

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

% **Date of order:- 13th February, 2023**

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

+ O.M.P.(I) (COMM.) 39/2020 & I.A. 13305/2021 & I.A.
12009/2022

HINDUSTAN CONSTRUCTION CO. LTD. Petitioner

Through: Mr. B. B. Gupta, Sr. Advocate
with Mr. Rishi Agrawala, Mr.
Achal Gupta, Mr. Udai Khanna
and Ms. Shruti Arora, Advocates

versus

NATIONAL HYDRO ELECTRIC POWER CORPORATION
LTD. Respondent

Through: Mr. Gauhar Mirza, Ms. Anushka
Shah and Ms. Adya Joshi,
Advocates

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

J U D G M E N T

CHANDRA DHARI SINGH, J.

1. The instant petition has been filed on behalf of the Petitioner seeking urgent intervention of this Court for restraining the Respondent from invocation/encashment of the Petitioner's Bank Guarantee under Section 9 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as "the Act") and praying for the following reliefs:

“(i) Direct the Respondent to deliver up Bank Guarantee bearing No. 05BG091 dated 25.01.2006, issued by Canara Bank for a sum of Rs.26,13,51,850/- (Rs. Twenty-Six Crores Thirteen Lakhs Fifty-One Thousand Eight Hundred Fifty Only) to the Petitioner in view of the Respondent having not paid to the Petitioner a sum of Rs. 360.30 Crores which has already been adjudicated upon by 5 Arbitral Awards in Respondents of the Project.

(ii) In the alternative, restrain the Respondent by way of an order and injunction, from encashing/invoking or taking any precipitative steps or receiving any monies under the Bank Guarantee of the Petitioner bearing No. 05BG091 dated 25.01.2006, issued by Canara Bank for a sum of Rs.26, 13,51,850/- (Rs. Twenty-Six Crores Thirteen Lakhs Fifty-One Thousand Eight Hundred Fifty Only), for the Project as per Contract dated 10.05.2006 along with Agreement dated 03.12.2014, during the pendency and until conclusion of the petitions under Section 34 of the Act;

(iii) Pass ad interim and interim ex parte reliefs in terms of prayer (i)-(ii) above;

(iv) Order costs of the Petition to be borne by the Respondent; and

(v) Pass such further and other reliefs as a nature and circumstances of the case may require.”

FACTUAL MATRIX

2. The Petitioner is a Company incorporated under the Indian Companies Act, 1913 having its Registered Office at Hincon House, Lal Bahadur Shastri Marg, Vikhroli (W), Mumbai - 400083.

3. The Respondent (formerly known as National Hydroelectric Power Corporation Limited) is a Public Sector Enterprise incorporated and registered under the Companies Act, 1956 having its Registered Office at NHPC Office Complex, Sector-33, Faridabad, Haryana and also at 2, Pragati Bhawan, Jai Singh Road, New Delhi.

4. The Respondent was desirous of setting up a 160 MW Hydroelectric Power Project in the state of West Bengal, known as Teesta Low Dam H.E. Project. On 19.01.2006, the Petitioner's bid for the "Construction of Diversion Arrangement, Concrete Gravity Dam along with Spillway, Roller Compacted Concrete (RCC) Dam, Intake Structure, Surface Power House, Tail Race Channel, Switch Yard and other associated Civil Works of Teesta Low Dam H.E. Project, Stage IV" (hereinafter referred to as "the Project") was accepted by the Respondent for a contract price of Rs. 395.90 crores by issuing the Letter of Acceptance.

5. On 10.05.2006, the contract agreement was signed and formally executed between the parties, and the date of commencement was agreed to be 01.05.2006. The originally stipulated time of completion was reckoned at 41 months. However, the work could not be completed till the scheduled completion date of 30.09.2009 and came to be finally completed on 29.02.2016. Meanwhile, there were a series of arbitral disputes that arose between the parties which led them to enter into several arbitral proceedings. Claims and counter-claims of the parties were adjudicated and the Awards therein came to be subsequently challenged by both of the parties as per the findings therein.

