defendant No.1 its office was outside Mumbai i.e. in Egypt, part of the cause of action had accrued within the territorial limits of the Courts at Mumbai being the observations as made by the learned Single Judge in allowing the leave petition under Clause XII of the Letters Patent cannot be faulted. Mr. Kamat would thus submit that in this view of the matter the appellants cannot have a quarrel on the jurisdiction of the learned Single Judge to consider the Suit and the Interim Application in passing of the impugned order.

25. Mr. Kamat in support of his contention on the merits of the invocation of the bank guarantee issued by the appellant, in favour of Fayum Gas, and whether the actions of Fayum Gas in that regard were legal and valid, and as to how, the same would have a bearing, on the invocation of the CBG are sought to be supported by drawing our attention to the documents relevant to the invocation of the principal bank guarantee by Fayum Gas. In such context, it is also his submission that the learned Single Judge has appropriately taken into consideration that both the guarantees in question were furnished as bid guarantees and not performance guarantees, hence, it was appropriate for the plaintiff's to approach the learned Single Judge in the

Suit in question, to seek the reliefs as prayed for, and which are appropriately granted in favour of the plaintiffs. Mr. Kamat hence would submit that no interference is called for in the appeal which deserves to be rejected.

26. Mr. Sakhardande in responding to Mr. Kamat's contention on whether the appellant could be called to be a person aggrieved in terms of Section 13 and more particularly as jurisprudentially as observed by the Supreme Court in *Adi Pherozshah Gandhi (supra)*, would submit that the person aggrieved in the context of the present case would be required to be broadly construed as observed in the decision of the Constitution Bench of Seven Judges, in the case of **Bar Council of Maharashtra Vs. M. V. Dabholkar & Ors.**² more particularly in paragraph 28 thereof. He therefore submits that Mr. Kamat's contention that the appellant is not a person aggrieved, cannot be accepted.

Reasons and Conclusion

27. It is on the aforesaid backdrop, we have heard learned counsel for the parties. With their assistance we have perused the record and more particularly the terms and conditions of the CBG which is the primary concern of the parties in the present proceedings.

2 (1975) 2 SCC 702

28. Some of the admitted facts are required to be noted. It is not in dispute that the plaintiff had participated in the tender issued by Fayum Gas, which required a bid guarantee to be issued. It also appears to be clear from the record that the plaintiff had approached the SBI for issuance of the bid guarantee and as the SBI could not issue the same directly as desired by Fayum Gas, the SBI approached the appellant, for issuance of the CBG. Accordingly the CBG in question was issued by SBI in favour of the appellant, which was to be valid up to 30 June 2023 and later on extended up to 30 November 2023.

29. It also appears to be not in dispute that the contract under the purchase orders issued by Fayum Gas in favour of the plaintiff, could not go through as disputes had arisen between these parties, as noted by us hereinabove, which ultimately culminated in Fayum Gas, terminating the purchase orders on 5 November 2023. As a consequence thereof Fayum Gas invoked the principal Bank Guarantee issued by the appellant, in favour of Fayum Gas which was at the behest of the SBI, but ultimately as applied by and for the benefit of the plaintiff. As the CBG was a back to back arrangement the appellant on the very same day invoked the CBG as issued by the SBI.

30. On the aforesaid conspectus, the questions which arise for our consideration are **firstly** as to whether the appellant had lawfully invoked the CBG as per the terms and conditions of the CBG and whether the appellant was entitled for proceeds of the CBG to be remitted to it by the SBI; **secondly**, whether any case for an injunction was made out by the plaintiff to restrain the SBI from honouring the proceeds of the CBG in favour of the appellant; **thirdly**, whether qua the CBG, this Court had jurisdiction to entertain the Commercial Suit, when the parties agreed to be governed by the Egyptian law qua the CBG.

31. Having considered the contents of the CBG, admittedly it is an “unconditional and irrevocable” bank guarantee, and notwithstanding any contestation of either the SBI or any third party, it was to be honoured.

