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

\+ FAO(OS) (COMM) 179/2026, CM APPLs. 45752/2026 and 45753/2026

M/S VISHAL INFRASTRUCTURE LTD AND MIS OJSC EURO- ASIAN CONSTRUCTION CORPORATION EVRASCON (JV) .....Appellant

Through: Mr. Sandeep Sethi and Mr. Sonal Kumar Singh, Sr. Advs. with Ms. Muskan Agarwal, Mr. Parth Sindhwani, Mr. Krisna Gambhir, Ms. Shreya Sethi and Mr. Puneet, Advs.

versus

CHIEF ENGINEER (CONST)-1 NORTH WESTERN RAILWAY JAIPUR & ORS. .....Respondents

Through: Mr. Siddhartha Shankar Ray, CGSC, Ms. Sonali Modi and Mr. Mukul Dev, Advs.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR
HON'BLE MR. JUSTICE VINOD KUMAR

JUDGMENT (ORAL)

% **20.07.2026**

C. HARI SHANKAR, J.

1. This appeal is directed against the judgment dated 16 July 2026 passed by learned Single Judge of this Court in OMP (I) (Comm) 240/2026 under Section 9 of the Arbitration and Conciliation Act, 1996, whereby the prayer of the appellant for restraint against invocation of Bank Guarantees No. 0002NDLG00146423 for ₹

6,22,00,000/-, (ii) No. LOBG801512208822 for ₹ 2,24,71,610/-, (iii) No. 009GT02223630006 for ₹ 5,76,85,000/-, and (iv) No. 022BG07253380004 for ₹ 3,00,00,000/- has been denied. Of these, Bank Guarantees Nos 0002NDLG00146423, LOBG801512208822 and 009GT02223630006 are Performance Guarantees and Bank Guarantee No. 022BG07253380004 is a Retention Bank Guarantee. We may note here that Clause 7.1.1 of Engineering, Procurement and Construction Agreement[1] envisages providing of a Performance Bank Guarantee[2] and Clause 7.5 envisages providing of a Retention Bank Guarantee[3]. The Clauses read thus:

> "7.1.1 The Contractor shall, for the performance of its obligations hereunder, provide to the Authority, within 30(Thirty) days of issue of LOA, an irrevocable and Unconditional Bank Guarantee (the "Performance Security"), for an amount equal to [3% (three per cent) or 5% (five per cent), which ever is applicable] of the Contract Price from a Bank in the form set forth in Annex-I of Schedule-F.
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> **7.5 Retention Money**
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> 7.5.1 From every payment for Works due to the Contractor in accordance with the provisions of Clause 17.5, the Authority shall deduct 6% (six per cent) thereof as guarantee money for performance of the obligations of the Contractor during the Construction Period (the **"Retention Money")** subject to the condition that the maximum amount of Retention Money shall not exceed 5% (five per cent) of the Contract Price.
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> 7.5.2 Upon occurrence of a Contractor's Default, the Authority shall, without prejudice to its other rights and remedies hereunder or in law, be entitled to appropriate the relevant amounts from the Retention Money as Damages for such Contractor's Default.
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> 7.5.3 The Contractor may, upon furnishing an irrevocable and unconditional bank guarantee from the Bank substantially in the form provided at Annex-II of Schedule F, require the Authority to

[1] "EPC Agreement", hereinafter
[2] "PBG", hereinafter
[3] "RBG", hereinafter

refund the Retention Money deducted by the Authority under the provisions of Clause 7.5.1. Provided that the refund hereunder shall be made in tranches of not less than 0.5% (zero point five per cent) of the Contract Price. Further, the Retention Money may be deposited as Bank Guarantee, issued by Bank after signing of the Agreement, but before the payment against the first Stage Payment. Provided further that validity of Bank Guarantee shall be extended from time to time depending upon extension granted for completion of the Project.

