Before Rakesh Kumar Jain, J.

ISGEC HEAVY ENGINEERING LIMITED—*Petitioner*

versus

CAVITE BIOFUEL PRODUCERS INC. AND ANOTHER— *Respondent*

ARB-ICA No.1 of 2018

April 17, 2018

A. Arbitration and Conciliation Act, 1996 Section 9— Encashment and Realization of the bank Guarantees Interim stay — As a matter of general Rule, injunction is not be granted But there are four exceptions to general Rule — Court may grant injunction restraining the invocation of bank guarantee if: (i) There is a fraud of egregious nature in connection with the bank guarantee which would vitiate the very foundation of such guarantee and the beneficiary seeks to take advantage of such fraud; (ii) the applicant, in the facts and circumstances of the case, clearly establishes a case of irretrievable injustice or irreparable damage; (iii) the applicant is able to establish exceptional or special equities of the kind which would outrage the conscience of the court; and (iv) the bank guarantee is not invoked strictly in its terms and by the person empowered to invoke under the terms of the guarantee.

Held, that the Court may grant injunction restraining the invocation of bank guarantee if; (i) there is a fraud of egregious nature in connection with the bank guarantee which would vitiate the very foundation of such guarantee and the beneficiary seeks to take advantage of such fraud; (ii) the applicant, in the facts and circumstances of the case, clearly establishes a case of irretrievable injustice or irreparable damage; (iii) the applicant is able to establish exceptional or special equities of the kind which would outrage the conscience of the court; and (iv) the bank guarantee is not invoked strictly in its terms and by the person empowered to invoke under the terms of the guarantee.

(Para 27)

Akshay Bhan, Senior Advocate, assisted by Shambu Sharan, Saurab Kapoor, Amandeep and Divya Krishnan, Advocates, *for the petitioner*.

Puneet Bali, Senior Advocate, assisted by Kapil Arora,

Advocate, for respondent no.1.

Sumeet Goel, Advocate, Manav Bajaj and Varsha Gupta, Advocates, for respondents no.2.

RAKESH KUMAR JAIN, J.

(1) This petition is filed under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act") for interim stay against the encashment and realization of the bank guarantees furnished by respondent no.2 on behalf of the petitioner to respondent no.1.

(2) The petitioner is a limited company, having its registered office at Yamunanagar, Haryana, and engaged in heavy engineering, equipment manufacturing and providing engineering solutions. Respondent no.1 is a Philippines based company and respondent no.2 is the bank who has issued various guarantees from time to time in compliance of the contract(s) entered into between the petitioner and respondent no.1.

(3) Respondent no.1 entered into an Engineering, Procurement and Construction Contract (hereinafter referred to as the "EPC Contract") with the petitioner for development, design, engineering, procurement, construction, installation, testing, commissioning, rectification of defects, rectification of certain fleet-wide defects, operation, maintenance, repair, refurbishment and modification of a fully integrated sugar mill, bio-ethanol distillery and cogeneration facility (hereinafter referred to as the "facility") to be located in Sitio Lobo-Lobo, Baranguay Cauangan, Municipality of Magallanes, Cavite, Philippines. On 16.06.2015, the EPC Contract was further split into two further contracts, namely, Offshore Supply Contract and the Onshore Supply Contract. The petitioner was engaged as the Offshore Contractor under the Offshore Supply Contract to perform offshore works forming part of the facility and a Philippines based company called as "Juntee Philippines Inc." (hereinafter referred to as the "Juntee") was engaged as the Onshore Contractor under the Onshore Supply Contract to perform onshore works forming part of the facility. Both the Offshore Supply Contract and the Onshore Supply Contract were collectively called Coordinated Contracts and Offshore Contractor and the Onshore Contractor were called as Coordinated Contractors. On 16.06.2015 itself, a Coordination Agreement was executed between the petitioner, respondent no.1 and Juntee.

(4) In terms of the aforesaid agreements/contracts, the petitioner furnished advance payment guarantees and performance bank guarantees through respondent no.2 to respondent no.1. In Appendix-I dealing with the Definitions and Interpretations, the Advance Payment Guarantees has been defined as "an advance payment guarantee issued on behalf of the Contractor to the Owner in respect of the Advance Payment in accordance with Clauses 12.1 to 12.5 in the form specified in Schedule 12 or otherwise in the Approved Form" and the Performance Bank Guarantee has been defined as "a performance bank guarantee or performance bank guarantees issued on behalf of the Contractor to the Owner under this Contract in the form specified in Schedule 12 or otherwise in the Approved Form".

(5) At this stage, it would be pertinent to mention that the word "security" is also defined as "any bank undertaking guarantees and other security procured or provided by the Contractor in favour of the Owner in respect of all or some of the Contractor's obligations under or in connection with this Contract (and includes the Performance Bank Guarantees)". Security is further defined in Clause 12 of the Offshore Supply Contract, in which both the Advance Payment Guarantee and Performance Bank Guarantee are defined in Clauses 12.1 to 12.9. The Advance Payment Guarantee and the Performance Bank Guarantee under the Onshore Supply Contract and the Offshore Supply Contract were given by the petitioner to the extent of 10% of the contract value for the two contracts and in terms of Clause 12.3, the advance payment was to be repaid through 10% deductions from each payment milestone until the advance payment is repaid in full. The petitioner was under an obligation to commence the onshore and offshore works on the commencement date and perform the said work in accordance with the programme, milestone schedule and under the Coordinated Contracts. The target date for commercial operations was fixed as 26.11.2016.