32. Thus, when under the settled principles of law a Bank Guarantee is an independent contract between the bank and the person in whose favour the bank guarantee is issued, the terms and conditions of the bank guarantee play a pivotal role, in determination of the rights of the parties under the contract of a bank guarantee. On a bare reading of the clauses of the CBG, we do not find that the plaintiff would be correct in its contention that something which is alien or is not recognized by the terms and conditions of the CBG would be required to be read and taken into account, in considering whether

the appellant would be entitled to the benefit under the CBG. The contention of the plaintiff in this regard is that due regard needs to be given, to the fact that the invocation of the principal guarantee issued by the appellant in favour of Fayum Gas, whether was legal and valid considering the contract between the said parties namely under the purchase order, would have relevance qua the invocation of the CBG. We do not find that there is any scope for accepting such contention being urged on behalf of the plaintiff, more particularly considering the terms of the CBG as agreed between the parties.

33. It cannot be countenanced that the Court would interpret the terms and conditions of the bank guarantee, so as to recognize anything extraneous or alien to what has been explicitly agreed between the parties, and / or which would amount to adding or substituting any term of the bank guarantee, de hors the position the parties have clearly taken, under the undisputed clauses of the bank guarantee. To accept such approach would be destructive of the contract of the bank guarantee bringing uncertainty or a clog on the application which is certainly not permissible. We are thus not inclined to accept Mr. Kamat's contention that the invocation of the CBG is required to be read in the context of the invocation of the principal guarantee, as issued by the appellant in favour of Fayum Gas and / or any dispute between Fayum

Gas and the plaintiff can at all be considered to be relevant, qua the invocation of the CBG.

34. Mr. Kamat's submission that it ought to be held that the learned Single Judge (Commercial Court) would have jurisdiction in passing the impugned order qua the CBG, in our opinion is also not acceptable. The reason being that under the CBG, the parties in Clause 44H thereof clearly agreed on "the Governing Law and / or Place of Jurisdiction" which was initially agreed to be 'IN' i.e. India, which was later on substituted to be the Egyptian law. Mr. Kamat's contention that the substitution of Clause 44H is relevant only insofar as the applicability of the Egyptian law is concerned and not qua the jurisdiction of the Indian Court is also untenable. This for the reason that Clause 44H of the CBG is required to be read holistically, under which the parties agree on both the counts namely the "Governing Law and / or to the Place of Jurisdiction". It would be anomalous to accept that the parties intended Egyptian law to be applicable however, subject themselves to the jurisdiction of the Courts in India. Thus, when the parties clearly agreed in the amended clause 44H to be governed by Egyptian law by substituting IN (India) as applicable to the clause as titled, certainly the Indian Court would lack jurisdiction to entertain any plea qua the CGB. Mr. Kamat's contention, in such context if accepted, it would render Clause 44H wholly unworkable and not as desired by the parties. It would also be difficult to accept that the

jurisdiction to entertain a plea qua CBG, on one hand, would be with the Indian Courts, however, in the context in hand the Indian Court would apply the Egyptian law, in adjudication of the Commercial Suit. In our opinion this would be too far fetched a proposition being canvassed by Mr. Kamat amounting to an untenable reading of Clause 44H, which the parties themselves have avoided to incorporate. Mr. Kamat's contention is also that although under Clause 44H the parties have agreed, that the bank guarantee would be governed by Egyptian law, it is not a situation that the Egyptian Law would be exclusively applicable, hence, there is scope for applicability of the Indian law. We do not agree as such interpretation of Clause 44H would be contrary to the express agreement between the parties and contrary to the Clause itself. We also find that the reliance of Mr. Kamat on Section 45 of the Evidence Act is wholly untenable, out of the context and not relevant in the facts in hand. We accordingly reject Mr. Kamat's contention in this regard.

35. Mr. Kamat's contention on the appellant being not a "party aggrieved" to maintain the appeal, is relying on the decision in **Adi Pheroze Shah Gandhi** (supra). In this regard, we may observe that although the said decision is in the context whether the Advocate General in the said case was a person aggrieved, the observations as made by the Supreme Court clearly accept the

settled principle of English Law that for a person to fall under the category of an aggrieved person, he must be a person who himself had grievance or must be aggrieved by the order which affects him. Applying such principles in the present context, we do not find that there is any scope for an argument that the appellant is not aggrieved by the impugned order passed by the learned Judge, more importantly when by the injunction as granted, it has taken away the benefit entitled to the appellant, under the CBG issued by the State Bank of India.