7.5.4 Within 15 (fifteen) days of the date of issue of the Completion Certificate, the Authority shall discharge the bank guarantees, if any, furnished by the Contractor under the provisions of Clause 7.5.3 and refund the balance of Retention Money remaining with the Authority after adjusting the amounts appropriated under the provisions of Clause 7.5.2 and the amounts refunded under the provisions of Clause 7.5.3.

7.5.5 The Parties agree that in the event of Termination of this Agreement, the Retention Money and the bank guarantees specified in this Clause 7.5 shall be treated as if they are Performance Security and shall be reckoned as such for the purposes of Termination Payment under Clause 21.6."

2. The covenants of the Bank Guarantees are, to all intents and purposes, similar, and read, by way of example in the case of Bank Guarantee No. 0002NDLG00146423 dated 28 December 2022 issued by the ICICI Bank, thus:

"1. The Bank hereby unconditionally and irrevocably guarantees the due and faithful performance of the Contractor's obligations during the 12-12-2025 (Construction Period/Defects Liability Period)under and in accordance with the Agreement, and agrees and undertakes to pay to the FA & CAO/ Construction, North Western Railway, Jaipur, upon its mere first written demand, and without any demur, reservation, contest or protest, and without any reference to the Contractor, such sum or sums up to an aggregate sum of the Guarantee Amount as the Authority shall claim, without the Authority being required to prove or to show grounds or reasons for its demand and/or for the sum specified therein.

2. A letter from the Authority, under the hand of an officer not below the rank of Chief Engineer (Const.)-I, North Western

> Railway, Jaipur, Railway, that the Contractor has committed default in the due and faithful performance of all or any of its obligations under and in accordance with the Agreement shall be conclusive, final and binding on the Bank. The Bank further agrees that the Authority shall be the sole judge as to whether the Contractor is in default in due and faithful performance of its obligations during and under the Agreement and its decision that the Contractor is in defaults shall be final and binding on the Bank notwithstanding any difference between the Authority and the Contractor, or any dispute between them pending before any court, tribunal, arbitrators or any other authority or body, or by the discharge of the Contractor for any reason whatsoever."

3. Aggrieved at the attempt of the respondents to encash the aforesaid Bank Guarantees, the appellant approached the learned Single Judge by means of an appeal under Section 9 of the Arbitration and Conciliation Act, 1996, seeking a restraint against the invocation of the Bank Guarantees. The learned Single Judge has dismissed the application by way of judgment dated 16 July 2026, against which the appellant is in appeal before us.

4. We have heard Mr. Sandeep Sethi and Mr. Sonal Kumar Singh, learned Senior Counsel for the appellant and Mr. Siddhartha Shankar Ray, learned CGSC for the respondents at length.

5. Plainly, the Bank Guarantees are unconditional in their terms. However, Mr. Sethi submits that the invocation of the Bank Guarantee is in the teeth of an assurance granted by the respondent to the learned Single Judge of this Court in para 8 of the judgment dated 26 May 2026 in OMP (I) (Comm) 220/2026 which was also preferred under Section 9 of the Arbitration and Conciliation Act, 1996, which reads thus:

> "8. The parties further agree that, till such time as the DAB

> renders its decision with respect to the disputes between the parties, Communication No. JU/Const.-/74-W-20/2025-26/PMS/JU/Pt-VII dated 12.05.2026 and Communication No. LECPL/MUJSNWR/ JU/2025-26/1845 dated 13.05.2026, insofar as they pertain to imposition of liquidated damages amounting to Rs. 47.75 Crores, shall not be acted upon."

6. Mr. Sethi submits that the amounts that were sought to be recovered by way of encashment of the aforenoted Bank Guarantees are subsumed in the damages contemplated in the letters dated 12 May 2026 and 13 May 2026 to which para 8 of the judgment dated 26 May 2026 refers. He, therefore, submits that, having undertaken before the learned Single Judge that till the DAB rendered decisions with respect to disputes between the parties, the said two letters would not be acted upon, the respondent could not have proceeded to invoke the Bank Guarantees in question, recovering the very same amount apart from amounts in excess thereof.