(6) The petitioner has furnished various guarantees under the offshore and onshore contracts, which are reproduced as under:-

Offshore Contract							
BG No.	**Nature of BG**	**New Expiry Date**	**Bank**	**BG Amount**	**Currency**	**BG reduction**	**Balance**
GO 282238549	Advance Payment Guarantee (10%)	30.4.2018	ANZ	4,702,500	US$	2,275,403.23	2,427,096.77

GO 282218549	Performance Bank Guarantee (12.5%)	30.4.2018	ANZ	5,878,125	US$	n.a.	5,878,125.00
GO 237788549	Further Advance Payment Guarantee	31.3.2018	ANZ	6,000,000	US$	n.a.	6,000,000

Onshore Contract							
BG No.	**Nature of BG**	**Expiry Date**	**Bank**	**BG Amount**	**Currency**	**BG reduction**	**Balance**
GO 282228549	Advance Payment Guarantee (10%)	30.4.2018	ANZ	62,356,200	PhP	31,379,249.74	30,976,950.26
GO 282248549	Performance Bank Guarantee (12.5%)	30.11.18	ANZ	77,945,250	PhP	n.a.	77,945,250.00
GO 237798549	Onshore Further Advance Payment Guarantee	30.4.2018	ANZ	4,000,000	US$	n.a.	4,000,000.00

(7) It was provided in the Advance Payment Guarantee furnished by respondent no.2 on behalf of the petitioner that *"we, ANZ Banking Group Limited, irrevocably and unconditionally undertake with you that whenever you give written notice (Refer Schedule 1) to us demanding payment, we will, notwithstanding any objection which may be made by the Contractor and without any right of set-off or counterclaim, immediately pay to you or as you may direct such an amount as you may in that notice require not exceeding (when aggregated with any amount(s) previously so paid) the Guaranteed Sum (Advance Payment Guarantee). The Guaranteed Sum will be repaid through 10% deductions from each payment Milestone until the Advance Payment has been repaid in full. The Advance Payment Guarantee shall progressively be proportionately reduced by an amount equal to 10% of each Invoice value as evidenced by the Contractor in its Invoices".*

(8) Similarly, in regard to the Performance Bank Guarantee, the Bank has stated that *"we, ANZ Banking Group Limited, irrevocably and unconditionally undertake with you that whenever you give written notice (Refer Schedule 1) to us demanding payment, we will, notwithstanding any objection which may be made by the Contractor and without any right of set-off or counterclaim, immediately pay to you or as you may direct such an amount as you may in that notice require not exceeding (when aggregated with any amount(s) previously so paid) the Guaranteed Sum (Performance Bank Guarantee).*

(9) The petitioner has alleged that it has given a notice on 02.12.2015 to respondent no.1 under Clause 37.5 of the Onshore Supply Contract regarding discovery of alleged site latent conditions and its cost implications. According to the petitioner, the aforesaid notice dated 02.12.2015 was followed by a reminder dated 10.12.2015 and in turn, it received the letter dated 04.01.2016 from respondent no.1 asking the petitioner to send the recent site topographical report in terms of Clause 37.6 of the Onshore Supply Contract. The petitioner had allegedly sent the letter dated 05.01.2016 with the site topographical report and, thereafter, vide letter dated 15.02.2016, request regarding variation in accordance with Clause 39 of the Onshore Supply Contract in terms of the latent conditions was made to respondent no.1. It also sent a letter dated 01.03.2016 to respondent no.1 for the formal extension of time and for approval of the additional cost towards change in the scope of work resulting from the latent conditions. Thereafter, respondent no.1, vide its letter dated 08.03.2016, responded to the petitioner that it was not in a position to assess the petitioner's latent conditions claim intimating about the interim arrangements to facilitate the work, while suggesting to continue discussion and assessment regarding alleged latent conditions claims and alleged variation claim. The petitioner sent letters dated 17.03.2016, 18.03.2016, 25.03.2016 and 12.04.2016, all in respect of the site latent conditions, its cost implications and requested for extension of time.

(10) Although, according to respondent no.1, the petitioner has deliberately concealed the material document from this Court at the time of filing the present petition, namely, the Deed of Agreement, which was executed amongst all the three parties on 21.05.2016, yet the said document has been placed on record by the petitioner by way of CM No.3621-CII of 2018, which was allowed vide order dated 19.02.2018. The Deed of Agreement was executed because the

Coordinated Contractors were facing cash inflow crunch, therefore, respondent no.1 had agreed to help them by providing further advance payments to alleviate the cash inflow issues on the terms and conditions set out in the said deed and accordingly, respondent no.1 gave a further advance of total USD 10 million (USD 6 million for offshore work and USD 4 million for onshore work) to the petitioner, in lieu of which the petitioner furnished Further Advance Payment Guarantees of USD 6 million and USD 4 million respectively.

(11) In respect of other terms relating to the security, it is provided in Clause 5.2 of the Deed of Agreement that *"the Owner may, at its absolute discretion, recover any amounts in accordance with either of the Coordinated Contracts, the Coordination Agreement or this deed by enforcing its rights against both or either of the Further Advance Payment Guarantees".*

(12) Since the target date for the commercial operation was 26.11.2016, which was not achieved, therefore, respondent no.1 sent a notice on 30.11.2016 to the petitioner informing its failure in this regard and reminded to furnish pending particulars for assessment of its alleged claim relating to latent conditions. In response to the said notice dated 30.11.2016, the petitioner had allegedly sent a letter dated 14.12.2016 to respondent no.1 while relying upon the letters dated 02.12.2015 and 01.03.2016 regarding the latent site conditions issues faced by it resulting into major changes in the overall scope of work causing non-achievement of commercial operations in time. The petitioner also sent the letter dated 10.02.2017 to respondent no.1 highlighting the impact of the latent site conditions on the completion time and the contract prices, whereas according to respondent no.1, the petitioner had left the site on 17.02.2017 and did not return for completion of work. Respondent no.1 sent a letter on 27.02.2017 and also reminded the petitioner that it is waiting for the further particulars regarding its alleged claim of latent conditions. The petitioner sent a letter on 14.03.2017, in response to the letter dated 27.02.2017 bringing it to the notice of respondent no.1 about the latent conditions faced by it and had accordingly issued notices under Clauses 37, 39, and 40 of the contract towards seeking extension of time and cost incurred owing to these latent conditions and again sought approval of respondent no.1 regarding the claims for extension of date for commercial operations and the consequential cost, which was denied by respondent no.1 vide its letter dated 05.04.2017 while alleging that the fault is all attributed to the petitioner and that the petitioner is liable to pay the Delay