36. In our opinion, also the manner in which the plaintiff has prayed for the interim relief and possibly with an intention to maintain the suit under a garb of a relief being sought against the State Bank of India, which in reality was against the appellant who was innocuously impleaded as defendant No. 3, without a specific relief being prayed against the appellant, either in the plaint or in the interim application, nonetheless has taken away the entitlement of the appellant under the CBG. In our opinion, the plaintiff in this regard has indulged in clever drafting qua the reliefs as pleaded not only in the plaint but also in the interim application. It is as clear as the sunlight, that the whose intention of the plaintiff, was to deprive the appellant of the benefit of the CBG, however in a circuitous method of the relief being portrayed to be against the State Bank of India and/or against defendant No.1.

37. In our opinion these were crucial aspects which have been completely overlooked by the learned Single Judge, in passing the impugned order. Also the basic premise that the CBG was an independent contract between the SBI and the Appellant, which had nothing to do with any dispute which had arisen between the plaintiff and Fayum Gas who were contracting parties. Also the most vital aspect that the CBG stood on it own legs, was wholly missed by the learned Single Judge, in passing the impugned order. Thus, in the facts in hand, what was relevant for the learned Single Judge was to consider the basic terms and conditions of the CBG and nothing else.

38. This apart the settled principles of law on which an injunction on invocation of bank guarantee could be granted to deprive the beneficiary of the bank guarantee ought to have been considered and applied by the learned Single Judge in passing the impugned order, which proceeds to consider the plaintiff's case on merits of its contentions qua defendant No.1- Fayum Gas. The principles of law in such context are laid down in catena of decisions.

39. In **S. Satyanarayana v. West Quay Multiport (P) Ltd.**³, the Division Bench of this Court considering the principles in this regard, referring to the

3 2015 SCC OnLine Bom 3352

decisions in *U.P. Cooperative Sugar Ltd.v.Singh Engineers Pvt. Ltd.*⁴. and *BSES Ltd. v. Fenner Ltd.*⁵ observed thus:

13. It is well-settled that a bank guarantee is an independent contract between the bank and the beneficiary and thus the bank guarantee is required to be honoured in accordance with its terms. If the bank guarantee is unconditional and irrevocable the exceptions in the bank not honouring its obligations under the bank guarantee are firstly a fraud of which the bank has a clear notice. Such a fraud must be of an egregious nature so as to vitiate in its entirety the underlying transaction. The nature of the fraud should be such that the beneficiary of the bank guarantee is seeking to be benefited from such fraud. The second exception are the 'special equities' such as an irretrievable injury or irretrievable injustice which would be caused to the party at whose instance the bank guarantee is issued and if an injunction at the relevant time is not granted the party can never be compensated for such an injury. (*U.P. Cooperative Sugar Ltd. v. Singh Engineers Pvt. Ltd.*, (1988) 1 SCC 174 and *BSES Ltd. v. Fenner Ltd.*(supra)).

(emphasis supplied)

40. In *Andhra Pradesh Pollution Control Board Vs. CCL Products (India) Ltd.*⁶ the Supreme Court summarised the following principles:

“15.A bank guarantee constitutes an independent contract between the issuing bank and the beneficiary to whom the guarantee is issued. Such a contract is independent of the underlying contract between the beneficiary and the third party at whose behest the bank guarantee is issued.

16. The principle which we have adopted accords with a consistent line of precedent of this Court. In *Ansal Engg. Projects Ltd. v. Tehri Hydro Development Corpn. Ltd.* [*Ansal Engg. Projects Ltd. v. Tehri Hydro Development Corpn. Ltd.*, (1996) 5 SCC 450] a three-Judge Bench of this Court held thus : (SCC p. 454, paras 4-5)

“4. It is settled law that bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction and the validity of the primary contract between the person at whose instance the bank guarantee was given and the beneficiary. Unless fraud or special equity exists, is pleaded and prima facie established by

4 (1988) 1 SCC 174

5 (2006) 2 SCC 728

6 (2019)20 SCC 669

strong evidence as a triable issue, the beneficiary cannot be restrained from encashing the bank guarantee even if dispute between the beneficiary and the person at whose instance the bank guarantee was given by the bank, had arisen in performance of the contract or execution of the works undertaken in furtherance thereof. The bank unconditionally and irrevocably promised to pay, on demand, the amount of liability undertaken in the guarantee without any demur or dispute in terms of the bank guarantee. ...

