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

Reserved on:10th August, 2020
Pronounced on: 30th September, 2020

\+ O.M.P. (I) (COMM.) 184/2020 & I.A. 5642/2020, I.A. 5643/2020

CRSC RESEARCH AND DESIGN INSTITUTE GROUP CO. LTD. ..... Petitioner

Through: Mr. Rajiv Nayar, Sr. Adv. with Mr. Krishna Vijay Singh, Mr. Manish Dembla, Mr. Ankur Khandelwal, Mr. Nachiketa Goyal, Mr. Kartik Nayar, Mr. Saurabh Seth, Advs.

versus

DEDICATED FREIGHT CORRIDOR CORPORATION OF INDIA LIMITED & ORS. ..... Respondents

Through: Mr. Tushar Mehta, Solicitor General, assisted by Ms. Garima Prashad, Advocate-on-Record, Mr. Abhishek Kumar Tripathi, Ms. Ankita Pandey and Mr. Imtiyaz, Advs.

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

J U D G E M E N T

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1. This petition, under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the 1996 Act"),

seeks an order of restraint against invocation/encashment of Bank Guarantees, furnished by the petitioner to Respondent No. 1.

2. Detailed submissions were advanced by Mr. Rajiv Nayar, learned Senior Counsel for the petitioner and Mr. Tushar Mehta, learned Solicitor General for Respondent No. 1 and, at joint request of learned Senior Counsel (as recorded on 10th August, 2020, when orders were reserved), this judgement finally disposes of the present proceedings.

Facts

3. *Vide* Letter of Acceptance dated 23rd June, 2016, Respondent No. 1 informed the petitioner that its bid, for "Design, Supply, Construction, Testing and Commissioning of Signalling, Telecommunication and Associated Works of Double Track Railway Lines Under Construction On A Design Build Lump Sum Basis for Mughalsarai-New Bhaupur Section of Eastern Dedicated Freight Corridor-Contract Package-203" (hereinafter referred to as "the Project"), for construction of Double Line Electrified Section, covering 388.14 km, between Mughal Sarai and New Bhaupur and 29.15 km between Junction Stations and IR Stations, had been accepted, at the contract price of ₹ 471 crores.

4. This Letter of Acceptance crystallised into a formal Contract, dated 3rd October, 2016. The petitioner was required, *vide* the Contract, to complete the Project Work during the period 4th August,

2016 to 30th April, 2019. The Contract fixed four Milestones, being dates by which specified sections of the Work was required to be completed by the petitioner. The specifics of the said Milestones may be depicted thus:

(i) Milestone 1 was fixed as 360 days from the Commencement Date, i.e. 29th July, 2017. Prior thereto, the petitioner was required to have commenced the activities of Permanent Works, which entitled him to payment of at least 10% of the Accepted Contract Amount.

(ii) Milestone 2 was fixed as 600 days from the Commencement Date, i.e. 27th March, 2018. Prior thereto, the petitioner was required to have completed

(a) 75% of laying of outdoor signalling and telecom cable, and their termination and testing, and

(b) supply of S & T equipment and its progress of installation,

which entitled the petitioner to payment of at least 40% of the accepted contract amount.

(iii) Milestone 3 was fixed as 800 days from the Commencement Date, i.e. 12th October, 2018. Prior thereto, the petitioner was required to have completed

(a) 90% of laying of outdoor signalling and telecom cable, and their termination and testing, and

(b) supply of S & T equipment and its progress of installation,

which entitled the petitioner to payment of at least 65% of the Accepted Contract Amount.

(iv) Milestone 4 was fixed as 1000 days from the Commencement Date, i.e. 30th April, 2019. Prior thereto, the petitioner was required to have completed all works, as per the Contract, and to have issued a Taking Over Certificate in accordance with Clause 10 of the Conditions of Contract.

5. The Contract appointed SYSTRA MVA Consulting (India) Pvt Ltd., Allahabad, as the Project Management Consultant (PMC) for the Contract. Communications with the petitioner were, generally, addressed by the PMC, on behalf of Respondent No. 1.

6. Four Advance Bank Guarantees, for a total value of approximately ₹ 38.06 crores, and one Performance Bank Guarantee, for ₹ 23.55 crores, were furnished by the petitioner, in accordance with the requirements of the Contract. The Advance Bank Guarantees are valid up to 1st May, 2021, and the Performance Bank Guarantee is valid till 24th June, 2021.

7. Various requests, for extension of time to perform the Contract, were made by the petitioner, and acceded to, by Respondent No. 1. *Vide* letter dated 19th May, 2020, however, Respondent No. 1 rejected the request, dated 7th May, 2020, of the petitioner, for further

extension of time. A tabular depiction of this position has been provided, in the petition, thus:

Date of letter seeking extension of time	**Date, to which extension of time was sought**	**Extension granted**	**Date of grant of extension**
17th August, 2017	Milestone 1:20th September, 2017	Not granted	Rejected *vide* letter dated 10th October, 2017
8th May, 2018	Milestone 2:16th February, 2019 Milestone 3:17th July, 2019 Milestone 4: 18th April, 2020	Milestone 2: Till 17th August, 2018 No extension granted for Milestones 3 and 4	18th August, 2018
23rd March, 2019	Milestone 2: 9th September, 2019 Milestone 3: 23rd January, 2020 Milestone 4: 28th August, 2020	Milestone 2: Till 4th August, 2019 Milestone 3: Till 20th October, 2020 Milestone 4: Till 7th May, 2020	20th May, 2019 (communicated *vide* letter dated 22nd June, 2019)
10th December, 2019	Milestone 2: 21st August, 2020 Milestone 3: 16th February, 2021 Milestone 4: 31st August, 2021	Milestone 2: Till 6th July, 2020 Milestone 3: Till 4th October, 2020 Milestone 4: Till 18th February, 2021	22nd April, 2020 (communicated *vide* letter dated 23rd April, 2020)
7th May, 2020	40 days extension sought for all Milestones	Not granted	Rejected *vide* letter dated 19th May, 2020

8. The letter, dated 22nd April, 2020, from Respondent No. 1 to the petitioner, granting extension of time, as sought by the petitioner, was granted "without levying any penalty on either of parties as recommended by PMC". The letter noted the fact that Milestone-1 had been achieved, by the petitioner, within the stipulated period, without extension. As noted hereinabove, the letter granted extension of time, for achieving Milestones 2, 3 and 4, till 6th July, 2020, 4th October, 2020 and 18th February, 2021, respectively.

9. In February-March, 2020, India was hit by the COVID-2019 pandemic, which ravaged the world. Consequent thereupon, Office Memorandum (OM), dated 13th May, 2020, was issued by the Department of Expenditure, Ministry of Finance, regarding invocability of *force majeure*, during the currency of the pandemic. Paras 4 and 5 of the OM read thus:

> "4. It is recognised that in view of the restrictions placed on the movement of goods, services and manpower on account of the lockdown situation prevailing overseas and in the country in terms of the guidelines issued by the MHA under the DM Act 2005 and the respective State and UT Governments, it may not be possible for the parties to the contract to fulfil contractual obligations. In respect of Public-private Partnership (PPP) concession contracts, a period of the contract may have become unremunerative. Therefore, after fulfilling due procedure and wherever applicable, parties to the contract may invoke FMC for all construction/works contracts, goods and services contracts and PPP contracts with Government Agencies and in such event, date for completion of contractual obligations which had to be completed on or after 20th February 2020 shall stand extended for a period of not less than three months and not more than six months without imposition of any cost of penalty on the

> contract/concessionaire. Concession period in PPP contracts ending on or after 20th February 2020 shall be extended by not less than three and not more than six months. The period of extension (between three and six months) may be decided based on the specific circumstances of the case and the period for which performance was affected by the force majeure events.
>
> 5. It is clarified that invocation of FMC would be held valid only in a situation where the parties to the contract were not in default of the contractual obligations as on 19th February, 2020. It is further clarified that invocation of FMC does not absolve all non-performances of a party to the contract, but only in respect of such non-performance as is attributable to a lockdown situation of restrictions imposed under any Act or executive order of the Government/s on account of COVID-19 global pandemic. It may be noted that, subject to the above stated, all contractual obligations shall revive on completion of the period."

10. According to the petitioner, the extensions of time, granted, to the petitioner by Respondent No. 1, for achieving Milestones 2, 3 and 4, would stand extended, *ipso facto*, by operation of the aforesaid OM, dated 13th May, 2020, issued by the Department of Expenditure, by at least three months. As such, the date for completion of Milestone 2, according to the petitioner, would stand extended at least till 6th October, 2020.