6. In due course, the Petitioner approached this Court seeking the aforesaid reliefs and this Court partly restrained the Respondent, under Section 9 of the Act from invoking the Petitioner's Bank Guarantee, directing the Respondent to *inter alia* provide one week's notice before invoking the same.

7. On 20.05.2014, the Respondent terminated the contract *vide* letter of termination issued on 26.05.2014 which, as per the statements made by the counsels, was stayed by the Calcutta High Court in Writ Petition bearing W.P.(C) No. 15740/2014 with direction to Respondent to revisit the termination.

8. In May 2016, the Respondent issued the Taking Over Certificate to the Petitioner mentioning achievement of substantial completion of the Contract having been achieved on 29.02.2016, with balance works mentioned in the Schedule to be completed.

9. Subsequently, the invocation of the Bank Guarantee was attempted by the Respondent through letter dated 04.02.2020, being the Impugned Letter herein, on the grounds that an amount of Rs.145.05 crores towards (i) CAR Insurance Premium, (ii) Flood Premium Insurance and (iii) Liquidated Damages were allegedly due from the Petitioner.

10. The Petitioner has preferred this instant petition under Section 9 of the Act seeking urgent intervention of this Court directing the Respondent to deliver the Bank Guarantee and, in the alternative, restrain the Respondent from invoking/encashing the Petitioner's Performance Bank Guarantee.

SUBMISSIONS

ON BEHALF OF THE PETITIONER

11. Mr. B.B. Gupta, learned senior counsel appearing on behalf of the Petitioner submitted that the present case falls under two criteria on the basis of which Bank Guarantee invocation should be restrained – *first*, that of a fraud being perpetrated by the Respondent, and *second*, that of irreparable damage being caused to the Petitioner on invocation of Bank Guarantee. It is submitted that the Respondent has committed fraud in issuing the Impugned Letter because the purpose for which the Bank Guarantee was provided has been achieved. The proposed invocation of the Bank Guarantee is clearly in the teeth of three Arbitration Awards passed against the Respondents in respect of the Project, where all the issues raised by the Respondent in the Impugned Letter have already been dealt with. There is no stay in any of the five awards by court of competent jurisdiction and hence, any encashment is fraudulent in nature.

12. It is submitted that on 29.02.2016, the Project was taken over for substantial completion of works. On 28.02.2017, the Defect Liability Period was completed. On 14.08.2021, the Defect Liability Certificate was issued. As per the Contract (Agreement No. NHPC/CCW/TLDP-IV/Lot-I), Clause 10.12, Performance Bank Guarantee was to be returned to the contractor within 14 days of issuance of Defect Liability Certificate. Hence, no basis remains for encashment of Bank Guarantee as the Defect Liability Certificate has already been issued by the Respondent. In view of the above-stated fact that the Defect Liability

Certificate stands already issued in favour of the Petitioner, the subject Bank Guarantee deserve to be released/returned to the Petitioner.

13. The learned senior counsel for the Petitioner has vehemently argued that if the Impugned Letter is not quashed and the Bank Guarantees are invoked, it will be violative of special equities and will cause irretrievable loss and damage to the Petitioner as a Bank Guarantee issued in favour of the Respondent during the execution of the contract cannot be said to have been given in perpetuity. It is trite law that authority shall be restrained from appropriating monies received under the Bank Guarantee in case of failure to prove the loss.

14. It is further submitted that once the Defect Liability Certificate has been issued, the Bank Guarantee deserves to be returned. This is agreed between parties as the purpose of the same for which it was provided has already been achieved. The learned senior counsel for the Petitioner submitted that the threat of invocation of the Bank Guarantee after culmination of all disputes before the five Arbitration Tribunals, as detailed in the Section 9 Petition, and after issuance of the Defect Liability Certificate by the Respondent admitting completion of works, can only be seen as an illegal act of the Respondent to prolong clearing its dues payable to the Petitioner and cause injustice. Reliance is also placed on the judgment of this Court in the case of *National Highways Authority of India v Continental Engineering Corporation (CEC) OMP (COMM) 422/2019* by judgment and order dated 13.04.2022.