Liquidated Damages as it has failed to achieve the commercial operations on 26.11.2016. Respondent no.1 also sent a letter dated 11.05.2017 intimating that it cannot properly consider the petitioner's case due to the pendency of the final details on its part and ultimately, after a brief correspondence between them, respondent no.1, vide letter dated 29.01.2018, rejected the petitioner's claim relating to latent conditions, extension of time and variation and further issued a notice on 30.01.2018 of termination of contract under Clause 44.1 of the contract on account of failure of the petitioner to achieve the commercial operations on 26.11.2016. According to respondent no.1, the status of the onshore work, completed by the petitioner up to 31.12.2017 was 43% and accordingly invoked all the bank guarantees.

(13) Aggrieved against the said action of respondent no.1, the petitioner preferred this petition under Section 9 of the Act on 01.02.2018, in which, it was ordered on 06.02.2018, that the bank guarantees shall not be encashed.

(14) At the threshold, respondent no.1 had raised the issue regarding territorial jurisdiction of this Court to hear the present petition on merits, which was decided by a separate order dated 07.02.2018, holding that this Court has the jurisdiction to hear the petition filed under Section 9 of the Act and the case was, thus, adjourned for hearing on merits and till then, the interim order was ordered to be continued.

(15) Learned counsel for the petitioner has submitted that respondent no.1 has terminated the contract without sending the notice or raising the invoice of the so called claims in terms of Clauses 44.16 to 44.19 of the contract. It is basically submitted that even if it is assumed that respondent no.1 is entitled for the Delay Liquidated Damages, which can be claimed on account of failure of the petitioner to achieve the commercial operation by the date fixed for the commencement of the commercial operation, the owner has to send invoice to the contractor and after expiration of 15 business days from the date of the owner's invoice, the amount invoiced shall be the debt due and payable to the owner on demand and may be deducted from any payments otherwise due from the owner to the contractor and the owner may also have recourse to the security. It is, thus, submitted that since the security would include the bank guarantees, therefore, it could be invoked/encashed only after the sum due is assessed in regard to the Delay Liquidated Damages. In this regard, learned counsel for the petitioner has relied upon a decision of the Supreme Court rendered

in the case of ***Gangotri Enterprises Ltd.*** *versus* ***Union of India (UOI) and ors.***[1] and has referred paras 37, 38, 42 and 43 of the said judgment, which read as under:-

> "37. The questions, which fell for consideration before this Court, were - first, what is the true interpretation of Clause 18; second what is the meaning of the words "sum due" and "may become due" under the contract or any other contract with the purchaser occurring in Clause 18; third, whether Clause 18 empowered the Union of India to make recovery of amount claimed by it by way of damages (liquidated or unliquidated) for breach of contract pending arbitration proceedings from the contractor and lastly, whether in such case, contractor is entitled to claim injunction against the Union of India from making recovery of such sum.
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> 38. Justice Bhagwati (as His Lordship then was) speaking for the Bench examined the issue in great detail in the light of law laid down by English and Indian Courts. The learned Judge in his distinctive style of writing after examining the entire case law on the subject held that an expression "sum due" occurring in Clause 18 would mean a sum for which there is an existing obligation to pay in praesenti or in other words which is presently payable and due and, therefore, recovery of only such sums can be made subject matter of Clause 18 which is presently payable and due. It was held that a claim, which is neither due and nor payable, cannot be made subject matter of Clause 18. It was further held that Clause 18 does not create a lien on other sums due to the contractor or give to the purchaser a right to retain such sums until his claim against the contractor is satisfied. It was also held that a claim for damages for breach of contract is not a claim for a sum presently due and payable and the purchaser is not entitled in exercise of the right conferred upon it under Clause 18 to recover the amount of such claim by appropriating other sums due to contractor.
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> 42. On perusal of the record of the case, we find that firstly, arbitration proceedings in relation to the contract dated 22.08.2005 are still pending. Secondly, the sum claimed by

[1] (2016) 11 SCC 720

the respondents from the appellant does not relate to the contract for which the Bank Guarantee had been furnished but it relates to another contract dated 22.08.2005 for which no bank guarantee had been furnished. Thirdly, the sum claimed by the respondents from the appellant is in the nature of damages, which is not yet adjudicated upon in arbitration proceedings. Fourthly, the sum claimed is neither a sum due in praesenti nor a sum payable. In other words, the sum claimed by the respondents is neither an admitted sum and nor a sum which stood adjudicated by any Court of law in any judicial proceedings but it is a disputed sum and lastly, the Bank Guarantee in question being in the nature of a performance guarantee furnished for execution work of contract dated 14.07.2006 (Anand Vihar works) and the work having been completed to the satisfaction of the respondents, they had no right to encash the Bank Guarantee.

43. We have, therefore, no hesitation in holding that both the courts below erred in dismissing the appellant's application for grant of injunction. We are indeed constrained to observe that both the courts committed jurisdictional error when they failed to take note of the law laid down by this Court in Union of India (DGS&D) (supra) which governed the controversy and instead placed reliance on **Himadri Chemicals Industries Ltd. vs. Coal Tar Refining Company**, AIR 2007 SC 2798 and **U.P. State Sugar Corporation vs. Sumac International Ltd.**, (1997) 1 SCC 568, which laid down general principle relating to Bank Guarantee. There can be no quarrel to the proposition laid down in those cases. However, every case has to be decided with reference to the facts of the case involved therein. The case at hand was similar on facts with that of the case of Union of India (DGS&D) (supra) and hence the law laid down in that case was applicable to this case. Even in this Court, both the learned counsel did not bring to our notice the law laid down in Union of India (DGS&D) case (supra)."