11. On 31st March, 2020, the petitioner wrote to Respondent No. 1, through the PMC, invoking Clause 19.2 of the Contract, which provided for *force majeure*, in the light of the 21 days' lockdown, imposed by the Central Government, consequent on the COVID-2019 pandemic, which was to last from 25th March, 2020 till 14th April, 2020. In view thereof, the petitioner stated that the petitioner had

been temporarily incapacitated from performing its obligations under the Contract. The petitioner, therefore, sought extension of time, for completing the contract, under Clause 8.4 thereof, which reads thus:

> "**8.4 Extension of Time for Completion**
>
> The Contractor shall be entitled subject to Sub- Clause 20.1 [Contractor's Claims] to an extension of the Time for Completion if and to the extent that completion for the purposes of Sub-Clause 10.1 [Taking over of the Works and Sections] is or will be delayed by any of the following causes:
>
> (a) A Variation (unless an adjustment to the Time for Completion has been agreed under Sub- Clause 13.3 [Variation Procedure]),
>
> (b) a cause of delay giving an entitlement to extension of time under Sub-Clause of these Conditions,
>
> (c) exceptionally adverse climatic conditions,
>
> (d) unforeseeable shortages in the availability of Goods caused due to changes in laws in accordance with the provisions of Sub- Clause 13.7, or
>
> (e) any delay, impediment or prevention caused by or attributable to the Employer, the Employers Personnel, or the Employers other contractors on the Site,
>
> (f) A cause of delay in handing over possession of Site in accordance with the provisions of Sub- Clause 2.1.
>
> If the Contractor considers himself to be entitled to an extension of the Time for Completion, the Contractor shall give notice to the Engineer in accordance with Sub- Clause 20.1 [Contractors Claims]. When determining each extension of time under Sub- Clause 20.1, the Engineer shall review previous

determinations and may increase, but shall not decrease, the total extension of time."

12. "*Force Majeure*" was covered by Clause 19 of the Contract. Sub-clauses 19.1, 19.2, 19.4 and 19.7, thereunder, may be reproduced thus:

"**19 Force Majeure**

19.1 Definition of Force Majeure

In this Clause, "Force Majeure" means an exceptional event or circumstance:

(a) which is beyond a Party's control,

(b) Which such Party could not reasonably have provided against before entering into a Contract,

(c) which, having arisen, such Party could not reasonably have avoided or overcome, and

(d) which is not substantially attributable to the other Party.

Force Majeure may include, but is not limited to, exceptional events or circumstances of the kind the listed below, so long as conditions (a) to (d) are satisfied:

(i) war, hostilities (whether war be declared or not), invasion, act of foreign enemies,

(ii) rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war,

(iii) riot, commotion, disorder, strike or lockout by persons other than the Contractor's Personnel and other employees of the Contract and Sub- contractors,

(iv) munitions of war, explosive Materials, ionising radiation or contamination by radioactivity, except as

may be attributable to the Contractor's use of such munitions, explosives, radiation or radioactivity, and

(v) natural catastrophes such as earthquake, hurricane, Typhoon or volcanic activity.

19.2 Notice of Force Majeure

If a party is or will be prevented from performing any of its obligations under the Contract by Force Majeure, then it shall give notice to the other Party of the events or circumstances constituting the Force Majeure and shall specify the obligations, the performance of which is or will be prevented. The notice shall be given within 14 days after the Party became aware, or should have become aware, of the relevant event or circumstance constituting Force Majeure.

The Party shall, having given notice, be excused performance of such obligations for so long as such Force Majeure prevents it from performing them.

Notwithstanding any other provision of this Clause, Force Majeure shall not apply to obligations of either Party to make payments to the other Party under the Contract.

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19.4 Consequences of Force Majeure

If the Contractor is prevented from performing any of his obligations under the Contract by *force majeure* of which notice has been given under Sub- Clause 19.2 [Notice of Force majeure], and suffers delay and/or incurs Cost by reason of such force majeure, the Contractor shall be entitled subject to Sub- Clause 20.1 [Contractors Claims] to:

(a) an extension of time for any such delay, if completion is or will be delayed, under Sub- Clause 8.4 [Extension of Time for Completion], and

(b) if the event or circumstance is of the kind described in sub- para (i) to (iv) of Sub- Clause 19.1 [Definition of Force majeure] and, in the case of sub-paras (ii) to (iv), occurs in the Country, payment of any such Cost.

After receiving this notice, the Engineer shall proceed in accordance with Sub- Clause 3.5 [Determinations] to agree or determine these matters.

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19.7 Release from Performance under the Law

Notwithstanding any other provision of this Clause, if any event or circumstance outside the control of the Parties (including, but not limited to, force majeure) arises which makes it impossible or unlawful for either or both Parties to fulfil its or their contractual obligations of which, under the law governing the Contract, entitles the Parties to be released from further performance of the Contract, then upon notice by either Party to the other Party of such event or circumstance:

(a) the Parties shall be discharged from further performance, without prejudice to the rights of either Party in respect of any previous breach of the Contract, and

(b) the sum payable by the Employer to the Contractor shall be the same as would have been payable under Sub- Clause 19.6 [Optional Termination, Payment and Release] if the Contract had been terminated under Sub- Clause 19.6."

13. The request, of the petitioner, for extension of time on the ground of *force majeure*, was rejected, by Respondent No. 1 (through the PMC), *vide* letter dated 19th May, 2020. Paras 1 and 2 thereof,

which dealt with the petitioner's claim for extension of time, read as under:

> "1. CRSCD as mentioned in para 1.2.3 of their letter that "India has declared a state of emergency to fight the pandemic by Closing borders" is not correct.
>
> 2. CRSCD has also mentioned in para 1.3.4; Delay Event 1 that "Force Majeure events has been preventing the Contractor from performing its obligations under the contract, including design, procurement is not correct", hence, not acceptable. CRSCD has regularly submitted soft copy of the design to PMC and PMC has also provided its review comments. A progress review meeting through VC was held on 11.04.2020, and the MOM of the meeting has details of designs submitted/reviewed between 25th March to 20th April 2020."

14. On 3rd July, 2020, Respondent No. 1 issued a 14 days' notice of termination, under Clause 15.2 of the General Conditions of Contract (GCC). The communication referred to eleven earlier communications, between the petitioner and Respondent No. 1 (through the PMC), dated 19th December, 2016, 24th June, 2017, 22nd February, 2018, 27th March, 2018, 7th June, 2018, 20th November, 2018, 1st August, 2019, 1st October, 2019, 18th November, 2019, 30th January, 2020 and 11th March, 2020. Thereafter, the communication proceeded to state thus:

> "Whereas a contract or agreement between DFCCIL (Employer) and M/s Beijing National Railway Research & Design Institute of Signal & Communication Group Co Ltd (Contractor) for the work captioned in subject line is in force with extended time of completion being 18.02.2021. The contract is being administered by M/s. SYSTRA Mott Macdonald (JD) as PMC.

Whereas the contract has been issued 10 nos. notices vide a reference (iii) to (xii) under sub- clause 15.1 of GCC/PCC by Engineer. Even after issuing 10 nos. notices under sub-clause 15.1 of GCC/PCC by the Engineer no significant improvement has been noticed.

The Engineer having convinced of the Contractor's failures and defaults under the contract, Engineer vide a reference (xiii) recommended DFCCIL to take necessary action as per the provision in the contract to invoke notice to Contractor as per Clause 15.2 (Termination by Employer) of GCC/PCC for non compliance of clause 15.1 of GCC/PCC by Contractor for notice issued to him to improve the progress of work and requested Employer for taking needful action in the matter.

And whereas the above and other correspondences of the Engineer including the replies submitted by the Contractor as of date, materials available on record, having been duly considered by the Employer and in the light of the same, the Employer hereby issue 14 Days Notice as per the terms and conditions of GCC/PCC Clause 15.2 (a) of the Contract Agreement.

The Notice of 14 days for Termination of Employer is being issued as required under sub- clause 15.2(a) of GCC (FIDIC Yellow Book 1999-Edition) without prejudice to the Employer's any right under the contract or otherwise."

Clauses 15.1 and 15.2 of the GCC read thus:

"**15 Termination by Employer**

15.1 Notice to Correct

If the Contractor fails to carry out any obligation under the Contract, the Engineer may by notice require the Contractor to make good the failure and to remedy it within a specified reasonable time.

15.2 Termination by Employer

The Employer shall be entitled to terminate the Contract if the Contractor:

(a) fails to comply with Sub-Clause 4.2 [Performance Security] or with a notice on this Sub-Clause 15.1 [Notice to Correct],

(b) abandons the Works or otherwise plainly demonstrates the intention not to continue performance of its obligations under the Contract,

(c) without reasonable excuse fails:

(i) to proceed with the Works in accordance with Clause 8 [Commencement, Delays and Suspension], or

(ii) to comply with a notice issued under Sub-Clause 7.5 [Rejection] or Sub-Clause 7.6 [Remedial Work], within 28 days after receiving it,

(d) subcontracts the whole of the Works or assigns the Contract without the required agreement,

(e) becomes bankrupt or insolvent, goes into liquidation, has a receiving or administration order made against him, compounds with his creditors, or carries on business under the receiver, trustee or manager for the benefits of his creditors, or of any act is done or event occurs which (under applicable Laws) has a similar effect to any of these acts or events, or

(f) gives or offers to give (directly or indirectly) to any person any bright, gift, gratuity, commission or other thing of value, as an inducement or reward:

(i) for doing or forbearing to do any action in relation to the Contract, or

(ii) for showing or forbearing to show favour of disfavoured to any person in relation to the Contract,

or if any of the Contractor's Personnel, agents Sub-contractors gives or offers to give (directly or

indirectly) to any person any such inducement or reward as is described in this sub- para (f). However, lawful inducements and rewards to Contractors Personnel shall not entitle termination.

In any of these events or circumstances, the Employer may, upon giving 14 days' notice to the Contractor, terminate the Contract and expel the Contract from the Site. However, in the case of sub-paragraph (e) or (f), the Employer may by notice to terminate the Contract immediately.

The Employer's election to terminate the Contract shall not prejudice to any other rights of the Employer, under the Contract or otherwise.