7. Mr. Sethi has also drawn our attention to Clauses 7.3.1 and 7.5.2 of the EPC agreement, which refers to recovery of damages by way of encashment of security and retention money provided by the appellant which read thus:

> "7.3.1 Upon occurrence of a Contractor Default, the Authority shall, without prejudice to its other rights and remedies hereunder or in law, be entitled to encash and appropriate from the Performance Security the amounts due to it as Damages for the Contractor Default.
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> 7.5.2 Upon occurrence of a Contractor's Default, the Authority shall, without prejudice to its other rights and remedies hereunder or in law, be entitled to appropriate the relevant amounts from the Retention Money as Damages for such Contractor's Default."

8. Thus, Mr. Sethi submits that the EPC specifically envisages the invocation and encashment of the PBG and RBG only towards recovery of damages which may be claimed by the respondent from the appellant. This very claim of the damages constitutes the subject matter of the two letters dated 12 May 2026 and 13 May 2026 referred to in para 8 of the judgment dated 26 May 2026 passed by the learned Single Judge. Having undertaken not to proceed to enforce the said letters till the DAB took a decision, therefore, Mr. Sethi submits that the respondent could not have proceeded to encash Bank Guarantees.

9. Mr. Ray, learned Counsel for the respondent refutes Mr. Sethi's contention that the amounts covered by the Bank Guarantees pertain to the damages envisaged to the afore-noted communications dated 12 May 2026 and 13 May 2026. He places reliance on Clause 21.6.1, which reads thus:

> "21.6 Termination Payment
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> 21. Upon Termination on account of Contractor Default under Clause 21.1, the Authority
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> > (a) encash and appropriate the Performance Security and Retention Money and in the event the Contractor has failed to replenish or extend the Performance Security, claim the amount stipulated in Clause 7.1.1, as agreed pre-determined compensation to the Authority for any losses, delays and cost of completing the Works, if any;
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> > (b) encash and appropriate the bank guarantee, if any, to the extent of the outstanding Advance Payment and interest thereon; and
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> > (c) pay to the Contractor, by way of Termination Payment, an amount equivalent to the Valuation of Unpaid Works after adjusting any other sums payable or recoverable, as the case may be, in accordance with the provisions of this Agreement; and all taxes due to be deducted at source."

10. Having heard learned counsel, we are of the opinion the impugned judgment of the learned Single Judge does not call for any interference. The entitlement to the encashment and invoking Bank Guarantees is not restricted to the claim for damages in Clauses 7.3.1 and 7.5 of the EPC Agreement. *Clause 21.6.1(a) of the Agreement independently entitles the respondent to encash both the Bank Guarantees on the agreement being terminated. It is not in dispute that the contract between the parties stands terminated on 29 May 2026.*

11. In that view of the matter, it cannot be said that, by attempting to encash the Bank Guarantees, the respondents were breaching the undertaking given in para 8 of order dated 26 May 2026 by the learned Single Judge in OMP (I) (Comm) 220/2026.

12. This, therefore, is not a case in which the encashment of the Bank Guarantee suffers from fraud, irreparable prejudice or special equities as would justify grant of an interlocutory and interdictory relief. In a case of an unconditional Bank Guarantee, a stay of invocation can be granted only in these circumstances, as held by the Supreme Court in ***Svenska Handelsbanken v. Indian Charge Chrome Ltd.***[4], thus:

> "53. On the question whether the High Court should, in a transaction between a banker and a banker, grant an injunction at the instance of the beneficiary of an irrevocable letter of credit restraining the issuing bank from recalling the amount paid under reserve from the negotiating bank acting on behalf of the

[4] **(1994) 1 SCC 502**

beneficiary against a document of guarantee at the instance of the beneficiary this Court held that:

> "[T]he High Court was wrong in granting the temporary injunction restraining the appellant bank from recalling the amount paid to the respondent bank. Courts usually refrain from granting injunction to restrain the performance of the contractual obligations arising out of a letter of credit or a bank guarantee between one bank and another. If such temporary injunctions were to be granted in a transaction between a banker and a banker, restraining a bank from recalling the amount due when payment is made under reserve to another bank or in terms of the letter of guarantee or credit executed by it, the whole banking system in the country would fail."