15. The learned senior counsel for the Petitioner further submitted that it is the admitted case of the Respondent itself that the subject Bank Guarantees deserve to be renewed in light of the pending proceedings before this Court in the captioned matter and not as a contractual obligation which stand satisfied upon the issuance of the Defect Liability Period Certificate.

16. It is submitted that in case the orders as prayed by the Petitioner are not granted, the Petitioner shall suffer irreparable loss and injury. It is submitted that no prejudice will be caused to the Respondent and grave and irreparable harm will be caused to the Petitioner if the present Application is not allowed, as the Petitioner has to keep the Bank Guarantee alive ever after the Defect Liability Certificate has been issued in its favour, only due to the pendency of the captioned Petition and not for any contractual compliance, as has been issued in its favour, only due to the pendency of the captioned petition and not for any contractual compliance, as has been stated in the letter dated 05.05.2022, issued by the Respondent itself. Thus, learned senior counsel for the Petitioner submitted that the balance of convenience is entirely in favour of the Petitioner.

17. Learned senior counsel for the Petitioner submitted that it is an admitted position that under five different awards passed by different arbitral tribunals, the Petitioner is entitled to recover a sum in excess of Rs.700 crores from the Respondent. He submitted that even if the said awards are subject matter of challenge by both the parties in different

petitions under Section 34 of the Act, the Respondent ought not to be allowed at this stage to recover any amount from the Petitioner.

18. It is thus submitted that the petitioner has no other efficacious remedy and to avoid irreparable harm, is constrained to file the present Petition. In view of the aforesaid facts, it is prayed that the instant petition be allowed and the Respondent be restrained from invoking the said Guarantee or be directed to return the said Guarantee to the Petitioner.

ON BEHALF OF THE RESPONDENT

19. *Per contra*, learned counsel for the Respondent has submitted that the instant petition under Section 9 of the Act is liable to be dismissed since it is misconceived and unsustainable.

20. It is submitted that during the execution of the Contract, several disputes arose between the parties which were referred to arbitration. A total of five references were made and the resultant awards were issued on 17.01.2014, 31.12.2015, 27.02.2018, 14.07.2018 and 18.09.2018. All five awards have been challenged by either the Petitioner or the Respondent under Section 34 of the Act, and the matters are currently pending before this Court.

21. Learned counsel for the Respondent has argued that while the Project works were yet to be completed, the Respondent by way of the Invocation Letter (and also in terms of the order dated 10.05.2014 passed in O.M.P. 536/2014), notified the Petitioner that an amount of approx. Rs. 145.05 Crores had become recoverable from the Petitioner under the

Contract as on 31.10.2019. Accordingly, it requested the same be paid by the Petitioner within one week, failing which the Respondent would be constrained to invoke the Bank Guarantee. The Petitioner did not respond to the Invocation Letter and instead, preferred this petition on 06.02.2020. Notably, the Invocation Letter was issued to the Petitioner much before the issuance of the Defect Liability Certificate on 14.07.2021 and thus the cause of action for the invocation is distinct. It is submitted that the Invocation Letter was in line with the order of this Court dated 10.05.2014 passed in O.M.P. 536/2014 that directed the Respondent to give the Petitioner one weeks advance written notice if it desired to invoke the Bank Guarantee.

22. Learned counsel for the Respondent further submitted that admittedly, the Bank Guarantee was not a subject matter of any arbitral proceedings between the parties. Moreover, the terms of the Bank Guarantee clearly show that it is unconditional at the option of the Respondent, with payment to be made by the issuing bank without “*any demur, reservation, contest, recourse or protest, and/or without reference to the Contractor.*”

23. It is submitted that pursuant to the filing of this Petition, this Court by an order dated 07.02.2020 granted *ad interim* relief to the Petitioner restraining the Respondent from taking any coercive steps in furtherance of the Respondent’s letter dated 04.02.2020. The *ad interim* Order was conditionally extended by this Court from time to time on 20.05.2020, 24.05.2021 and 23.05.2022, on the terms that the Petitioner extends the validity of the Bank Guarantee from time to time. The Bank Guarantee

was accordingly renewed by the Respondent and is currently valid till 31.05.2023, with the claim period expiring on 31.08.2023.