The Contractor shall then leave the Site and deliver any required Goods, all Contractor's Documents, and other design documents made by or for him, to the Engineer. However, the Contractor shall use his best efforts to comply immediately with any reasonable instructions included in the notice (i) for the assignment of any subcontract, and (ii) for the protection of life or property or for the safety of the Works.

After termination, the Employer may complete the Works and/or arrange for any other entities to do so. The Employer and these entities may then use any Goods, Contractor's Documents and other design documents made by or on behalf of the Contractor.

The Employer shall then give notice that the Contractor's Equipment and Temporary Works will be released to the Contract are at or near the Site."

15. Apprehending that, consequent to the issuance of notice for termination of the Contract, Respondent No. 1 would invoke and encash the Bank Guarantees provided by it, the petitioner has approached this Court, by means of the present petition under Section

9 of the 1996 Act, as the Contract admittedly contained an arbitration clause.

16. Detailed submissions have been advanced by Mr. Rajiv Nayar, learned Senior Counsel for the petitioner and Mr. Tushar Mehta, learned Solicitor General appearing for Respondent No. 1. Copious written submissions have also been filed by learned Counsel, during as well as after the conclusion of the proceedings and reserving of judgement.

Rival submissions

17. Mr. Rajiv Nayar, learned Senior Counsel for the petitioner contends thus:

(i) Having extended the time for completion of the work, *vide* letter dated 23rd April, 2020 *supra*, till 18th February, 2021, Respondent No. 1 could not have terminated the contract on the allegation of delay/slow progress on 3rd July, 2020. Mr. Nayar draws my attention, in this context, to the fact that the letter dated 3rd July, 2020 does not notice the extension of time granted, by Respondent No. 1, *vide* letter dated 22nd April, 2020 *supra*, till 6th July, 2020 for Milestone 2, 4th October, 2020 for Milestone 3 and 18th February, 2021 for Milestone 4. In this context, Mr. Nayar places reliance on Clause 8.2 and 8.4 of the Contract, which dealt with the "Time for Completion", and Extension thereof, in conjunction with Clause 1.1.3.3, which

defined in the said expression. Clause 8.2 set out the timelines under the various Milestones. Clause 1.1.3.3 reads thus:

> "**1.1.3.3 "Time for Completion"** means the time for completing the Works ora Section (as the case may be) under Sub-Clause 8.2 [Time for Completion], as stated in the Appendix to Tender (with any extension under Sub-Clause 8.4 [Extension of Time for Completion]), calculated from the Commencement Date."

(ii) The grant of extension, periodically, as sought by the petitioner, without levying of delay damages, amounted to an acknowledgement and admission of the fact that no delay was attributable to the petitioner. Clause 8.7 of the Contract rendered the contractor liable to pay delay damages to Respondent No. 1, in the event of failure, by the contractor, to achieve any milestone on the scheduled date, except where the failure had occurred owing to *force majeure* or for reasons solely attributable to the employer. The Clause did not confer the Engineer with any discretion in that regard, or with the power to waive delay damages, if the contractor was at fault. While granting three extensions of time, for completion of Milestones 2, 3 and 4, Respondent No. 1 did not impose any delay damages, and did not reserve any right to levy delay damages. Rather, extension of time was granted, specifically, "without levying any penalties". This amounted to an acknowledgement, by Respondent No. 1, that the delay was either due to *force majeure*, or owing to reasons attributable to Respondent No. 1. The submission, of Respondent No. 1, that

it had levied delay damages of ₹ 1.84 crores, for delay in achieving Milestone 1, did not remedy the situation. Milestone 1 had been achieved in 2017. Extensions of time, granted for achieving Milestones 2, 3 and 4, thereafter, were not conditioned by any levy of delay damages. The levy of delay damages in respect of Milestone 1 which, itself, was unlawful, did not remedy the situation. Clause 8.7 of the Contract read thus:

> "**8.7 Delay Damages**
>
> The Contractor shall complete the Works in accordance with the Time for Completion of Works set forth in Sub- Clause 8.2 [Time for Completion]. In the event that the Contractor fails to achieve any Milestone on the date set forth for such Milestone in the Time for Completion, unless such failure has occurred due to Force Majeure or for reasons solely attributable to the Employer, the Contractor shall pay Delay Damages to the Employer in a sum calculated at the rate stated in the Appendix to Tender until such Milestone is achieved; provided that if the construction period for any or all Milestones is extended in accordance with the provisions of this Contract, the date set forth in the Sub-Clause 8.2 [Time for Completion] shall be deemed to be modified accordingly and the provisions of this Sub-Clause shall apply as if Appendix to Tender has been amended accordingly; provided further that in the event Whole of the Works are completed within the Time for Completion as stated in the Sub-Clause 8.2 [Time for Completion] of the Particular Conditions, the Delay Damages paid under this Sub-Clause shall be refunded by the Employer to the Contract, but without any interest thereon.

It is agreed that recovery of Damages under this Sub-Clause shall be without prejudice to the rights of the Employer under this Contract including the right of Termination thereof.

The parties hereby accept the delays cause loss to the public and national economy for whose benefit the Works is meant, and that the loss is not susceptible to precise measurement. The Parties hereby agree that the rate of delay damages agreed in this Clause 8.7 is a reasonable predetermined amount, and that the delay damages are not by way of penalty. Further, the total amount of Delay Damages under Sub-Clause 8.7 shall not exceed the maximum amount of delay damages (if any) stated in the Appendix to Tender."

(iii) Similarly, though Clause 15.1 of the Contract permitted the Engineer to issue "Notices to Correct", to the petitioner, and though such notices were, in fact, issued, the communications, whereby extension of time was granted to the petitioner, by Respondent No. 1, made no reference to such earlier communications alleging default or slow progress. Clause 15.1 may be reproduced, for the sake of reference, thus:

"**15.1 Notice to Correct**

If the Contractor fails to carry out any obligation under the Contract, the Engineer may buy notice required the Contractor to make good the failure and to remedy it within a specified reasonable time."

(iv) The respondent had failed to show any change of circumstances, between 22nd April, 2020, when the last extension of time had been granted by Respondent No. 1 (as

noted above), and 3rd July, 2020, when the contract was terminated, as would entitle Respondent No. 1 to terminate the contract.

(v) The termination was also invalid as there was a *force majeure* situation, with effect from 24th March, 2020, which entitled the petitioner, as of right, to extension of time of at least three months, under Clause 19 of the contract as well as in terms of the OM dated 13th May, 2020 issued by the Department of Expenditure, especially as the petitioner had duly tendered a *force majeure* notice in terms of the contract. Applying the OM dated 13th May, 2020, to the extension of time already granted by Respondent No. 1, the date for completion of Milestone 2 could, at the earliest, be 6th October, 2020. Respondent No. 1 could not, therefore, lawfully terminate the contract before the said date. Mr. Nayar points out that the impugned termination notice, dated 3rd July, 2020, failed to take note of the Circulars, dated 11th May, 2020 and 13th May, 2020, issued by the Government.

(vi) Besides, even if it were to be assumed that the petitioner could not achieve Milestone 1 within the extended time, it was always possible that the petitioner would accelerate the work and complete the contract before the revised date, i.e. 18th February, 2021. It was for this reason that Clause 8.7 of the Contract provided that, if the entire work was completed within the original or extended time, delay damages, even if imposed

for non-completion of any interim Milestone within the time granted, would be refunded.

(vii) The contention of Respondent No. 1 that the Engineer had recommended termination of the Contract on 11th March, 2020, was disputable. No copy, of the said recommendation of the Engineer, was marked to the petitioner, as required by Clause 3.5 of the GCC. Communications, from Respondent No. 1, after 11th March, 2020, made no reference to the said recommendation of the Engineer. Besides, the contract did not empower the Engineer to recommend termination thereof, or to arrive at any determination in that regard. In any event, Respondent No. 1 granted further extension of time, on 22nd April, 2020, nearly a month and a half after the purported letter of the Engineer which, accordingly, would stand superseded. The reliance, by Respondent No. 1, on the said letter dated 11th March, 2020, of the Engineer, as a ground to justify the termination of the Contract was, therefore, misplaced.

(viii) The dispute, regarding the validity of the termination of the contract, stood referred by Respondent No. 1 to the Dispute Adjudication Board (DAB) and, unless such dispute was decided in favour of Respondent No. 1, it could not be permitted to invoke the Bank Guarantees. In this context, Mr. Nayar refers to Clause 20.2 of the Contract, which requires disputes to be "adjudicated by a DAB in accordance with Sub-Clause 20.4". The DAB was required to be appointed, by the parties, jointly, within twenty-eight days of tendering of notice,

by one party to the other, of its intention to refer the dispute to the DAB in accordance with Sub-Clause 20.4. Sub-Clause 20.4, to the extent it is relevant, reads thus:

> "**20.4 Obtaining Dispute Adjudication Board's Decision**
>
> If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the seclusion of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, then after a DAB has been appointed pursuant to Sub- Clause 20.2 and 20.3, either Party may refer the dispute in writing to the DAB for its decision, with a copy to the other Party. Such reference shall state that it is given under this Sub- Clause.
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> *****
>
> Within 84 days after receiving such reference or the advance payment referred to in Clause 6 of Appendix – General Conditions of Dispute Adjudication Agreement, whichever date is later, or within such other period as may be proposed by the DAB and approved by both Parties, the DAB shall give its decision, which shall be reasoned and shall state that it is given under this Sub- Clause. ... The decision shall be binding on both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award as described below. ...
>
> If either Party is dissatisfied with the DAB's decision, then either Party may, within 28 days after receiving the decision, give notice to the other Party of its dissatisfaction. If the DAB fails to give its decision within the period of 84 days (or as otherwise approved) after receiving such reference of such payment, then either Party may, within 28 days after this period has

expired, give notice to the other Party of its dissatisfaction.