(16) It is further submitted that the injunction can be sought by the petitioner against invocation of the bank guarantees and its encashment in case of fraud, irretrievable injustice or irreparable

damages, special equities or where the bank guarantee is not invoked strictly in its terms and by the person empowered to invoke under the terms of the guarantee. In support of his submission, he has relied upon a Single Bench judgment of the Delhi High Court rendered in the case of ***Continental Construction Ltd. and anr.*** *versus* ***Satluj Jal Vidyut Nigam Ltd.***[2]. The relevant paragraphs of the said decision are reproduced as under:-

> "20. On the analysis of the above law laid down by the Supreme Court in its different judgments, it is clear that injunction against encashment of bank guarantee is an exception and not the rule. Cases of such exceptions would have to be evidenced by documents and pleadings on record and compulsorily should fall within any of the following limited categories:-
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> i) If there is a fraud in connection with the bank guarantee which would vitiate the very foundation of such guarantee and the beneficiary seeks to take advantage of such fraud.
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> ii) The applicant, in the facts and circumstance of the case, clearly establishes a case of irretrievable injustice or irreparable damage.
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> iii) The applicant is able to establish exceptional or special equities of the kind which would prick the judicial conscience of the court.
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> iv) When the bank guarantee is not invoked strictly in its terms and by the person empowered to invoke under the terms of the guarantee. In other words, the letter of invocation is in apparent violation to the specific terms of the bank guarantee.
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> 21. The exceptional cases would be few but it could never be stated as an absolute proposition of law that under no circumstances the court could injunct encashment/invocation of a bank guarantee which might have been furnished by a party as an independent contract. A beneficiary is not vested with an unquestionable or unequivocal legal right to encash the bank guarantee on demand. The obligation of the bank furnishing the bank guarantee to pay would be subject to a limited exceptional

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[2] 2006(1) ARBLR 321 (Delhi)

circumstance afore-noticed. As a matter of rule, the bank would be under obligation to encash the bank guarantee, once it is invoked in its terms. The exceptions afore-noticed are merely indicative of the kind of cases where the court may injunct encashment of a bank guarantee. It is neither possible nor permissible to exhaustively classify the cases where the court would not interfere and where the court would judicially intervene in such matters. Every case would have to be decided keeping in view its peculiar facts and circumstances. Despite the principal contract and bank guarantee being Ejusdem negotii, the bank guarantee is an independent and self-contained contract enforceable on its own terms. Except in the exceptional cases where definite material is available before the court to prima facie satisfy itself that on the basis of the pleadings of the parties; documents supporting has such a plea; the case falls in one or more of the categories afore-indicated, the bank guarantee would be encashable per se. It has an obligation which is not dependent upon adjudication of main disputes. The concept of irretrievable injustice, or damages, or special equities would come into play where the parties to a contract having been provided with internal adjudicative mechanism, attempts to frustrate results of such an internal adjudication by recourse to encashment of bank guarantee, particularly when under the terms and conditions of the contract, including the terms of the guarantee, such determination is 'final', of course subject to the limitations spelled out in such contracts. An attempt to over- reach the process of adjudication with intent to cause irreparable prejudice to the other side would be a circumstance which would influence the decision or tilt the special equities in favor of the applicant before the Court.

22. In light of the above principles, it will be now proper to revert back to the facts of the present case. There is no dispute to the fact that the contracted work had been completed by the applicant. Correspondences have been placed on record to show that the work had been completed and the performance period had commenced which was to end on 8th July, 2003. It can also not be disputed that the bank guarantee in question was sought to be invoked just a day prior to the expiry of the performance period.”

(17) He has further referred to another decision of the Single Bench of the Delhi High Court in this regard, in which exception has been carved out, rendered in the case of ***Hindustan Construction Co. Ltd. and anr.*** *versus* ***Satluj Jal Vidyut Nigam Ltd.***[3] and another judgment of the Single Bench of the Delhi High Court rendered in the case of ***Nangia Construction India (P) Ltd.*** *versus* ***National Buildings Construction Corporation Ltd. and Ors.***[4].

(18) Learned counsel for the petitioner has further submitted that respondent no.1 has not adverted to the issue raised by the petitioner about the latent conditions, its cost implications and the request for extension of time.

(19) On the other hand, counsel for respondent no.1 has submitted that the issue as to whether there was delay on the part of the petitioner or on the part of respondent no.1 would be a matter to be looked into by the arbitrator but insofar the bank guarantee is concerned, it was irrevocable and unconditional and is an altogether separate contract having a statutory force in terms of Section 126 of the Indian Contract Act, 1872. He has also referred to certain decisions starting from the case of ***Essar Projects (India) Limited*** *versus* ***Indian Oil Corporation Limited and another***[5] delivered by the Single Bench of the Delhi High Court in which paragraphs 23, 25 and 30 are relevant and reproduced as under:-

> "23. The scope of interference by courts in the invocation of the bank guarantees is no longer *res integra*. It has been repeatedly held that specially in cases of unconditional bank guarantees, the court should not interfere unless the petitioner is able to establish fraud of egregious nature or is able to plead special equities. I need not burden my opinion with numerous judicial pronouncements, suffice it to reproduce the relevant paragraphs of a judgment of this very Court in CWHEC-HCIL (JV) v. Calcutta Haldia Port Road Co. Ltd. & Ors., ILR (2008) 1 Del 353:
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> "10. In light of the aforesaid discussion, the following principles governing the invocation of bank guarantees are culled out :

[3] AIR 2006 Delhi 169

[4] 1990 RLR 252

[5] 2017 SCC Online Del 8817

(i) A bank guarantee is an independent and distinct contract between the bank and the beneficiary.

(ii) In the case of unconditional bank guarantees, the bank undertakes to give money to the beneficiary on demand, without demur or protest.