24. The learned counsel for the Respondent submitted that prior to the hearing of the Petition and during its pendency, on 14.08.2021, the Respondent issued to the Petitioner a Defect Liability Certificate in accordance with the terms of the underlying Contract between the parties. During oral submissions, although the Petitioner stated that it moved to the Court immediately, factually the Petitioner preferred I.A. No. 12009/2022, seeking a release of the Bank Guarantee only on 29.07.2022 i.e. nearly 11 months later. In the said Application, the prayers were identical to the prayers in the main petition and the Petitioner failed to show if it was seeking any leave of the Court to either amend the Petition, and sought a release of the Bank Guarantee in view of the issuance of the Defect Liability Certificate.

25. It is submitted that it is a well settled law that the encashment of an “unconditional bank guarantee” cannot be injuncted, barring exceptional cases of egregious fraud or special equities. Reliance in this regard is placed on various judgments including *Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co.*, (2007) 8 SCC 110; *Andhra Pradesh Pollution Control Board v. CCL Products (India) Ltd.*, 2019 SCC OnLine SC 985; *U. P. Cooperative Federation Ltd. v. Singh Consultants and Engineers (P) Ltd.*, (1988) 1 SCC 174; *Vinitech Electronics Pvt. Ltd. vs HCL Infosystems Ltd.*, (2008) 1 SCC 544; and *Classic KSM Bashir JV vs. Rites Ltd. and Ors*, 2018 SCC OnLine Del 9056.

26. It is submitted that the Respondent's case is that the argument of the Petitioner is not one of special equities, but merely one of convenience as it does not wish to go through the rigors of the position settled by statutory mandate. It is submitted that the relief(s) sought by the Petitioner are not maintainable under Section 9 of the Act. The disputes between the parties regarding the invocation of the Bank Guarantee are triable issues, which require a final adjudication on merit. Hence, it is incumbent upon the Petitioner to seek appropriate remedies in independent proceedings, and not pigeon-hole its contractual dispute under Section 9 of the Act.

27. The Learned Counsel further submitted that the petition does not constitute a post-award proceeding in terms of Section 9 of the Act, as canvassed by the Petitioner and in any case, a final relief cannot be granted at an interim stage. Reliance is placed in this regard on *Orissa Manganese & Minerals Ltd. v. Synergy Ispat Pvt. Ltd*, 2014 (16) SCC 654.

28. It is further submitted by the learned counsel for the Respondent that in the instant case, the issues as to whether the Bank Guarantee was rightfully invoked by the Respondent, or whether the claims/ amounts demanded by the Respondent under the Invocation Letter raised in the five arbitral references, require adjudication and are triable in nature. Further, the relief sought by the Petitioner, i.e., the release/ return of the Bank Guarantee by the Respondent, would amount to a final relief and are not aimed at preserving the subject matter of any dispute between the parties.

29. It is submitted that the Petitioner's case does not fall within the exceptions of fraud or special equities. Admittedly, the Respondent's attempt at invocation of the Bank Guarantee cannot be categorized as fraud of the nature which vitiates the entire transaction.

30. The learned counsel for the Respondent has vehemently submitted that the petitioner has cited the exception of "*special equities*" since it alleges that the attempt to invoke the Bank Guarantee by the Respondent is for issues that have been adjudicated upon and decided against the Respondent in the five awards. It is submitted that the Petitioner's case is not one of special equities, as there is no irretrievable injury or irreparable harm being caused to classify it as such.

31. It is submitted that the Petitioner has attempted to rely on decision of a Coordinate Bench of this Court in *Tecnimont Pvt. Ltd. & Anr. v. ONGC Petro Additions Ltd., 2020 SCC Online Del 653* to make out a case of special equities. At the outset, it is clarified that in the said case, the release of the Bank Guarantee was a specific issue framed in the proceedings between the parties and was specifically rejected by the arbitral tribunal. However, in the present case, the Bank Guarantee was admittedly not a subject matter of any of the aforesaid references, and is entirely unconnected to the five awards.