In either event, this notice of dissatisfaction shall state that it is given under this Sub-Clause, and shall set out the matter in dispute and the reason(s) for the dissatisfaction. Except as stated in Sub-Clause 20.7 and Sub-Clause 20.8, neither Party shall be entitled to commence arbitration of a dispute unless the notice of dissatisfaction has been given in accordance with this Sub-Clause."

(ix) The termination of the contract, by Respondent No. 1, was based on alleged non-compliance, by the petitioner, with "Notices to Correct", issued by the PMC under Clause 15.1, which charged the petitioner with having been slow in the progress of the work. The reliance, on the said Notices to Correct, was misguided, as the Engineer himself had, subsequently, determined and recommended extension of time, in Terms of Clause 8.4 read with Clause 3.5 of the Contract. These extensions of time were also approved by Respondent No. 1, the last such approval having been accorded *vide* letter dated 22nd April, 2020.

(x) The termination of the contract, by Respondent No. 1 was illegal. If Respondent No. 1 did not desire to continue with the contract, it should have resorted to Clause 15.5, which read thus:

"**15.5 Employer's Entitlement to Termination**

The Employer shall be entitled to terminate the Contract, at any time for the Employer's convenience, by giving notice of such

termination to the Contractor. The termination shall take effect 28 days after the date of the dates on which the Contractor receives this notice or the Employer returns the Performance Security. The Employer shall not terminate the Contract under this Sub-Clause in order to execute the Works himself or to arrange for the Works to be executed by another contractor.

After the termination, the Contractor shall proceed in accordance with Sub- Clause 16.3 [Cessation of Work and Removal of Contractors Equipment] and shall be paid in accordance with Sub-Clause 19.6 [Optional termination, Payment and Release]."

(xi) Respondent No. 1 was seeking to justify the invocation of the Bank Guarantees by reference to Clauses 15.3 and 15.4 of the GCC. These clauses read as under:

"**15.3 Valuation at Date of Termination**

As soon as practicable after a notice of termination under Sub-Clause 15.2 [Termination by Employer] has taken effect, the Engineer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine the value of the Works, Goods and Contractor's Documents, and any other sums due to the Contractor for work completed up to any defined stage of payment in accordance with the Contract. Extent of damages to the Employer due to termination under sub-Clause 15.2 has been fixed as (1) Forfeiture of Performance Security (2) Forfeiture of Retention money (3) five per cent (5%) of the cost of the balance work at the date of termination. The Parties hereby agree that the rate of these damages agreed in this is a reasonable pre-determined amount, and that these damages are not by way of penalty."

15.4 Payment after Termination

> After a notice of termination under Sub-Clause 15.2 [Termination by Employer] has taken effect, the Employer may:
>
> (a) proceed in accordance with Sub-Clause 2.5 [Employer's Claims],
>
> (b) withhold further payments to the Contractor until the actions in accordance with the following sub-paragraphs (c) and (d) are completed;
>
> (c) encash and forfeit the whole of the amounts of Performance Security and Retention Money and take possession of Plant and Materials delivered to Site, for which payment has been made by the Employer;
>
> (d) encash and appropriate the bank guarantee for the Advance Payment to recover the outstanding amount, if any, of the Advance Payment; and
>
> (e) pay to the Contractor any sums due under Sub-Clause 15.3 [Valuation at Termination], after the full amounts of the Performance Security and Retention Money and five per cent (5%) of the cost of the balance work (as per clause 15.3) and any other amount due from the Contractor have been received by the Employer. Any outstanding amounts against the Contractor shall immediately become due and payable by the Contractor to the Employer."

Clauses 15.3 and 15.4 presupposed the existence of a valid termination of the contract, under Clause 15.2. The termination of the contract itself being invalid, the invocation of the Bank

Guarantees of the petitioner could not be justified under Clauses 15.3 and 15.4.

(xii) Sub-Clause 15.4(a) itself required Respondent No. 1 to proceed in accordance with Clause 2.5. Clause 2.5 requires the employer, i.e. Respondent No. 1 to raise a claim if the employer considered himself entitled to any payment under any Clause, in connection with the Contract. The Engineer was, thereafter, required to proceed in accordance with Clause 3.5, to determine the amount, if any, to which the employer was entitled to be paid by the contractor. As such, Respondent No. 1 was not entitled to any amount, till there was an *a priori* determination, by the Engineer, of such entitlement, under Clause 3.5. Any such determination was also subject to revision by the DAB and, thereafter, by the Arbitral Tribunal. In the present case, they had been no determination of liability, by the Engineer, under Clause 3.5. Respondent No. 1 could not, therefore, proceed to encash the Bank Guarantees, by resorting to Clauses 15.3 and 15.4. This itself made out a case for injunctive relief, in favour of the petitioner, till the matter was decided in arbitral proceedings. This issue, contends Mr. Nayar, stands settled by the judgement of a coordinate bench of this Court in ***Larsen & Toubro Ltd v. Experion Developers Pvt Ltd & Ors***[1]. Clauses 2.5, 3.5 and 4.2 of the Contract read as under:

"**2.5 Employer's Claims**

[1] **2019 SCC OnLine Del 9097**

If the Employer considers himself to be entitled to any payment under any Clause of these Conditions or otherwise in connection with the Contract, and/or to any extension of the Defects Notification Period, the Employer or the Engineer shall give notice and particulars to the Contractor. However, notice is not required for payments due under Sub-Clause 4.19 [Electricity, Water and Gas], under Sub-Clause 4.20 [Employers Equipment and Free-Issue Material], or for other services requested by the Contractor.

The notice shall be given as soon as practicable after the Employer became aware of the event or circumstances giving rise to the claim. A notice relating to any extension of the Defects Notification Period shall be given before the expiry of such period.

The particulars shall specify the Clause or other basis of the claim, and shall include substantiation of the amount and/or extension to which the Employer considers himself to be entitled in connection with the Contract. The Engineer shall then proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine (i) the amount (if any) which the Employer is entitled to be paid by the Contractor, and/or (ii) the extension (if any) of the Defects Notification Period in accordance with Sub-Clause 11.3 [Extension of Defects Notification Period].

This amount may be included as a deduction in the Contract Price and Payment Certificates. The Employer shall only be entitled to set off against or make any deduction from an amount certified in a Payment Certificate, or to otherwise claim against the Contractor, in accordance with this Sub-Clause."

"**3.5 Determinations**

Whenever these Conditions provide that the Engineer shall proceed in accordance with this Sub-Clause 3.5 to agree or determine any matter, the Engineer shall consult with each Party in an endeavour to reach agreement. If agreement is not achieved, the Engineer shall make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances.

The Engineer shall give notice to both Parties of each agreement of determination, with supporting particulars. Each Party shall give effect to each agreement or determination unless and until revised under Clause 20 [Claims, Disputes and Arbitration]."

"**4.2 Performance Security**

The Contractor shall obtain (at his cost) a Performance Security for proper performance, in the amount and currencies stated in the Appendix to Tender. If an amount is not stated in the Appendix to Tender, this Sub-Clause shall not apply.

The Contractor shall deliver the Performance Security to the Employer within 28 days after receiving the Letter of Acceptance, and shall send a copy to the Engineer. The Performance Security shall be issued by an entity and from within a country (or other jurisdiction) approved by the Employer, and shall be in the form annexed to the Particular Conditions or in another form approved by the Employer.

The Contractor shall ensure that the Performance Security is valid and enforceable until the Contractor has executed and completed the Works and remedied any defects. If the terms of the Performance Security specify its expiry date, and the Contractor has not become entitled to receive the Performance Certificate by the date 28 days prior to the expiry date, the

Contractor shall extend the validity of the Performance Security until the Works have been completed and any defects have been remedied.

The Employer shall not make a claim under the Performance Security, except for amounts to which the Employer is entitled under the Contract in the event of:

(a) failure by the Contractor to extend the validity of the Performance Security as described in the preceding paragraph, in which event the Employer may claim the full amount of the Performance Security,

(b) failure by the Contractor to pay the Employer an amount due, as either agreed by the Contractor or determined under Sub-Clause 2.5 [Employer's Claims] or Clause 20 [Claims, Disputes and Arbitration], within 42 days after this agreement or determination,

(c) failure by the Contractor to remedy a default within 42 days after receiving the Employer's notice requiring the default to be remedied, or

(d) circumstances which entitle the Employer to termination under Sub-Clause 15.2[Termination by Employer], irrespective of whether notice of termination has been given.

The Employer shall indemnify and hold the Contractor harmless against and from all damages, losses and expenses (including legal fees and expenses) resulting from a claim under the Performance Security to the extent to which the Employer was not entitled to make the claim.

The Employer shall return the Performance Security to the Contractor within 21 days after

receiving a copy of the Performance Certificate."

(xiii) Besides, the use of the word "entitle", in Clause 4.2(d), indicates that there has to be *a priori* determination of the existence of circumstances which entitles Respondent No. 1 to terminate the agreement. Such determination of entitlement could only be by adjudication. The same expression, significantly, found place in Clause 2.5 of the Contract. "Entitlement" could be determined only by following the regimen prescribed by Clauses 2.5 to 3.5. There had been no quantification of any amount, as being payable to Respondent No. 1, prior to the termination of the contract.