(iii) Further, in unconditional bank guarantees, the nature of the obligation of the bank is absolute and not dependent upon any dispute or proceeding between the beneficiary of the bank guarantee and the party at whose instance the bank guarantee.

(iv) As bank guarantees are fundamental to trade and commerce, both at the domestic and international level, the general rule is that courts of law should be slow and cautious in granting injunction to restrain their realization. For instance, courts should refrain from probing into the disputes between the parties or from embarking on questions as to whether the beneficiary is trying to take undue enrichment, etc.

(v) However, there are four exceptions to the aforesaid general rule, that is, the court may grant injunction restraining the invocation of bank guarantee, if:

(a) there is a fraud of an egregious nature in connection with the bank guarantee which would vitiate the very foundation of such guarantee and the beneficiary seeks to take advantage of such fraud.

(b) the applicant, in the facts and circumstances of the case, clearly establishes a case of irretrievable injustice or irreparable damage.

(c)the applicant is able to establish exceptional or special equities of the kind which would outrage the conscience of the court.

(d) the bank guarantee is not invoked strictly in its terms and by the person empowered to invoke under the terms of the guarantee.

42. The importance of bank guarantees in facilitating trade and commerce, both nationally and internationally, cannot be understated. An unconditional bank guarantee creates an

irrevocable obligation on the bank to honour the bank guarantee irrespective of any dispute between the party furnishing the bank guarantee and the beneficiary thereof. This obligation of the bank manifests an act of trust and faith in order to mobilize practices pertaining to trade and commerce. The courts of law, too, should be extremely circumspective and sporadic in interfering with the invocation of bank guarantees, lest the free flow of trade and commerce is imperiled. The general rule is that the court, ordinarily, should avoid granting injunction to restrain the invocation of bank guarantee, unless it is prima facie satisfied that the act of the beneficiary/respondents is so glaring and unreasonable so as to cause irretrievable injury to the petitioner. The principle underlying the maxim judicis est in pronuntiando sequi regulam, exceptions non probat should be strictly adhered to by the Court in matters pertaining to stay on invocation of bank guarantees. That is to say, the judge in his decision ought to follow the rule, when the exception is not made apparent." (Emphasis Supplied)"

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"25. As regards, the submission of Mr.Jain that the respondent no.1 has acted as an arbiter in its own cause and decided the quantum of damages unilaterally, the question, in my view, stands fully answered in the case of Hindustan Steelworks Construction Ltd. (Supra). In the case, the appellant had granted a contract for construction of civil works in a steel plant to the contractor, which despite extensions was unable to complete the project within the stipulated time and the appellant rescinded the contract. As per the terms of the contract, the appellant assessed the loss/damages and invoked the bank guarantees. The contractor rushed before the Trial Court praying for an injunction restraining the appellant from invoking the bank guarantees to no avail and then approached the Andhra Pradesh High Court alleging that since the bank guarantees were given for securing due performance, the same would be encashable only after the arbitrators decide the factum of breach as well as the damage suffered. The High Court reversed the decision of the Trial Court finding that the

liability to pay damages would arise only after it is established that there is a breach of contract and same could be ascertained by the arbitrator. This did not find favour with the Apex Court, which allowed the appeals and observed as under:

"6. After noticing that bank guarantees in this case except Bank Guarantees Nos. 3/21, 3/39 and 6/175 were given towards security deposits only it observed that: "Neither of the learned counsels had drawn attention of this Court to any decision granting or refusing injunction in regard to a bank guarantee given by way of security deposit to indemnify against any loss or damage caused by breach of the terms and conditions of the contract." It then considered the position of law with respect to liquidated damages in our country and observed that: "Hence there cannot be any agreement in regard to the amount that has to be allowed except the upper limit that can be fixed, in case of breach." Relying upon the decision of this Court in Union of India v. Raman Iron Foundry [(1974) 2 SCC 231 : AIR 1974 SC 1265] the High Court held that any term in the agreement that one of the parties shall be the sole judge to quantify the same has to be held as invalid. According to the High Court liability to pay damages would arise only after it is established that there is a breach of the contract and it is for the court or the arbitrator to decide as to who has committed the breach. Till the liability is ascertained, it cannot be said that there is a "debt due or debt owing". On these grounds the High Court rejected the contention raised on behalf of HSCL that it was the sole judge to decide as to whether the contractor has committed a breach of the contract and what is the extent of damage caused to it. It also held that in the absence of any determination by the Court or the arbitrator no amount can be said to be payable by the contractor to HSCL by way of damages and, therefore, it will be just and proper to restrain HSCL from enforcing the bank guarantees.

14. The High Court also committed a grave error in restraining the appellant from invoking bank guarantees on the ground that in India only a reasonable amount can be awarded by way of damages even when the parties to the

contract have provided for liquidated damages and that a term in a bank guarantee making the beneficiary the sole judge on the question of breach of contract and the extent of loss or damages would be invalid and that no amount can be said to be due till an adjudication in that behalf is made either by a court or an arbitrator, as the case may be. In taking that view the High Court has overlooked the correct position that a bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction and the primary contract between the person at whose instance the bank guarantee is given and the beneficiary. What the High Court has observed would be applicable only to the parties to the underlying transaction or the primary contract but can have no relevance to the bank guarantee given by the bank, as the transaction between the bank and the beneficiary is independent and of a different nature. In case of an unconditional bank guarantee the nature of obligation of the bank is absolute and not dependent upon any dispute or proceeding between the party at whose instance the bank guarantee is given and the beneficiary. The High Court thus failed to appreciate the real object and nature of a bank guarantee. The distinction which the High Court has drawn between a guarantee for due performance of a works contract and a guarantee given towards security deposit for that contract is also unwarranted. The said distinction appears to be the result of the same fallacy committed by the High Court of not appreciating the distinction between the primary contract between the parties and a bank guarantee and also the real object of a bank guarantee and the nature of the bank's obligation thereunder. Whether the bank guarantee is towards security deposit or mobilisation advance or working funds or for due performance of the contract if the same is unconditional and if there is a stipulation in the bank guarantee that the bank should pay on demand without a demur and that the beneficiary shall be the sole judge not only on the question of breach of contract but also with respect to the amount of loss or damages, the obligation of the bank would remain the same and that obligation has to be discharged in the manner provided in the bank guarantee. In General Electric Technical Services