32. It is further submitted that the Coordinate Bench's decision in *Tecnimont (Supra)* was subsequently modified by a Division Bench of this Court by way of its order dated 24.06.2020 in FAO(OS)(COMM)72/2020, declaring as under:

“A large number of issues, in relation to the invocation of bank guarantees, in the aftermath of an arbitral award, including the issue whether special equities are an exception to the jurisprudence governing the invocation of bank guarantees, namely egregious fraud, irretrievable injustice or irreparable harm, require to be adjudicated by way of an authoritative pronouncement in the present appeal.”

It is submitted that the matter is currently pending before this Court and hence, the Petitioner’s reliance on said judgment is entirely misplaced.

33. In light of the aforesaid, it is submitted that the instant petition is devoid of merits and this Court may be pleased to dismiss the present petition.

QUESTION FOR ADJUDICATION

34. Heard learned counsels appearing on behalf of both the parties and perused the records.

35. I have given thoughtful consideration to the submissions made by the parties. The only issue before this Court is whether the instant Performance Bank Guarantee invoked by the respondent can be held to be valid.

ANALYSIS

36. The instant petition has been filed under Section 9 of the Act seeking urgent intervention of this Court for restraining the Respondent from invocation/encashment of the Petitioner’s Bank Guarantee, dated 25.01.2006 and subsisting till 31.05.2020 bearing No. 05BG091, issued

by Canara Bank in favour of the Respondent. The invocation was attempted through the impugned letter dated 04.02.2020. The Bank Guarantee was for an amount of Rs. 26,13,51,850/- which is valid and subsisting till 31.05.2023, in respect of the Teesta Low Dam H.E. Project Stage – IV.

37. Before advertizing to and analysing the facts of this case, it is pertinent to peruse the law regarding Bank Guarantee as well its evolution. The modern documentary credit had its origin from letters of credit. Therefore, it is pertinent to begin the discussion with the traditional letter of credit. Paul R. Verkuil in an article [***“Bank Solvency and Guaranty Letters of Credit”***, **Stanford Law Review**, **V. 25 1972-73 at p. 719**] explains the salient features of a letter of credit in these terms:

“The letter of credit is a contract. The issuing party — usually a bank — promises to pay the ‘beneficiary’ — traditionally a seller of goods — on demand if the beneficiary presents whatever documents may be required by the letter. They are normally the only two parties involved in the contract. The bank which issues a letter of credit acts as a principal, not as agent for its customer, and engages its own credit. The letter of credit thus evidences — irrevocable obligation to honour the draft presented by the beneficiary upon compliance with the terms of the credit.”

38. The letter of credit as a banking practice came to be developed over decades of international trade. It was most commonly used in conjunction with the sale of goods between geographically distant parties and was intended to facilitate the transfer of goods between distant and unfamiliar buyer and seller. Due to the element of unfamiliarity, it was difficult to

trust the creditworthiness or credentials of an unknown customer. It was also found to be difficult for a buyer to pay for goods prior to their delivery. Therefore, the bank's letter of credit as an instrument came into existence to bridge this gap.

39. In such transactions, the seller/beneficiary receives payment from issuing bank when he presents a demand as per terms of the documents. The bank must pay if the documents are in order and the terms of credit are satisfied. The bank, however, is not allowed to determine whether the seller had actually performed its part of service as promised. Any dispute between the buyer and the seller with regards to the contract must be settled between themselves. The Courts, however, carved out an exception to this rule of absolute independence, and held that if there has been "fraud in the transaction" on account of the beneficiary, the bank could dishonour the beneficiary's demand for payment.

40. The law relating to invocation of bank guarantees with the consistent line of precedents is well settled and a three-Judge Bench of the Hon'ble Supreme Court in ***Ansal Engg. Projects Ltd. v. Tehri Hydro Development Corpn. Ltd.***, (1996) 5 SCC 450 held 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 prima 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. ... The court exercising its power cannot interfere with enforcement of bank guarantee/letters of credit except only in cases where fraud or special equity is prima facie made out in the case as triable issue by strong evidence so as to prevent irretrievable injustice to the parties.”