(xiv) The judgement in ***IVRCL Ltd v. Rail Vikash Nigam Ltd***[2], on which Respondent No. 1 relies, did not take into account the decisions in ***Simon Carves Ltd v. Ensus UK Ltd***[3] and ***Doosan Babcock Ltd v. Comercializadora de Equiposy Materiales Mabe Limitada***[4], which were relied upon, by the same Hon'ble Judge, in ***Larsen & Toubro***[1]. As such, ***Larsen & Toubro***[1], being at a later in point of time, was entitled to precedence over ***IVRCL***[2].

(xv) The amount to which the petitioner was entitled, from Respondent No. 1, was far in excess of the cumulative value of the Bank Guarantees submitted by the petitioner. Relying on

[2]**2017 SCC OnLine Del 12561**
[3]**(2011) EWHC 657 (TCC)**
[4]**(2013) EWHC 3201 (TCC)**

the judgement, rendered by this Bench in ***Halliburton Offshore Services Inc. v. Vedanta Ltd***[5], the petitioner contends that special equities and irretrievable injustice justify the grant of injunction, under Section 9 of the 1996 Act. I may note, here, that ***Halliburton Offshore Services Inc.***[5] was an *ad interim* order, rendered by me, which has lost its value as a precedent, as the petition, in which the said order was rendered, was subsequently disposed of, *vide* a detailed judgement of a coordinate Bench.

(xvi) In these circumstances, allowing Respondent No. 1 to invoke, or encash, the Bank Guarantees submitted by the petitioner, would amount to an egregious fraud.

18. To buttress his submissions, Mr. Nayar placed reliance on the judgement of the Supreme Court in ***Gangotri Enterprises Ltd v. U.O.I.***[6]**,** the order, dated 26th July, 2007, of the Division Bench of this Court in FAO (OS) 77/2006 (***Satluj Jal Vidyut Vikas Nigam Ltd v. Hindustan Construction Co Ltd***), the judgement of the Division Bench of this Court in ***Satluj Jal Vidyut Nigam Ltd v. Jai Prakash Hyundai Consortium***[7] read with the order, dated 3rd April, 2006, of the Supreme Court in SLP (C) 5456/2006 (***Satluj Jal Vidyut Nigam Ltd v. Jai Prakash Hyundai Consortium***), the judgement of a learned Single Judge of this Court in ***Continental Construction Ltd v. Satluj Jal Vidyut Nigam Ltd***[8] and the opinions of the Queen's Bench of the

[5]**2020 SCC OnLine Del 542**
[6]**(2016) 11 SCC 720**
[7]**ILR (2006) 1 Delhi 415**
[8]**(2006) 1 Arb LR 321 (Delhi)**

High Court of the UK in ***Simon Carves Ltd***[3] and ***Doosan Babcock Ltd***[4].

19. Mr. Nayar has also submitted that any apprehension, expressed by Respondent No. 1, of difficulty, in recovery, at a later stage, were Respondent No. 1 to succeed in arbitration, is unfounded, as the petitioner is willing to keep its Bank Guarantees alive, pending the decision on the disputes between the petitioner and Respondent No. 1. On the other hand, encashment of the Bank Guarantees, at this stage, is bound to result in irreparable loss and prejudice to the petitioner, who would be handicapped in bidding for other projects.

20. In response, the learned Solicitor General contended thus:

(i) The petitioner was not justified in approaching this Court, even when the dispute was pending before the DAB. This, in fact, amounted to circumventing Clauses 20.2 to 20.5 of the contract .

(ii) Only three extensions, as sought by the petitioner, had been granted by Respondent No. 1, viz.

(a) on 21st July, 2018, extension of time was granted, for achieving Milestone 2, till 17th August, 2018, and no extension of time was granted for achieving Milestone 3 or Milestone 4,

(b) on 20th May, 2019, extension of time was granted, for achieving Milestone 2, till 4th August, 2019, for

Milestone 3 till 20th October, 2019, and for Milestone 4 till 7th May, 2020, and

(c) on 22nd April, 2020, extension of time was granted, for achieving Milestone 2, till 6th July, 2020, for Milestone 3 till 4th October, 2020 and for Milestone 4 till 18th February, 2021.

As the petitioner had failed to achieve Milestone 2 by 6th July, 2020, despite the three extensions, to achieve the said Milestone, having been granted, the contract was terminated.

(iii) The petitioner was issued as many as ten Notices to Correct, under Clause 15.1 of the Contract. Details of these notices were enlisted in the notice for termination, issued on 3rd July, 2020. It was only when, despite the ten Notices, no perceptible improvement was displayed by the petitioner, that it was decided to terminate the contract. Sub-Clause 15.2(a) of the Contract entitled Respondent No. 1 to do so. Even in its reply dated 13th July, 2020, to the termination notice dated 3rd July, 2020, the petitioner had been unable to provide any schedule for completion or any plan for improving the progress of the work.

(iv) Clause 15.2 further stipulated that the election, of Respondent No. 1 to terminate the Contract would not prejudice any of its other rights, under the Contract or otherwise.

(v) Clause 15.3 of the Contract, as amended, specifically stipulated the extent of damages to which Respondent No. 1 would be entitled consequent on termination under Clause 15.2 "as (1) Forfeiture of Performance Security, (2) Forfeiture of Retention money and (3) five per cent (5%) of the cost of the balance work at the date of termination". The Clause further stipulated that it was agreed, between the parties, that this represented a reasonable pre-determined amount, and was not by way of penalty.

(vi) Clause 15.4 entitled the employer, i.e. Respondent No. 1, consequent to the notice of termination, under Clause 15.2 taking effect, to encash and forfeit the entire Performance Security and Retention Money, encash and appropriate the Advance Bank Guarantees, and required Respondent No. 1 to pay, to the Contractor, any sums due under Clause 15.3 only after the full amount of Performance Security, Retention Money, 5% of the cost of balance work and any other amount due from the Contractor, had been received by Respondent No. 1.

(vii) A bare reading of the Office Memorandum, dated 13th May, 2020, issued by the Department of Expenditure, Ministry of Finance, made it clear that the amnesty, provided therein, did not extend to contractors who were in default before 19th February, 2020.

(viii) The assertion, of the petitioner, that extension of time had, in all cases, been granted without levying liquidated damages, was not correct. Liquidated damages of ₹ 1.84 crores were levied, while granting extension of time in respect of Milestone 1.

(ix) In any event, non-levying of liquidated damages, while granting extension of time, did not estop Respondent No. 1 from terminating the contract, if otherwise permissible. Nor did it prohibit Respondent No. 1 from invoking, or encashing, the Bank Guarantees furnished by the petitioner. Respondent No. 1 had never abandoned its claim to liquidated or delay damages. Reliance was placed, for this purpose, on ***IVRCL[2]***.

(x) While granting extension, in respect of Milestones 2, 3 and 4, the letter dated 29th January, 2020 clearly stated that no abortive cost claim on account of such extension would be payable, as the delays, in achieving the milestones, were owing to reasons attributable to the petitioner.

(xi) Sub-Clause 4.2(d) of the Contract entitled Respondent No. 1 to terminate the contract even without complying with the procedure stipulated in Clause 15. In view of the consistent failure, on the part of the petitioner, to improve, despite the several notices issued by Respondent No. 1 in that regard, the termination of the contract was justified.

(xii) The petitioner has not placed, on record, any quantification, for its alleged claim of ₹ 53.74 crore. Respondent No. 1 did not acknowledge any of the claims of the petitioner, and, as already noted hereinabove, had specifically written, to the petitioner, that no abortive cost claim on account of extension would be payable, as the delay in achieving the milestones was attributable to the petitioner.

(xiii) The reliance, by the petitioner, on the *force majeure* clause in the Contract, was also misdirected, as termination of the contract had been effected owing to failure, on the part of the petitioner, to improve its performance, despite several Notices to Correct having been issued, to the petitioner, by Respondent No. 1 under Clause 15.1 of the GCC. This consistent default entitled Respondent No. 1 to terminate the contract, in accordance with Clause 15.2. *Force majeure*, even if it existed, did not divest Respondent No. 1 of the said right, or invalidate its exercise.

(xiv) In fact, it was only after continuously defaulting, despite several notices having been issued to the petitioner, that, on 31st March, 2020, the petitioner sought, for the first time, to capitalise on the COVID-2019 pandemic, and the situation that has resulted therefrom.