5. ... The court exercising its power cannot interfere with enforcement of bank guarantee/letters of credit except only in cases where fraud or special equity is prima facie made out in the case as triable issue by strong evidence so as to prevent irretrievable injustice to the parties.”

17. The same principle was followed in *SBI v. Mula Sahakari Sakhar Karkhana Ltd.* [*SBI v. Mula Sahakari Sakhar Karkhana Ltd.*, (2006) 6 SCC 293] where a two-Judge Bench of this Court held thus : (SCC p. 301, paras 33-34)

“33. It is beyond any cavil that a bank guarantee must be construed on its own terms. It is considered to be a separate transaction.

34. If a construction, as was suggested by Mr Naphade, is to be accepted, it would also be open to a banker to put forward a case that absolute and unequivocal bank guarantee should be read as a conditional one having regard to circumstances attending thereto. It is, to our mind, impermissible in law.”

41. In **Standard Chartered Bank Vs. Heavy Engineering Corporation Ltd. & Anr.**⁷ the Court reiterated the following principles in the context on injunction on invocation of the bank guarantee:

“23. The settled position in law that emerges from the precedents of this Court is that the bank guarantee is an independent contract between bank and the beneficiary and the bank is always obliged to honour its guarantee as long as it is an unconditional and irrevocable one. The dispute between the beneficiary and the party at whose instance the bank has given the guarantee is immaterial and is of no consequence. There are, however, exceptions to this rule when there is a clear case of fraud, irretrievable injustice or special equities. The Court ordinarily should not interfere with the invocation or encashment of the bank guarantee so long as the invocation is in terms of the bank guarantee.”

⁷ (2020)13 SCC 574

42. In **Atlanta Infrastructure Ltd. v. Delta Marine Co.**⁸ in similar context the Supreme Court made the following observations:

“7.....It is trite to say that as a bank guarantee is an independent contract, there is a limited scope for interference in case of encashment of bank guarantee as enunciated by various courts including this Court from time-to-time. One of the reasons for interference could be egregious fraud. The fraud must be relatable to the bank guarantee.

43. The aforesaid position of law as laid down in these decision certainly cannot be disputed on behalf of the plaintiffs in its applicability in the present facts.

44. Insofar Mr. Kamat’s contention that as leave was granted under Clause XII of the Letters Patent, on such petition being filed by the plaintiff, this Court had jurisdiction to entertain a prayer qua the CBG, also cannot be accepted. We may observe that in granting of such leave, the learned Single Judge has neither examined whether such leave could be granted qua the appellant (defendant No. 3) and more particularly, in terms of the independent contract of the CBG which was not between the plaintiff and the appellant but SBI and the appellant. This perhaps for the reason that as earlier observed by us, by clever drafting no relief whatsoever was directly sought against defendant No. 3 / Appellant. The learned Single Judge in granting leave under Clause XII of the Letters Patent, proceeded merely on the basis that relief is primarily sought against the State Bank of India, which

8 (2021) 20 SCC 593

was to honor the invocation of the CBG as issued in favour of the appellant. This is clear from the reading of the order passed on the Leave Petition which reads thus:

“2.The Suit is for declaring termination vide e-mail letter dated 5th November, 2023 about purchase order dated 18th April, 2023 by Defendant No.1 – Purchaser as null and void. Further declaration and injunctions are sought.

3. There are two Defendants, one is Purchaser of pipes and second is Bank who has issued a Bank guarantee on behalf of the Plaintiff. The Bank guarantee is issued from Mumbai. It is to be encashed at Mumbai. They are having Office at Mumbai. Only Defendant No.1 is having Office outside Bombay at Egypt. Part of cause of action has occurred within the territorial limits of this Court. Read Para No.5 of the Petition and the averments in the Plaint. Leave under Clause XII of Letters Patent is granted.”