41. In the case of ***Standard Chartered Bank v. Heavy Engg. Corpn. Ltd., (2020) 13 SCC 574***, the Hon’ble Supreme Court held as under:

“20. A bank guarantee constitutes an independent contract. In Hindustan Construction Co. Ltd. v. State of Bihar [Hindustan Construction Co. Ltd. v. State of Bihar, (1999) 8 SCC 436], a two-Judge Bench of this Court formulated the condition upon which the invocation of the bank guarantee depends in the following terms: (SCC p. 442, para 9)

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

bound by the terms thereof. The invocation, therefore, will have to be in accordance with the terms of the bank guarantee, or else, the invocation itself would be bad.”

42. The same principle was followed in ***SBI v. Mula Sahakari Sakhar Karkhana Ltd., (2006) 6 SCC 293*** wherein a two-Judge Bench of the Hon’ble Supreme Court held as under:

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

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

43. Taking note of the exposition of law on the subject in ***Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co., (2007) 8 SCC 110***, a two-Judge Bench of the Hon’ble Supreme Court in ***Gujarat Maritime Board v. Larsen & Toubro Infrastructure Development Projects Ltd., (2016) 10 SCC 46*** has laid down the principles for grant or refusal for invocation of bank guarantee or a letter of credit. The relevant paragraph is as under:

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

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

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

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

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

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

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

44. What is evident from the perusal of the aforesaid established propositions of law is that if in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would

otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee.

45. The existence of any dispute between the parties to the contract is not a ground for issuing an injunction to restrain the enforcement of bank guarantees. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee is the first exception whereas the second exception is that allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned.

46. As regards the exceptional ground of fraud, the following observations of Sir John Donaldson, M.R. in *Bolivinter Oil SA v. Chase Manhattan Bank* have been approved by the Supreme Court in an earlier decision at *U.P. Coop. Federation Ltd. v. Singh Consultants and Engineers (P) Ltd., (1988) 1 SCC 174* as under:

*“54. The court, however, should not lightly interfere with the operation of irrevocable documentary credit. I agree with my learned brother that in order to restrain the operation of the irrevocable letter of credit, performance bond or guarantee, there should be serious dispute to be tried and there should be a good prima facie acts of fraud. As Sir John Donaldson, M.R. said in *Bolivinter Oil SA v. Chase Manhattan Bank [(1984) 1 All ER 351, 352]* :*

“The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear, both as to the fact of fraud and as to the bank's knowledge. It would certainly not

normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it discharged.”

47. While explaining and approving the ruling in *Itek Corpn. v. First National Bank of Boston*, **566 Fed Supp 1210**, the Hon'ble Supreme Court in the case of *Standard Chartered Bank v. Heavy Engg. Corpn. Ltd.*, (**Supra**) held that irretrievable injury, which is the second exception to the rule against granting of injunctions when unconditional bank guarantees are sought to be realised, must be of the kind which was the subject-matter of the decision in the *Itek Corpn. Case (Supra)*. To avail this exception, exceptional circumstances, which make it impossible for the guarantor to reimburse himself if he ultimately succeeds, will have to be decisively established. A mere apprehension that the other party will not be able to pay, is not enough.

48. What is also evident from the perusal of the aforesaid established propositions of law is that if in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms, irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. Accordingly, the existence of any dispute between the parties to the

contract is not a ground for issuing an injunction to restrain the enforcement of bank guarantees.

49. However, there are exceptions to this general rule. *First*, a fraud in connection with such a bank guarantee which 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. *Second*, 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. There is a *third* exception, being that of special equities operating in favour of the party against whom the bank guarantee is being sought to be invoked.