(xv) Invocation of bank guarantees could be restrained only in the case of egregious fraud, or irreparable injustice, of the kind which would make it impossible for the guarantor to reimburse

himself, or the existence of special equities. No egregious fraud has been alleged by the petitioner. Nor could it be stated that irreparable injustice will ensue, were the bank guarantees encashed, as Respondent No. 1 was a reputed Public Sector Undertaking. Bank guarantees were separate contracts, and were not dispute-centric. The right to invoke Bank Guarantees was independent of the dispute between the parties. Banks are bound to honour bank guarantees, irrespective of the disputes between the parties. The decisions in ***Itek Corpn v. First National Bank of Boston***[9] and ***U.P. State Sugar Corporation v. Sumac International Ltd.***[10], on which the petitioner placed reliance, did not advance its case. In fact, the said reliance was self-defeating, as ***Itek Corpn***[9] involved a situation of impossibility, to enforce a decree, passed by American Courts, in Iran. In the present case, the petitioner was engaged in litigation in India, and could not allege, therefore, that it could not execute the award, were it to result in favour of the petitioner, in India. Rather, Respondent No. 1 would find itself unable to execute any award, passed in its favour, in a foreign country. ***Itek Corpn***[9], therefore, advanced the case of Respondent No. 1, rather than that of the petitioner. On the principle that courts should be slow in staying the invocation of bank guarantees, the learned Solicitor General placed reliance on ***Himadri Chemicals Industries Ltd v. Coal Tar Refining Co***[11], ***Vinitec Electronics Pvt Ltd v, HCL Infosystems Ltd***[12],

[9] **566 Fed Supp 1210 (1983)**
[10] **(1997) 1 SCC 568**
[11] **(2007) 8 SCC 110**
[12] **(2008) 1 SCC 544**

N.H.A.I. v . Ganga Enterprises[13] and ***State of Maharashtra v. National Construction Co.***[14]**.**

(xvi) Without challenging the legality of the termination of the contract, by Respondent No. 1, the petitioner had sought a restraint against the invocation of the Bank Guarantees furnished by it. This prayer was, therefore, directly contrary to Clause 15.2(a) of the Contract, as well as to the express stipulation, in Clause 15.2, that the election, by Respondent No. 1, to terminate the contract would not prejudice any of its other rights, under the contract or otherwise. Following the termination of the contract, invocation and encashment of the Bank Guarantee was triggered by Clause 15.3, and Clause 15.4, additionally, entitling Respondent No. 1 to invoke the Bank Guarantees.

(xvii) Apropos the judgement in ***Larsen & Toubro***[1], the learned Solicitor General sought to distinguish the decision, by pointing out that, in the said case, there was a specific finding that defects in the work had been alleged by Respondent No. 1 (in that case) only on 28th June, 2019, after invocation of the Bank Guarantees. In these circumstances, the learned Single Judge held that "at least *prima facie*, stage of invoking Sub-Clause 4.2(d) of the Agreement has also not arisen as on the date of the invocation of the Bank Guarantees." In the present case, points out the learned Solicitor General, as many as ten Notices to

[13] **(2003) 7 SCC 410**
[14] **(1996) 1 SCC 735**

Correct had been issued, before the contract was terminated and the Bank Guarantees were invoked. Attention was once again invited, in this context, to the decision in ***IVRCL***[2].

Analysis

Scope of Section 9 of the 1996 Act

21. This Court has, in its recent decision in ***Avantha Holdings Ltd. v. Vistra ITCL India Ltd.***[15], examined, in detail, the scope of Section 9 of the 1996 Act. From the judgements of the Supreme Court in ***Ramniklal N. Bhutta v. State of Maharashtra***[16], ***Raunaq International Ltd v. I.V.R. Construction Ltd***[17], ***Adhunik Steels Ltd v. Orissa Manganese & Minerals (P) Ltd***[18], ***Arvind Constructions Ltd v. Kalinga Mining Corporation***[19], ***Firm Ashok Traders v. Gurumukh Das Saluja***[20], the judgement of this Court in ***Olex Focas Pvt. Ltd v. Skoda Export Co. Ltd***[21] and of the High Court of Madras in ***V. Sekar v. Akash Housing***[22] – to all of which decisions detailed allusion is to be found in the said judgement – the following principles emerge:

(i) Interim measures, per definition, are granted to ensure that the proceedings were not frustrated.

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[15]**MANU/DE/1548/2020**
[16]**(1997) 1 SCC 134**
[17]**(1999) 1 SCC 492**
[18]**(2007) 7 SCC 125**
[19]**(2007) 6 SCC 798**
[20]**(2004) 3 SCC 155**
[21]**AIR 2000 Del 161**
[22]**AIR 2011 Mad 110 : (2011) 3 Arb LR 327 (Madras)**

(ii) While exercising power under Section 9, the Court is required to be mindful of the fact that concurrent power is vested in the Arbitral Tribunal, by Section 17. The reliefs which can be granted under Section 17, by the Arbitral Tribunal, are identical to those which can be granted by the Court under Section 9. While, therefore, exercising jurisdiction under Section 9, the Court, even at the pre-arbitration stage, should not usurp the jurisdiction which, otherwise, would vest in the arbitral tribunal, even if it is yet to be constituted. Hence, litigants would be in a position to misuse Section 9 as providing an opportunity to forum shop.

(iii) Subject to the above, the principles governing the grant of interim relief, under Section 9, are the same as those which govern the exercise of such power under Order XXXIX of the Code of Civil Procedure, 1908 (CPC), i.e., the existence of a *prima facie* case in favour of the applicant, the balance of convenience being in favour of the grant of such interim relief, and the likelihood of irreparable prejudice, or loss, resulting, were interim relief not to be granted. Additionally, public interest is also a factor to be borne in mind.

(iv) Even the conjoint existence of these factors, however, would not, *ipso facto*, make out a case for the grant of interim protection under Section 9. Additionally, the Court has to satisfy itself that the reliefs, sought in the Section 9 petition, cannot await a Section 17 proceeding, before a duly constituted arbitral tribunal. Emergent necessity of ordering interim

protection is, therefore, also a factor to be borne in mind, while exercising jurisdiction under Section 9.

(v) As a result, the criteria, which are required to be satisfied, before interim protection can be granted under Section 9 are

(a) the existence of an arbitration clause, and manifest intent, of the Section 9 petitioner, to invoke the said clause, and initiate arbitral proceedings,

(b) the existence of a *prima facie* case, balance of convenience and irreparable loss, justifying such grant of interim relief to the applicant, and

(c) the existence of emergent necessity, so that, if interim protection is not granted by the Court, even before arbitral proceedings are initiated and the chance to approach the arbitral Tribunal under Section 17 manifests itself, there is a possibility of the arbitral proceedings being frustrated or rendered futile.

Power to stay invocation of a Bank Guarantee

22. On the issue of the power of the court to stay invocation of bank guarantees, the learned Solicitor General has placed reliance on ***Himadri Chemicals***[11], ***Vinitec Electronics***[12], ***N.H.A.I. v. Ganga Enterprises***[13] and ***National Construction Co***[14]. Additionally, the learned Solicitor General has submitted that ***Itek Corpn***[9], in fact, advanced the case of the respondent, rather than that of the petitioner.

23. ***Himadri Chemicals***[11] is an important judgement, in this canon. Para 14 of the report, in the said case, enumerates the following six principles, governing the grant of injunction against the invocation of unconditional bank guarantees:

> "(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 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 Letter of Credit.
>
> (iv) Since a Bank Guarantee or 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 Guarantee or Letter 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 Letter of Credit would result in irretrievable harm or injustice to one of the parties concerned."

24. The learned Solicitor General also placed reliance on ***Vinitec Electronics***[12] which, in turn, took note of the earlier decisions in ***U.P. State Sugar Corporation***[10], ***B.S.E.S. Ltd v. Fenner India Ltd***[23],

[23] **(2006) 2 SCC 728**

Himadri Chemicals[11] and ***Mahatma Gandhi Sahakara Sakkare Karkhane v. National Heavy Engineering Coop. Ltd***[24], and proceeded to hold thus (in paras 11, 12 and 14 of the report):

> "**11.** The law relating to invocation of bank guarantees is by now well settled by a catena of decisions of this Court. The bank guarantees which provided that they are payable by the guarantor on demand is considered to be an unconditional bank guarantee. When in the course of commercial dealings, unconditional guarantees have been given or accepted the beneficiary is entitled to realise such a bank guarantee in terms thereof irrespective of any pending disputes. In ***U.P. State Sugar Corpn. v. Sumac International Ltd., (1997) 1 SCC 568*** this Court observed that: (SCC p. 574, para 12)
>
> > "12. The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realise such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realisation of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the

[24] **(2007) 6 SCC 470**

guarantee and the adverse effect of such an injunction on commercial dealings in the country. The two grounds are not necessarily connected, though both may coexist in some cases."

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

> "10. There are, however, two exceptions to this rule. The first is when there is a clear fraud of which the bank has notice and a fraud of the beneficiary from which it seeks to benefit. The fraud must be of an egregious nature as to vitiate the entire underlying transaction. The second exception to the general rule of non-intervention is when there are 'special equities' in favour of injunction, such as when 'irretrievable injury' or 'irretrievable injustice' would occur if such an injunction were not granted. The general rule and its exceptions has been reiterated in so many judgments of this Court, that in ***U.P. State Sugar Corpn. v. Sumac International Ltd., (1997) 1 SCC 568*** this Court, correctly declared that the law was 'settled'."

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

> "If the bank guarantee furnished is an unconditional and irrevocable one, it is not open to the bank to raise any objection whatsoever to pay the amounts under the guarantee. The person in whose favour the guarantee is furnished by the bank cannot be prevented by way of an injunction from enforcing the guarantee on the pretext that the condition for enforcing the bank guarantee in terms of the agreement entered into

> between the parties has not been fulfilled. Such a course is impermissible. The seller cannot raise the dispute of whatsoever nature and prevent the purchaser from enforcing the bank guarantee by way of injunction except on the ground of fraud and irretrievable injury.
>
> What is relevant are the terms incorporated in the guarantee executed by the bank. On careful analysis of the terms and conditions of the guarantee in the present case, it is found that the guarantee is an unconditional one. The respondent, therefore, cannot be allowed to raise any dispute and prevent the appellant from encashing the bank guarantee. *The mere fact that the bank guarantee refers to the principal agreement without referring to any specific clause in the preamble of the deed of guarantee does not make the guarantee furnished by the bank to be a conditional one*."
>
> (Paras 22 and 28)"
>
> (Underscoring supplied; italics in original)

25. The following principles clearly emerge from the decision in ***Vinitec Electronics***[12]:

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

(ii) Unconditional bank guarantees entitled the guarantor to realisation thereof, irrespective of any pending disputes. In fact, disputes between the guarantor, and the parties, at whose instance the bank has given the guarantee, are immaterial and of no consequence. Enforcement of the guarantee cannot be injuncted on the pretext that the condition for enforcing the bank guarantee, in terms of the agreement between the parties, has not been fulfilled. What is relevant are the terms

incorporated in the guarantee (and not those in the agreement between the parties). The mere fact that the bank guarantee refers to the principal agreement, without referring to any specific clause, does not make the bank guarantee conditional.