Co. Inc. v. Punj Sons (P) Ltd. [(1991) 4 SCC 230] while dealing with a case of bank guarantee given for securing mobilization advance it has been held that the right of a contractor to recover certain amounts under running bills would have no relevance to the liability of the bank under the guarantee given by it. In that case also the stipulations in the bank guarantee were that the bank had to pay on demand without a demur and that the beneficiary was to be the sole judge as regards the loss or damage caused to it. This Court held that notwithstanding the dispute between the contractor and the party giving the contract, the bank was under an obligation to discharge its liability as per the terms of the bank guarantee. Larsen and Toubro Ltd. v. Maharashtra SEB [(1995) 6 SCC 68] and Hindustan Steel Workers Construction Ltd. v. G.S. Atwal & Co. (Engineers) (P) Ltd. [(1995) 6 SCC 76] were also cases of work contracts wherein bank guarantees were given either towards advances or release of security deposits or for the performance of the contract. In both these cases this Court held that the bank guarantees being irrevocable and unconditional and as the beneficiary was made the sole judge on the question of breach of performance of the contract and the extent of loss or damages an injunction restraining the beneficiary from invoking the bank guarantees could not have been granted. The above-referred three subsequent decisions of this Court also go to show that the view taken by the High Court is clearly wrong.

23. We are, therefore, of the opinion that the correct position of law is that commitment of banks must be honoured free from interference by the courts and it is only in exceptional cases, that is to say, in case of fraud or in a case where irretrievable injustice would be done if bank guarantee is allowed to be encashed, the court should interfere. In this case fraud has not been pleaded and the relief for injunction was sought by the contractor /Respondent 1 on the ground that special equities or the special circumstances of the case required it. The special circumstances and/or special equities which have been pleaded in this case are that there is a serious dispute on the question as to who has committed breach of the contract, that the contractor has a counter-claim against the appellant, that the disputes between the

parties have been referred to the arbitrators and that no amount can be said to be due and payable by the contractor to the appellant till the arbitrators declare their award. In our opinion, these factors are not sufficient to make this case an exceptional case justifying interference by restraining the appellant from enforcing the bank guarantees. The High Court was, therefore, not right in restraining the appellant from enforcing the bank guarantees.

(Emphasis Supplied)"

Xxx xxx xxx xxx

"30. In the present case, the petitioner has not been able to establish any special equities in claim or counter claim on behalf of the petitioner against a ground to stay the bank guarantee which is an independent document. Therefore, I find no grounds to stay the invocation of the two bank guarantees."

(20) He has also referred to a judgment of the Supreme Court rendered in the case of ***Adani Agri Fresh Limited*** *versus* ***Mahaboob Sharif and others***[6], in which the Supreme Court has made the following observations:-

"8. Reliance was also placed on **Vinitec Electronics Private Ltd. vs. HCL Infosystems Ltd.**, (2008) 1 SCC 544. The following observations have been recorded in the above judgment:

"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 un-conditional bank guarantee. When in the course of commercial dealings, unconditional guarantees have been given or accepted the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. In **U.P. State Sugar Corporation vs. Sumac International Ltd.**, this Court observed that:

'12.The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial

[6] (2016) 14 SCC 517

dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country. The two grounds are not necessarily connected, though both may coexist in some cases.'

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 Limited vs. Fenner India Ltd.** this Court held :

'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 (hereinafter `U.P. State Sugar Corpn') this Court, correctly declare that the law was `settled'.'

13. In **Himadri Chemicals Industries Ltd. V. Coal Tar Refining Company**, this court summarized the principles for grant of refusal to grant of injunction to restrain the enforcement of a bank guarantee or a letter of credit in the following manner :

'14...(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 realize 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 realization 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.

14. In **Mahatama Gandhi Sahakra Sakkare Karkhane vs. National Heavy Engg. Coop. Ltd and anr.**, this Court

observed:

"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 principle 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.

*   *   *

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

25. This Court in more than one decision took the view that fraud, if any, must be of an egregious nature as to vitiate the underlying transaction. We have meticulously examined the pleadings in the present case in which no factual foundation is laid in support of the allegation of fraud. There is not even a proper allegation of any fraud as such and in fact the whole case of the appellant centers around the allegation

with regard to the alleged breach of contract by the respondent. The plea of fraud in the appellants own words is to the following effect:

"That despite the respondent, HCL being in default of not making payment as stipulated in the bank guarantee, in perpetration of abject dishonesty and fraud, the respondent, HCL fraudulently invoked the bank guarantee furnished by the applicant and sought remittance of the sums under the conditional bank guarantee from the Oriental Bank of Commerce vide letter of invocation dated 16.12.2003."

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

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

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

(Emphasis supplied)"

(21) Further, in the case of ***Ansal Engineering Projects Ltd.*** *versus* ***Tehri Hydro Development Corporation Ltd. and another***[7], the Supreme Court has observed as under:-

"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 prime

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[7] (1996) 5 SCC 450

facie established by 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. The object behind is to inculcate respect for free flow of commerce and trade and faith in the commercial banking transactions unhedged by pending disputes between the beneficiary and the contractor.