50. Relevant portions of the Bank Guarantee in the instant case are extracted hereunder:

“We, Canara Bank, ... do hereby guarantee and undertake to pay the Employer, on demand any and all monies payable by the Contractor to the extent of INR 19,79,51,850 /-(Rupees Nineteen Crores seventy Nine lakhs Fifty One Thousand Eight Hundred and Fifty Only) as aforesaid at any time up to 03-01-2011 without any demur, reservation, contest, recourse or protest and/or without any reference to the Contractor. Any

such demand made by the Employer on the Bank shall be conclusive and binding notwithstanding any difference between the Employer and the Contractor or any dispute pending before any Court, Tribunal, Arbitrator or any other authority. The Bank undertakes not to revoke this guarantee during its currency without previous consent of the Employer and further agrees that the guarantees herein contained shall continue to be enforceable till the Employer discharges this guarantee or till 03-01-2011 whichever is earlier.

The Employer shall have the fullest liberty, without affecting in any way the liability of the Bank under this guarantee, from time to time to extend the time for performance of the Contract by the Contractor. The Employer shall have the fullest liberty, without affecting this guarantee, to postpone from time to time the exercise of any powers vested in them or of any right which they might have against the Contractor, and to exercise the same at any time in any manner, and either to enforce or to forbear to enforce any covenants, contained or implied, in the Contract between the Employer and the Contractor or any other course or remedy or security available to the Employer. The Bank shall not be released of its obligations under these presents by any exercise by the Employer of its liberty with reference to the matters aforesaid or any of them or by reason of any other act or forbearance or other acts of omission or commission on the part of the Employer or any other indulgence shown by the Employer or by any other matter or things whatsoever which under the law would, but for this provision have the effect of relieving the Bank.”

51. A bare perusal of the portion as extracted above reveals that the Guarantee is unconditional. The said Bank Guarantee was extended to an amount of Rs. 26,13,51,850/- which was extended from time to time and as on date remains valid and subsisting till 31.05.2022. The Taking Over Certificate dated 16.05.2016 was granted to the Petitioner. Subsequently a

Defects Liability Certificate dated 14.08.2021 was also handed over to the Petitioner.

52. This Court has also perused the Clauses 10.1 and 10.2 of the Agreement between the parties. The said clauses are reproduced hereunder:

“10.1 Performance Security

If the Contract requires the Contractor to obtain security for his proper performance of the Contract, he shall obtain and provide to the Employer such security within 28 days after the receipt of the Letter of Acceptance, in the sum stated in the Appendix to Tender. When providing such security to the Employer, the Contractor shall notify the Engineer of so doing. Such security shall be in the form annexed to these Conditions or in such other form as may be agreed between the Employer and the Contractor. The institution providing such security shall be subject to the approval of the Employer. The cost of complying with the requirements of this Clause shall be borne by the Contractor, unless the Contract otherwise provides.

10.2 Period of Validity of Performance Security

The performance security shall be valid until the Contractor has executed and completed the Works and remedied any defects therein in accordance with the Contract. No claim shall be made against such security after the issue of the Defects Liability Certificate in accordance with Sub-Clause 62.1 and such security shall be returned to the Contractor within 14 days of the issue of the said Defects Liability Certificate.”

53. As per the Petitioner the following claims *qua* the Project were allowed and awarded by the Arbitral Tribunals in favour of the Petitioner

and are due upon the respondent, in the manner as described in the Table hereunder:

| <i>Project</i> | <i>Reference</i> | <i>Date of Award</i> | <i>Amount Awarded to Petitioner (in Crores)</i> | <i>Amount Received (in Crores)</i> | <i>Amount Due/ Outstanding (in Crores)</i> |
|----------------|------------------|----------------------|---|------------------------------------|--|
| TLDP-IV | Ref.I | 17.01.2014 | 446.88 | 278.81 | 168.07 |
| TLDP-IV | Ref. II. | 31.12.2015 | 79.25 | 47.56 | 31.69 |
| TLDP-IV | Ref. III. | 27.02.2018 | 64.24 | 0 | 64.24 |
| TLDP-IV | Ref. IV. | 18.09.2018 | 96.30 | 0 | 96.30 |

54. It has been contended by the Petitioner that in the present case the claims made by the Respondent for which the Bank Guarantee are sought to be invoked have been adjudicated against the Respondent. It has also been submitted that in view of the Taking Over Certificate dated 16.05.2016, as well as the Defects Liability Certificate dated 14.08.2021 being granted to the Petitioner, there is no case of non-performance to make out a case for invocation of Bank Guarantee. Thus, there being no loss which can be covered by the Bank Guarantee, it is the petitioner's case that the respondent has no right to invoke the guarantee.