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

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

(a) fraud of an egregious nature, or

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

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

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

26. The Court, in ***Vinitec Electronics***[12] proceeded, thereafter, to examine whether the bank guarantee, forming the subject matter of the controversy before it, was conditional or unconditional, and the discussion, in the judgement, on this aspect, is instructive. Paras 17, 18 and 19 of the report deserve, in this context, to be reproduced *in extenso*:

"**17.** The relevant clause in the bank guarantee dated 10-8-2001 furnished by the appellant is to the following effect:

> "Whereas M/s Vinitec Electronics Pvt. Ltd., H-33, Bali Nagar, New Delhi (hereinafter called 'the supplier') supplied their Vinitec online UPS systems of various capacities pursuant to their agreement dated 10th May, 2000 and PO No. 4500011730 dated 30-5-2000 (hereinafter called 'the Company') for the final purchaser President of India through the Director, National Crime Records Bureau, Ministry of Home Affairs, Government of India, New Delhi (hereinafter called 'the purchaser').
>
> Whereas in terms of Clause 15 of the agreement for receiving the entire balance payments of Rs 49,99,335 from the company, the supplier has agreed to provide a performance bank guarantee equivalent to Rs 16,81,238.50 as 10% of the value of the contract to be kept valid till the warranty period during which time the supplier is required to perform their warranty obligations to the purchaser; and
>
> Whereas pursuant to the application made by the supplier, we, Oriental Bank of Commerce, Kirti Nagar, New Delhi (hereinafter called 'the Bank') have accordingly agreed to give the supplier a bank guarantee for the aforesaid purpose.
>
> Therefore, we, the Bank, hereby affirm that we are guarantors and responsible on behalf of the supplier up to a total of Rs 16,81,238.50 (Rupees sixteen lakhs eighty-one thousand two hundred thirty-eight and paise fifty only) and we undertake to pay any sum or sums within the limit of Rs 16,81,238.50 (Rupees sixteen lakhs eighty-one thousand two hundred thirty-eight and paise fifty only) as aforesaid upon *receipt of written demand from the purchaser and Company within the validity of this bank guarantee establishing the supplier to be in default for the performance of their warranty obligations under the contract*.
> We, the Bank, affirm that our liability under this guarantee is limited to the total amount of Rs 16,81,238.50 (Rupees sixteen lakhs eighty-one

thousand two hundred thirty-eight and paise fifty only) and it shall remain in full force up to and including 31st August, 2003 and shall be extended from time to time for such further period(s) as desired by the purchaser, Company and supplier on whose behalf this guarantee has been given."

18. Thereafter by a letter dated 20-8-2001, the bank guarantee was amended and Para 4 of the bank guarantee dated 10-8-2001 was substituted and the same reads as under:

> "Therefore, we, the Bank, hereby affirm that we are guarantors and responsible on behalf of the supplier up to a total of Rs 16,81,238.50 (Rupees sixteen lakhs eighty-one thousand two hundred thirty-eight and paise fifty only) and we undertake to pay any sum or sums within the limit of Rs 16,81,238.50 (Rupees sixteen lakhs eighty-one thousand two hundred thirty-eight and paise fifty only) as aforesaid *upon receipt of written demand from the Company within the validity of this bank guarantee*."

19. In the unamended bank guarantee the Bank affirmed that they are guarantors and responsible on behalf of the supplier up to a total of Rs 16,81,238.50 (Rupees sixteen lakhs eighty-one thousand two hundred thirty-eight and paise fifty only) and had undertaken to pay any sum or sums within that limit upon receipt of written demand from the purchaser within the validity of bank guarantee provided it is established that *the supplier be in default for the performance of their warranty obligations under the contract*. This makes it abundantly clear that what was furnished was a conditional bank guarantee and the bankers were liable to pay the amounts only upon establishing the fact that the supplier was in default for the performance of their warranty obligations under the contract. But by the subsequent letter dated 20-8-2001, the relevant clause in bank guarantee was amended whereunder the Bank stood as guarantor and responsible on behalf of the supplier up to a total of Rs 16,81,238.50 (Rupees sixteen lakhs eighty-one thousand two hundred thirty-eight and paise fifty only) and had undertaken to pay any sum or sums within that limit "upon receipt of written demand from the Company within the validity of this bank guarantee". This amended clause makes it abundantly clear

> that the Bank had undertaken to pay amounts up to a total of Rs 16,81,238.50. The condition that the amounts shall be paid only upon establishing the supplier to be in default for the performance of their warranty obligation under the contract has been specifically deleted. In our considered opinion, the bank guarantee as amended replacing Para 4 of the original bank guarantee makes the bank guarantee furnished as unconditional one. The bankers are bound to honour and pay the amounts at once upon receipt of written demand from the respondent."
>
> (Emphasis supplied)

27. These paras illustrate, lucidly, the distinction between a conditional bank guarantee and an unconditional bank guarantee. The judgement in ***Vinitec Electronics***[12] makes it abundantly clear that the first aspect, to be taken into consideration, is the bank guarantee itself, and the terms thereof. If the bank guarantee is conditional, then, if the conditions have not been fulfilled, injunction, against encashment and invocation, may unquestionably follow. If, however, the bank guarantee is unconditional, then injunction can be granted only if egregious fraud, irretrievable injustice, or special equities, exist, and not otherwise.

28. The issue was revisited, by the Supreme Court, in its more recent decision in ***Standard Chartered Bank v. Heavy Engineering Corporation Ltd***[25]. The terms of the bank guarantees, in that case, contemplated their invocation "against any loss or damage caused to or suffered by the Corporation by reason or any breach or failure by the said supplier, in due performance of the aforesaid contract". The specifics of the controversy between the parties need not detain us.

[25] **2019 SCC OnLine SC 1638**

Suffice it to state that the Supreme Court held the bank guarantees to be "unconditional" and "specific in nature". Thereafter, the Supreme Court, relying on its earlier decisions ***Ansal Engineering Projects Ltd v. Tehri Hydro Development Corporation Ltd***[26], ***Hindustan Construction Co. Ltd v. State of Bihar***[27], ***State Bank of India v. Mula Sahakari Sakhar Karkhana Ltd***[28], ***Himadri Chemicals***[11] and ***Gujarat Maritime Board v. Larsen & Toubro Infrastructure Development Projects Ltd***[29], reiterated the principles already set out hereinabove, and emphasised, additionally, that fraud or special equities had, to support the prayer for stay of invocation of bank guarantees, to be "pleaded and *prima facie* established by strong evidence as a triable issue".

29. The above legal position stands reiterated in ***Yograj Infras. Ltd. V. Ssangyong Eng. & Construction Co. Ltd***[30] and ***Adani Agri Fresh Ltd v. Mahaboob Sharif***[31]**.**

30. Thus far, the position in law appears to be crystal clear.

31. Some scope for debate, however, arises, on the concept of "special equities". The decisions of the Supreme Court – perhaps, advisedly – do not delineate, in precise contours, the ambit of the expression. Significantly, ***Fenner India Ltd***[23] regards "irretrievable injustice" as a specie of the "special equities" genus, whereas ***Standard Chartered Bank***[25] treat "special equities" and "irretrievable

[26](1996) 5 SCC 450
[27](1999) 8 SCC 436
[28](2006) 6 SCC 293
[29](2016) 10 SCC 46
[30]2012 (2) SCALE 58: JT 2012 (2) SC 17
[31](2016) 14 SCC 517

injustice" as distinct circumstances, either of which would justify injuncting the invocation of a bank guarantee."Irretrievable injustice", to reiterate, has to be of such a magnitude as would override the twin considerations of the express terms of the guarantee and the adverse effect, from the grant of injunction, on commercial dealings in the country. "Special equities", too, must, therefore, be so "special" so as to prevail over these two considerations, otherwise paramount while examining a prayer for injunction against invocation of a bank guarantee. While, therefore, examining whether "special equities" exist, so as to justify the grant of a prayer for injuncting invocation of a bank guarantee, the Court has to tread warily, and cannot confer, on the expression "special equities", so elastic a construction, as would snap the rule.

Applying the law to the facts

32. With the above principles to guide us, we may now turn to the facts.

33. The law, as expounded by the Supreme Court in the judgements referred to hereinabove, require the Court, in the first instance, to examine the Bank Guarantees, to ascertain whether they are conditional or unconditional.

34. As noted hereinabove, there were four Advance Bank Guarantees, and one Performance Bank Guarantee. The four Advance Bank Guarantees were issued by the Standard Chartered Bank Trade

Services New Delhi, on 24th May, 2015, whereas the Performance Bank Guarantee was issued by the Industrial and Commercial Bank of China Ltd., Mumbai Branch, on 3rd August, 2016.