54. In ***U.P. Cooperative Federation Ltd.* v. *Singh Consultants & Engineers (P) Ltd.***[5] the facts were: The appellant, a State Government enterprise, on or about May 17, 1983, entered into a contract with the respondent, a private limited company, for the supply and installation of a vanaspati manufacturing plant at a place in the district of Nainital. The contract bond contemplated guaranteed performance of the work at various stages in accordance with the time schedule prescribed and provided for completion and commissioning of the plant after trial run by May 15, 1984. According to the appellant, the time was essentially and indisputably the essence of the contract.

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58. The appellant then moved this Court and this Court through Sabyasachi Mukharji and Shetty, JJ. allowed the appeal; at page 1138 of the report Mukharji, J. observed as under:

> "Under the terms agreed to between the parties, there is no scope of injunction. The High Court proceeded on the basis that this was not an injunction sought against the bank but against the appellant. But the net effect of the injunction is to restrain the bank from performing the bank guarantee. That cannot be done. One cannot do indirectly what one is not free to do directly. The respondent was not to suffer any injustice which was irretrievable. The respondent can sue the appellant for damages. There cannot be any basis in the case for apprehension that irretrievable damage would be caused, if any. His Lordship was of the opinion that this was not a case in which injunction should be granted. An irrevocable commitment either in the form of confirmed

[5] **(1988) 1 SCC 174**

bank guarantee or irrevocable letter of credit cannot be interfered with except if a case of fraud or a case of a question of apprehension of irretrievable injustice has been made out. This is the well-settled principle of the law in England. This is also the well-settled principle of law in India. *No fraud and no question of irretrievable injustice was involved in the case.*"

(emphasis supplied)

The learned Judge at pages 1141 and 1142 held as under:

"In order to restrain the operation either of irrevocable letter of credit or of confirmed letter of credit or of bank guarantee, there should be a serious dispute and a good *prima facie* case of fraud and special equities in the form of preventing irretrievable injustice between the parties; otherwise, the very purpose of bank guarantees would be negatived and the fabric of trading operation would be jeopardised. The commitments of the banks must be honoured free from interference by the courts; otherwise, trust in commerce internal and international would be irreparably damaged. It is only in exceptional cases, that is, in cases of fraud or in cases of irretrievable injustice that the court should interfere. This is not a case where irretrievable injustice would be done by enforcement of the bank guarantee. This is also not a case where a strong *prima facie* case of fraud in entering into a transaction was made out. The High Court should not have interfered with the bank guarantee. The judgment and order of the High Court set aside. The order of the Civil Judge restored."

(emphasis in original)

59. Shetty, J. concurring with Mukharji, J. noticed the question involved at page 1143 of the report as under:

"Whether the obligation is similar to the one arising under a letter of credit? Whether the Court could interfere in regard to such obligation, and if so, under what circumstances? These are the questions raised in the appeal."

The learned Judge at pages 1144 to 1145 observed:

"The primary question for consideration is whether the High Court was justified in restraining the appellant from invoking the bank guarantees. The basic nature of the case relates to the obligations assumed by the bank under the guarantees given to the appellant. If under the law, the bank cannot be prevented by the respondent from honouring the credit guarantees, the appellant also cannot be restrained from invoking the guarantees. What applies to the bank must equally apply to the appellant. Therefore, the frame of the suit by not impleading the bank cannot make any difference in the position of law. Equally, it would be futile to contend that the court was justified in granting the injunction since it has found a *prima facie* case in favour of the respondent. The question of examining the *prima facie* case or balance of convenience does not arise if the court cannot interfere with the unconditional commitment made by the bank in the guarantees in question."