45. This apart in so far as the the injunction as granted by learned Single Judge is concerned, there is hardly any reasoning on the first principles which required due consideration in injuncting the invocation of the CBG by the appellant. This is clear from the following observations as made by the Court in granting the interim reliefs in terms of prayer clause (a) and (b) of the interim application filed by the plaintiffs: Para 5 to 9

“5.Defendant No.1 has called tenders globally for the purpose of supplying of pipes. Tender of Defendant No.1 was approved. Defendant No.1 is liable to pay the Plaintiff. Whereas, one of the conditions of Tender is furnishing of Bank guarantee issued by their Banker – Defendant No.2. It was issued in US Dollar.

6. However, when the question of payment of the goods to be supplied by the Plaintiff arose, a dispute cropped up in between them. Defendant No.1 intends to pay in Egyptian Pound. Plaintiff was finding some difficulty to convert Egyptian Pound to American Dollar. Though Plaintiff raised this issue with their Banker, it could not resolve. No goods were dispatched. There are correspondence from month of April 2023 till 5 November, 2023.

The assistance of Defendant No.1 is sought for getting the approval from the Central Bank of Egypt to transfer Egypt Pound into US Dollars in Bank's Nostro Account. Somehow, the issue could not be resolved. Finally, the Defendant No.1 terminated the contract as per the letter dated 5 November, 2023.

7. Contention is, when the Bank guarantee was furnished, Defendant No.1 insisted US Dollar. However, when the question of payment from their side had come, they have not cooperated for resolving the issue with Central Bank of Egypt. Further contention is, the issue of nature of exchange was not covered as per the Tender Document. Plaintiff's contention is, on one hand, Defendant No.1 has terminated the agreement. Whereas, on the other hand, they want to encash the Bank guarantee. The period of original Bank guarantee has also expired. Plaintiff got it extended. It is valid upto 30 November, 2023.

8. It is true that Bank guarantee can be encashed at any time once there is termination from the side of Defendant No.1. So, the Plaintiff apprehends that they will lose money particularly when they are not faulted with this issue. Hence, an *ex parte* injunction in terms of prayer clauses (a) and (b) is sought. It reads thus:

"(a) That this Hon'ble Court be pleased to pass appropriate orders granting *ex parte* stay on the invocation by Respondent No.1 dated 7 November 2023 of the Bid Bond / Performance Guarantee (Exhibit X) ;

(b) That the Hon'ble Court be pleased to pass an *ex parte* order of temporary injunction restraining the Respondent No.2 by themselves and / or through their branches or howsoever otherwise in any manner whatsoever from making payment on the Bid Bond / Performance Guarantee and / or cause further costs and expenses to be incurred by the Applicant.

9. There is a request to keep this matter during vacation so that both these Defendants can get an opportunity to put forth their case. Because, otherwise also the validity of the Bank guarantee is upto 30th November 2023. Hence, Order:-

ORDER

- (i) An *ex parte* injunction is granted in terms of prayer clause (a) and (b).
- (ii) Matter be kept before vacation Judge in view of the urgency on 17th November, 2023.
- (iii) Let copy of this order be served on both the Defendants by e-mail.

- (iv) Parties to act on an authenticated copy of this order.

46. In the light of the above discussion, we answer the questions as noted by us in paragraph 30 of this judgment to hold that the appellant had lawfully invoked the CBG and as per its terms and conditions and accordingly, had become entitled to the proceeds of the CBG to be remitted to it by the SBI. Further no case whatsoever was made out by the plaintiff for an injunction to restrain the SBI from honouring the proceeds of the CBG in favour of the appellant. We also hold that qua the CBG, this Court had no jurisdiction to entertain the commercial suit as the parties had agreed to be governed by the Egyptian Law.

47. Resultantly, the appeal needs to succeed. It is accordingly allowed in terms of the following order:

ORDER

- (i) The impugned order dated 9 November 2024 passed by the learned Single Judge on Interim application (L) 31678 of 2023 is quashed and set aside.
- (ii) It is held that the appellant would be entitled to the benefits of CBG issued in its favour by defendant No.2-State Bank of India.

48. At this stage, learned counsel for the respondents has prayed that the ad-interim orders passed by this Court be continued for some time. Mr.

Sakhardande has opposed this prayer in submitting that the appellant being a bank unwarrantedly suffered the present litigation, and that no case whatsoever is made out for extension of the ad-interim order. In the facts and circumstances of the case, we are not inclined to extend the ad-interim orders.

(ADVAIT M. SETHNA, J.)

(G. S. KULKARNI, J.)