5. It is equally settled law that in terms of the bank guarantee the beneficiary is entitled to; invoke the bank guarantee and seek encashment of the amount specified in the bank guarantee. It does not depend upon the result of the decision in the dispute between the parties, in case of the breach. The underlying object is that an irrevocable commitment either in the form of bank guarantee or letters of credit solemnly given by the bank must be honoured. 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 prime facie made out in the case as triable issue by strong evidence so as to prevent irretrievable injustice to the parties. The trading operation would not be jettisoned and faith of the people in the efficacy of banking transactions Would not be eroded or brought to disbelief. The question therefore, is : whether the petitioner had made but any case of irreparable injury by proof of special equity or fraud so as to invoke the jurisdiction of the Court by way of injunction to restrain the first respondent from encashing the bank guarantee. The High Court held that the petitioner has not made out either. We have carefully scanned the reasons given by the High Court as well as the contentions raised by the parties. On the facts, we do not find that any case of fraud has been made out. The contention is that after promise to extend time for constructing the buildings and allotment of extra houses and the term of bank guarantees was extended, the contract was terminated. It is not a case of fraud but one of acting in

terms of contract. It is next contended by Shri G. Nageshwara Rao, learned counsel for the petitioner that unless the amount due and payable is determined by a competent court or tribunal by mere invocation of bank guarantee or letter of credit pleading that the amount is due and payable by the petitioner, which was disputed, cannot be held to be due and payable in- a case. The Court has yet to go into the question and until a finding after trial, or decision is given by a court or tribunal that amount is due and payable by the petitioner, it cannot be held to be due and payable. Therefore, the High Court committed manifest error of law in refusing to grant injunction as the petitioner has made out a prima facie Strong case. We find no force in the contention. All the clauses of the contract of the bank guarantee are to be read together. Bank guarantee/letters of credit is an independent contract between the bank and the beneficiary. It does not depend on the result of the dispute between the person on whose behalf the bank guarantee was given by the bank and the beneficiary. Though the question was not elaborately discussed, it was in sum answered by this Court in **Hindustan Steel Workers Construction Ltd. vs. G.S. Atwal & Co. (Engineers) Pvt. Ltd.** This Court had held in part 6 that the entire dispute was pending before the arbitrator. Whether, and if so, what is the amount due to the appellant was to be adjudicated in the arbitration proceedings. The order of the learned Single Judge proceeds on the basis that the amounts claimed were not and cannot be said to be due and the bank has Violated the understanding between the respondent and the Bank in. giving unconditional guarantee to the appellant. The learned Judge held that the bank had issued a guarantee in a standard form, covering a wider spectrum than agreed to between the respondent and the bank and it cannot be a reason to hold that the appellant is in any way fettered in invoking the unconditional bank guarantee. Similarly, the reasoning of the learned Single Judge that before invoking the performance guarantee the appellant should assess the quantum of loss and damages and mention the ascertained figure. Cannot be put forward to restrain the appellant from invoking the unconditional guarantee. This reasoning would clearly indicate that the final adjudication is not a pre-

> condition to invoke the bank guarantee and that is not a ground to issue injunction restraining the beneficiary to enforce the bank guarantee. In **Hindustan Steel Works Construction Ltd. v. Tarapore & Co. & Anr.,** it was contended that a contractor had a counter- claim against the appellant; that disputes had been referred to the arbitrator and no amount was said to be due and payable by the contractor to the appellant till the arbitrator declared the award. It was contended therein that those were exceptional circumstances justifying interference by restraining the appellant from enforcing the bank guarantee. The High Court had issued interim injunction from enforcing the bank guarantee. Interfering with and reversing the order of the High Court, this has held in para 23 that a bank must honour its commitment free from interference by the courts. The special circumstances or special equity pleaded in the case that there was a serious dispute on the question as to who has committed the breach of the contract and that whether the amount is due and payable by the contractor to the appellant till the arbitrator declares the award/was not sufficient to make the case an exceptional one justifying interference by restraining the appellant from enforcing the bank guarantee. The order of injunction, therefore, was reserved with certain directions with which we are not concerned in this case."

(22) He has also cited the judgment rendered in the case of ***Hindustan Steelworks Construction Ltd.*** *versus* ***Tarapore & Co. and another***[8], in which the Supreme Court has observed as under:-

> "14. The High Court also committed a grave error in restraining the appellant from invoking bank guarantees on the ground that on India only reasonable amount can be awarded by way of damages even when the parties to the contract have provided for liquidated damages and that a term in a bank guarantees making the beneficiary the sole judge on the question of breach of contract and the extent of loss or damages would be invalid and that no amount can be said to be due till and adjudication in that behalf is made either by a court on an arbitrator, as the case may be. In

[8] (1996) 5 SCC 34

taking that view the High Court has overlooked the correct position that a bank guarantees is a independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction and the primary contract between the person at whose instance the bank guarantee is given and the beneficiary. What the High Court has observed would be applicable only to the parties to the underlying transaction or the primary contract but can have no relevance to the bank guarantee given by the bank, as the transaction between the bank and the beneficiary is independent and of a different nature. In case of an unconditional bank guarantee the nature of obligation of the bank is absolute and not dependent upon any dispute or proceeding between the party at whose instance the bank guarantee is given and the beneficiary. The High Court thus failed to appreciate the real object and nature of a bank guarantee. The distinction which the High Court has drawn between a guarantee for due performance of a works contract and guarantee given towards security deposit for that contract is also unwarranted. The said distinction appears to be the result of the same fallacy committed by the High Court of not appreciating the distinction between the primary contract between the parties and a bank guarantee and also the real object of a bank guarantee and the nature of bank's obligation thereunder. Whether the bank guarantee is towards security deposit or mobilisation advance or working funds or for due performance of the contract if the same is unconditional and if there is a stipulation in the bank guarantee that the bank should pay on demand without a demur and that the beneficiary shall be the sole judge not only on the question of breach of contract but also with respect to the amount of loss or damages, the obligation of the bank would remain the same and that obligation has to be discharged in the manner provided in the bank gurantee. In **General Electric Technical Services Company Inc. vs. Punj Sons Ltd.**, while dealing with a case of bank guarantee given for securing mobilization advance it has been held that the right of a contractor to recover certain amounts under running bills would have no relevance to the liability of the bank under the guarantee given by it. In that case also the stipulations in the bank guarantee were that the