(emphasis in original)

The learned Judge further at pages 1145, 1146 and 1148 observed:

"The modern documentary credit had its origin from letters of credit. The letter of credit has developed over hundreds of years of international trade. It was intended to facilitate the transfer of goods between distant and unfamiliar buyer and seller. It was found difficult for a buyer to pay for goods prior to their delivery. The bank's letter of credit came to bridge this gap. In such transactions, the seller (beneficiary) receives payment from the issuing bank when he presents a demand as per the terms of the documents. The bank must pay if the documents are in order and the terms of credit are satisfied. The bank, however, was not allowed to determine whether the seller had actually shipped the goods or whether the goods conformed to the requirements of the contract. Any dispute between the seller and the buyer must be settled between themselves. The Courts, however, in carving out an exception to this rule of absolute independence, *held that if there has been a 'fraud in the transaction', the bank could dishonour beneficiary's demand for payment*. The Courts have generally permitted dishonour only on the fraud of the beneficiary, not the fraud of somebody else.

In modern commercial transactions, various devices are used to ensure performance by the contracting parties. The traditional letter of credit has taken a new meaning. Stand-by letters of credit are also used in business circles. Performance bond and guarantee bond are also devices increasingly adopted in transactions. The Courts have treated such documents as analogous to letter of credit."

(emphasis supplied)

Learned Judge at pages 1149 and 1150 again observed as under:

"Whether it is a traditional letter of credit or a new device, like performance bond or performance guarantee, the

> obligation of the bank appears to be the same. Since the bank pledges its own credit, involving its reputation, it has no defence except in the case of fraud. The nature of the fraud that the courts talk about is the fraud of an 'egregious nature as to vitiate the entire underlying transaction'. It is the fraud of the beneficiary, not fraud of somebody else. The bank cannot be compelled to honour the credit in such cases. In such cases, it would be proper for the bank to ask the buyer to approach the court for an injunction. The court, however, should not lightly interfere with the operation of irrevocable documentary credit. In order to restrain the operation of irrevocable letter of credit, performance bond or guarantee, there should be a serious dispute to be tried and there should *be a good prima facie act of fraud*."
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> (emphasis supplied)

Learned Judge at page 1150 observed:

> "The sound banking system may, however, require more caution in the issuance of irrevocable documentary credits. It would be for the banks to safeguard themselves by other means, and, generally, not for the courts to come to their rescue with injunctions *unless there is established fraud*. The appeal must be allowed, and the order of the Civil Judge, restored."
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> (emphasis supplied)

60. We have referred to the observations of both Sabyasachi Mukharji as well as Shetty, JJ. in extenso to emphasise that in case of confirmed bank guarantees/irrevocable letters of credit, it cannot be interfered with unless there is fraud and irretrievable injustice involved in the case and fraud has to be an established fraud. The expression "to prevent irretrievable injustice" appears to have been taken from the decision of the Court of Appeal in England in the case of ***Elian and Rabbath (Trading as Elian & Rabbath)* v. *Matsas and Matsas***[6]. The facts of that case were peculiar. The first defendant, a vessel, was chartered by Lebanese charterers for carriage of plaintiffs' cargo (consigned to Hungary) from Beirut to Rijeka. Discharge of the cargo was delayed at Rijeka and the shipowners exercised their lien on cargo in respect of demurrage due to delay in discharge of cargo. The third defendant-bank put up a guarantee in London in favour of the second defendants, who were first defendants' London agents, to secure release of cargo. There was a claim by Yugoslavians to distrain upon goods, involving the ship in further delay and master of the ship, on lifting original lien, immediately exercised another