CONCLUSION

55. The legislative intent behind enacting the Arbitration Act is to make justice-delivery simple, inexpensive, party-led and time-bound as

well as to take the burden of a big chunk of commercial off the conventional Courts. This being the motivation and expectation, the finality of the arbitral award gains enormous importance. However, appealing the award granted by the Arbitrator/Tribunal has become a routine practice for the aggrieved party whose claims are not allowed; and the challenge petition becomes pending, further adding to the burden of the Courts as well as posing a looming threat to the finality of the award, thus defeating the ends for which the Act had been legislated.

56. The remedy provided in Section 34 against an arbitral award is in any case not the same as an appeal. The intention behind incorporating Section 34 was to make the result of the annulment procedure prescribed therein potentially different from that in an appeal. In appeal, the decision under review not only may be confirmed, but may also be modified. In annulment, on the other hand, the decision under review may either be invalidated in whole or in part or be left to stand if the plea for annulment is rejected. Section 34 provides for annulment only on the grounds affecting legitimacy of the process of decision as distinct from substantive correctness of the contents of the decision. It is thus clear that the even if the respondent succeeds in its Section 34 petition, the setting aside of the arbitral Award in rejecting the counter-claims of the respondent does not result in the same being decreed in its favour. It would be open to the respondent to commence fresh proceedings against the petitioners.

57. Nevertheless, in view of the alternate prayer made and pressed by the petitioner to restrain the respondent from invoking the Bank

Guarantee till the pendency of Section 34 petitions challenging the arbitral awards *qua* the contract between the parties in relation the Project, this Court has not ventured into the question of return of Bank Guarantees.

58. This Court shall now adjudicate the question regarding stay on invocation of Bank Guarantee in the instant case. The settled position in law that emerges from the precedents is that the bank guarantee is an independent contract between bank and the beneficiary, and the bank is always obliged to honour its guarantee as long as it is an unconditional and irrevocable one. There are, however, exceptions to this rule when there is a clear case of fraud, irretrievable injustice or special equities.

59. In the case at hand, the facts and circumstances of the case cumulatively demonstrate *special equities* in favour of the Petitioner. *Firstly*, it is an admitted fact that the Petitioner has arbitral awards with respect to the Project in its favour wherein the counter-claims of the Respondent have been dismissed. *Secondly*, the Bank Guarantees given during the contract cannot be said to have been given in perpetuity even for the period after the completion of project and adjudication of claims/counter-claims between the parties. *Thirdly*, even if the Respondent succeeds in its challenge to the Award under Section 34, it has to resort to fresh arbitration proceedings with regard to the counter-claims. *Fourthly*, there is no *prima facie* case made out in light of the awards passed in favour of the Petitioner, especially in light of the uncontested facts that on 29.02.2016, the project was taken over for substantial completion of works, and on 28.02.2017, the Defect Liability

Period was completed, and finally on 14.08.2021, the Defect Liability Certificate was issued. Therefore, no valid basis for invocation/encashment of the bank guarantee by the respondent exist. *Fifthly*, as on date, as per the statements made by the learned counsels, there is no stay whatsoever on either of the awards passed *qua* the said Project in any of the Section 34 petitions. *Sixthly*, as per the provisions of the contract, specifically Clauses 10.1 and 10.2, Performance Bank Guarantee ought to be returned to the contractor within 14 days of issuance of Defects Liability Certificate.

60. In view of the aforesaid, the respondent is restrained from invoking/encashing the bank guarantee till the disposal of and subject to the judgment in the Section 34 petitions challenging the arbitral awards *qua* the contract between the parties in relation the Project.

61. The instant petition accordingly stands disposed in the aforesaid terms.

62. It is made clear that any comments made herein as to the merits of the case shall have no bearing whatsoever in the pending challenges to the arbitral awards *qua* the Project in question.

63. The judgment be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

FEBRUARY 13, 2023
gs/@dityak.