bank had to pay on demand without a demur and that the beneficiary was to be the sole judge as regards the loss or damage caused to it. This Court held that notwithstanding the dispute between the contractor and the party giving the contract, the bank was under an obligation to discharge its liability as per the terms of the bank guarantee. **Larsen and Toubro Ltd. vs. Maharashtra State Electricity Board** and **Hindustan Steel Workers Construction Ltd. Vs. G.S. Atwal & Co (Engineers) Pvt. Ltd.** were also cases of work contracts wherein bank guarantees were given either towards advances or release of security deposits or for due, performance of the contract. In both those cases this Court held that the bank guarantees being irrevocable and unconditional and as the beneficiary was made the sole judge on the question of breach of performance of the contract and the extent of loss or damages an injunction restraining the beneficiary from invoking the bank guarantees could not have been granted. The above referred three subsequent decisions of this Court also go to show that the view taken by the High Court is clearly wrong."

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"23. We are, therefore, of the opinion that the correct position of law is that commitment of banks must be honored free from interference by the courts and it is only in exceptional cases, that' is to say, in case of fraud or in a case where irretrievable injustice would be done if bank guarantee is allowed to be encashed, the court should interfere. In this case fraud has not been pleaded and. the relief for injunction was sought by the contractor /Respondent No.1 on the ground that special equities or the special circumstances of the case required it. The special circumstances and/or special equities which have been pleaded in this case are that there is a serious dispute on the question as to who has committed breach of the contract, that the contractor has a counter claim against the appellant, that the disputes between the parties have been referred to the arbitrators and that no amount can be said to be due and payable by the contractor to the appellant till the arbitrators declare their award. In our opinion, these factors are not sufficient to make this case an exceptional case justifying

interference by restraining the appellant from enforcing the bank guarantees."

(23) Apart from above, learned counsel for respondent no.1 has also referred to a judgment rendered by the Supreme Court in the case of ***Dwarikesh Sugar Industries Ltd.*** *versus* ***Prem Heavy Engineering Works (P) Ltd. and another***[9].

(24) Learned counsel for respondent no.1 has also referred to a letter dated 05.04.2017, which has not been referred by the petitioner, in which the alleged causes of delay on the part of the petitioner has been mentioned and it has been specifically averred that respondent no.1 was informed that on 17.02.2017, the Onshore Contractor's Site Personnel and other Personnel engaged for the work left the site and have not since returned to perform the work and the Onshore Contractor has removed the equipments from the site without proper authorization by respondent no.1, from which it is apparent that the petitioner was not performing its part of the contract in terms of the various contracts entered into between the parties.

(25) I have heard learned counsel for the parties and examined the available record with their able assistance.

(26) It is an undeniable fact that the petitioner has failed to maintain the date of completion of work and had to enter into the Deed of Agreement because of the financial crunch and respondent no.1 had further advanced 10 Million USD, both for the onshore and offshore works, for which the petitioner had furnished the Further Advance Payment Guarantees. Insofar as the issue regarding latent defects is concerned, the parties to the contract had various correspondences. The petitioner's allegation is that respondent no.1 did not decide the issue promptly but on the other hand, the submission of respondent no.1 is that the petitioner had withdrawn all its personnel from the site on 17.02.2017 without completing the work, though the date of completion of work was 26.11.2016.

(27) At the stage of interim stay, this Court would not go into this arena of allegations and counter allegations as it would be a matter of evidence and shall only be decided by the Arbitrator but the fact remains that the bank guarantees were irrevocable and unconditional, which were to be invoked and encashed on the asking of respondent no.1 but there are four exceptions to the general rule, which have been

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[9] (1997) 6 SCC 450

elaborately mentioned in ***Essar Projects (India) Limited's*** *case (supra),* that the Court may grant injunction restraining the invocation of bank guarantee if; (i) there is a fraud of egregious nature in connection with the bank guarantee which would vitiate the very foundation of such guarantee and the beneficiary seeks to take advantage of such fraud; (ii) the applicant, in the facts and circumstances of the case, clearly establishes a case of irretrievable injustice or irreparable damage; (iii) the applicant is able to establish exceptional or special equities of the kind which would outrage the conscience of the court; and (iv) the bank guarantee is not invoked strictly in its terms and by the person empowered to invoke under the terms of the guarantee.

(28) As a matter of general rule, the injunction is not to be granted, therefore, the Court has carved out aforesaid four exceptions and in the exceptions, adjectives have been used in the case of fraud by referring it to be "egregious" and in the case of "equities", the adjective used is "special", meaning thereby the petitioner, who is seeking injunction, has to establish fraud by way of pleadings and *prima facie* proof beyond doubt that too in regard to the bank guarantee and that the beneficiary is seeking advantage of such fraud and exceptional or special equities which would outrage the conscience of the Court.

(29) In this case, the petitioner has not pleaded any kind of fraud much-less of "egregious" nature in connection with the bank guarantees and has also not established the case of irretrievable injustice or irreparable damages much-less the special equities for the purpose of tilting the balance in its favour for granting injunction by breaking the general rule, as per which the commitment of the bank is required to be free from interference by the Court especially when the bank guarantee is irrevocable and unconditional.

(30) All that has been argued on behalf of the petitioner is that respondent no.1 has not followed the due procedure in regard to the Delay Liquidated Damages and until and unless the sum due is assessed; the bank guarantees cannot be invoked. This could not be the reason alone on which the petitioner can rely upon for the purpose of seeking injunction, otherwise the whole purpose of providing the bank guarantees by the petitioner through respondent no.2 to respondent no.1 would become irrelevant and farce.

(31) Thus, keeping in view the aforesaid facts and circumstances and looking from any angle, I do not find any reason to interfere in the

present petition for the purpose of interim stay and hence, the same is hereby dismissed, though without any order as to costs.

Divya Gurnay