[6] **(1966) 2 Lloyd's Rep 495**

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lien, in respect of extra delay. Original lien was raised when Hungarian buyers put up 2000 Pounds. Two years later the shipowners claimed arbitration with charterers to assess demurrage for which the first lien was exercised and claimed to enforce guarantee. Plaintiff claimed declaration that guarantee was not valid (as the original lien had been lifted) and an injunction to restrain shipowners or their agents from enforcing guarantee. The shipowners and their London agents as first and second defendants appealed against granting of injunction by Blain, J. It was held by the Court of Appeal that it was a special case in which court should grant injunction to prevent what might be irretrievable injustice. Lord Denning observed that although the shippers were not parties to the bank guarantee, nevertheless they had a most important interest in it. If the Midland Bank Ltd., paid under this guarantee, they would claim against the Lebanese Bank, who in turn would claim against the shippers. The shippers would certainly be debited with the account. On being so debited, they would have to sue the shipowners for breach of their promise express or implied to release the goods. Lord Denning posed the question: "Were the shippers to be forced to take that course?" Or can they short-circuit the dispute by suing the shipowners at once for an injunction? Lord Denning observed that it was a special case in which injunction should be granted and went on to observe that there was a prima facie ground for saying that the shipowners promised that, if the bank guarantee was given, they would release the goods. He further went on to observe that the only lien they had in mind at that time was the lien for demurrage. But would anyone suppose that the goods would be held for another lien in respect of extra delay. His Lordship observed that "it can well be argued that the guarantee was given on the understanding that the lien was raised and no further lien imposed, and that when the shipowners, in breach of that understanding imposed a further lien, they were disabled from acting on the guarantee". If we closely analyse the facts of that case, irretrievable injustice which was made the basis for grant of injunction really was on the ground that the guarantee was not encashable on its terms when the buyers had paid 2000 Pounds to lift the original lien.

61. Another matter came before this Hon'ble Court in ***General Electric Technical Services Company Inc.*** **v.** ***Punj Sons (P) Ltd.***[7]. The facts of the case are as follows.

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68**.** On the question, whether the court was justified in restraining the bank from paying the appellant under the bank guarantee at the instance of Respondent 1, allowing the appeal of the appellant-company, this Court held as under:

[7] **(1991) 4 SCC 230**

"In the instant case, the High Court has misconstrued the terms of the bank guarantee and the nature of the inter-se rights of the parties under the contract. The mobilisation advance is required to be recovered by the appellant from the running bills submitted by the respondent. If the full mobilisation advance has not been recovered, it would be to the advantage of the respondent. Secondly, the Bank is not concerned with the outstanding amount payable by the appellant under the running bills. The right to recover the amount under the running bills has no relevance to the liability of the Bank under the guarantee. 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 appellant 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. The demand by the appellant is under the bank guarantee and as per the terms thereof. The Bank has to pay and the Bank was willing to pay as per the undertaking. The Bank cannot be interdicted by the court at the instance of Respondent 1 in the absence of fraud or special equities in the form of preventing irretrievable injustice between the parties. The High Court in the absence of prima facie case on such matters has committed an error in restraining the Bank from honouring its commitment under the bank guarantee."

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71. Shetty, J. speaking for the Bench noticed the earlier observations of Mukharji, J. in the case of ***U.P. Cooperative Federation Ltd***. and stated that the nature of the fraud that the courts talk about is fraud of an "egregious nature as to vitiate the entire underlying transaction". It is fraud of the beneficiary, not the fraud of somebody else.

72. Again in this very judgment Shetty, J. referred to the observations of Mukharji, J. that there should be prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Mere irretrievable injustice without prima facie case of established fraud is of no consequence in restraining the encashment of bank guarantee."

13. A Division Bench of this Court in ***CRSC Research and Design Institute Group Co Ltd v. Dedicated Freight Corridor Corporation of***

India Ltd & Ors[8] has distilled the entire law on the subject, and held thus:

> 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

[8] **2020 SCC OnLine Del 1526**

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.

14. In that view of the matter, we are of the opinion that there is no error in the view adopted by the learned Single Judge.

15. The appeal is accordingly dismissed *in limine*.

C. HARI SHANKAR, J

VINOD KUMAR, J

JULY 20, 2026/ss