35. The four Advance Bank Guarantees were titled "Advance Payment Security – Demand Guarantee", and the relevant covenants thereof read as under:

"ADVANCE PAYMENT GUARANTEE
DEMAND GUARANTEE

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

Dated: 27.05.2019

Advance Payment Guarantee No.: 316020698264

Guarantor: Standard Chartered Bank Trade Services – New Delhi 2nd Floor DLF Building No, 7A, DLF Cyber City, Sector-23/24/25A Gurgaon – 122 002

We have been informed that Beijing National Railway Research and Design Institute of Signal and Communication Group Co., Ltd Building No.12, Block 1 of Advanced Business Park No. 188, Nansihuanxilu, Fengtai District, Beijing, China (hereinafter called 'the applicant') has entered into Contract No. HQ/S and T/EC/D-B/Mughalsarai – New Bhaupur Dated 03/10/2016 which the beneficiary, for the execution of signalling and communication works of design, supply, construction, testing and commissioning of signaling, telecommunication and associated works of double track railways lines under construction on a design build lump sum basis for Mughalsarai-New Bhaupur Section of Eastern Dedicated Freight Corridor (hereinafter called 'the Contract').

Furthermore, we understand that, according to the conditions of the Contract, an advance payment in the sum, INR 145,149,012.00 (say Indian Rupees One Hundred and Forty-

Five Million, One Hundred and Forty-Nine Thousand, and Twelve only) is to be made against an Advance Payment Guarantee.

At the request of the applicant, we as guarantor, hereby irrevocably undertake to pay the beneficiary any sum or sums not exceeding in total an amount of INR 145,149,012.00 (say Indian Rupees One Hundred and Forty-Five Million, One Hundred and Forty-Nine Thousand, and Twelve only) upon receipt by us of the beneficiary's complying demand supported by the beneficiary's statement, whether in the demand itself or in a separate signed document accompanying or identifying the demand, *stating either that the applicant:*

(A) has used the advance payment for purposes other than the costs of mobilization in respect of the works, or

(B) has failed to repay the advance payment in accordance with the contract conditions, specifying the amount which the applicant has failed to repay."

(Emphasis supplied)

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

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

"PERFORMANCE SECURITY
(DEMAND GUARANTEE)

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

Date: 3rdAug 2016

Performance Guarantee No.: LG28501B600124

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

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

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

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

(Emphasis supplied)

38. Clearly, the Advance Bank Guarantees and the Performance Bank Guarantee, are both conditional. The condition, which is required to be fulfilled, before the Bank would honour the Bank Guarantees is, however, merely the furnishing of a statement by the beneficiary, i.e. by Respondent No. 1. Nothing more is required. In the case of the Advance Bank Guarantees, the statement, to be presented by Respondent No. 1, is required to state that the petitioner has used the Advance Payment for purposes other than the costs of mobilization in respect of the works, or has failed to repay the Advance Payment in accordance with the contract conditions, specifying the amount which the petitioner has failed to repay. The Performance Bank Guarantee, on the other hand, requires Respondent No. 1 to furnish a statement, stating that the petitioner is in breach of its obligations under the contract. The Performance Bank Guarantee makes the matter even more explicit, by stipulating that Respondent No. 1 is not required to prove or show grounds, justifying the said statement. Though such a caveat is not to be found in the covenants of the Advance Bank Guarantees, the mere fact that they only required the furnishing of a statement, by Respondent No. 1, and nothing more, incorporates, by implication, such a covenant. In other words, be it the Advance Bank Guarantees or the Performance Bank Guarantee, if Respondent No. 1 furnishes a statement, to the effect as stipulated in the Bank Guarantee(s), the Bank is bound to honour the Bank Guarantee, and Respondent No. 1 is entitled to invoke and encash it. There is no material to indicate that Respondent No. 1 has furnished, to the concerned Bank(s), statements, as required by the Bank Guarantees, towards invocation thereof.

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

40. Equally, in the case of the Advance Bank Guarantees, if Respondent No. 1, as the beneficiary thereunder, furnishes a signed document, accompanying the demand for invocation, to the effect that the petitioner has used the advance payment for purposes other than

mobilization, or has failed to repay the advance payment in accordance with the contract conditions, in whole or in part, the Bank would, *ipso facto*, be bound to honour the request for invocation of the Bank Guarantee. It would not be open to the Bank to go behind the signed statement tendered by Respondent No 1, or to carry out any enquiry or investigation to verify the correctness thereof. Any such attempt by the Bank would be in gross violation of the terms of the Bank Guarantee and, as the Supreme Court has cautioned in the afore-quoted decisions, would throw, into disarray, the very credibility of the commitment of the Bank, towards its customers. The faith of the investing public, in the entire banking system of the country would also, in the bargain, be irrevocably compromised.

41. The jurisdiction of the Court to interfere, in such cases, is, however, not irrevocably foreclosed. In cases of egregious fraud, irretrievable injustice, or special equities, the Court can still step in and injunct the invocation of the bank guarantee(s).

42. Courts cannot afford to be over-aware of the use, in the above principle, of the qualifying adjectives "egregious", "irretrievable" and "special". It is only fraud which is egregious in nature, injustice which is irretrievable and equities which are special, the existence of which would justify the stay of invocation of an unconditional bank guarantee. In each case, the circumstance must be pleaded and proved, by cogent evidence.

43. Apparently aware of the above legal position, the petitioner has, specifically, averred, in the petition, the existence of egregious fraud,

irretrievable injustice and special equities, in so many words. The question, however, is not whether the petitioner has pleaded the existence of the circumstances, but whether they do, in fact, exist.

44. "Fraud", in all its complexities and contours, has been subjected to judicial analysis, *ad nauseam*, by courts in this country, as well as across the world, to the extent that every skein of the fabric may be said to have been unraveled. An exhaustive analysis of the various judicial pronouncements on the issue may result in this judgement never coming to an end, and reference, to some authoritative pronouncements would, therefore, suffice. In ***Commissioner of Customs (Preventive) v. Aafloat Textiles India Pvt Ltd***[32] , one finds the following searching analysis:

> "9. "*Fraud" means an intention to deceive; whether it is from any expectation of advantage to the party himself or from the ill will towards the other is immaterial. The expression "fraud" involves two elements, deceit and injury to the person deceived. Injury is something other than economic loss, that is, deprivation of property, whether movable or immovable or of money and it will include and any harm whatever caused to any person in body, mind, reputation or such others.* In short, it is a non-economic or non-pecuniary loss. A benefit or advantage to the deceiver, will almost always call loss or detriment to the deceived. Even in those rare cases where there is a benefit or advantage to the deceiver, but no corresponding loss to the deceived, the second condition is satisfied. See ***Dr. Vimla v. Delhi Administration, 1963 Supp. 2 SCR 585*** and ***Indian Bank v. Satyam Fibers (India) Pvt. Ltd., AIR 1996 SC 2592.***
>
> 10. *A "fraud" is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It*

[32] **(2009) 11 SCC 18**

is a cheating intended to get an advantage. See ***S.P. Changalvaraya Naidu v. Jagannath, AIR 1994 SC 853***.

11. "Fraud" as is well known vitiates every solemn act. Fraud and justice never dwell together. *Fraud is a conduct either by letter or words, which includes the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter. It is also well settled that misrepresentation itself amounts to fraud.* Indeed, innocent misrepresentation may also give reason to claim relief against fraud. *A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations, which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad.* An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. *Fraud and deception are synonymous.* Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including *res judicata*. See ***Ram Chandra Singh v. Savitri Devi and Ors., (2003) 8 SCC 319*** .

12. "Fraud" and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence. *It is a concept descriptive of human conduct.* Michael Levi likens a fraudster to Milton's sorcerer, Comus, who exulted in his ability to, 'wing me into the easy hearted man and trap him into snares'. *It has been defined as an act of trickery or deceit.* In Webster's Third New International Dictionary *"fraud" in equity has been defined as an act or omission to act or concealment by which one person obtains an advantage against conscience over another or which equity or public policy forbids as being prejudicial to another.* In Black's Legal Dictionary*, "fraud" is defined as an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or surrender a legal right; a false representation of a matter of fact whether by words or by conduct, by false or misleading allegations, or by concealment of that which*

should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury. In Concise Oxford Dictionary, *it has been defined as criminal deception, use of false representation to gain unjust advantage; dishonest artifice or trick.* According to Halsbury's Laws of England, a representation is deemed to have been false, and therefore a misrepresentation, if it was at the material date false in substance and in fact. Section 17 of the Indian Contract Act, 1872 defines "fraud" as act committed by a party to a contract with intent to deceive another. *From dictionary meaning or even otherwise fraud arises out of deliberate active role of representator about a fact, which he knows to be untrue yet he succeeds in misleading the representee by making him believe it to be true. The representation to become fraudulent must be of fact with knowledge that it was false.* In a leading English case i.e. ***Derry and Ors. v. Peek (1886-90) All ER 1*** what constitutes "fraud" was described thus: (All ER p. 22 B-C) *"fraud" is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false".* But "fraud" in public law is not the same as "fraud" in private law. Nor can the ingredients, which establish "fraud" in commercial transaction, be of assistance in determining fraud in Administrative Law. It has been aptly observed by Lord Bridge in ***Khawaja v. Secretary. of State for Home Deptt. (1983) 1 All ER 765***, that it is dangerous to introduce maxims of common law as to effect of fraud while determining fraud in relation of statutory law. "Fraud" in relation to statute must be a colourable transaction to evade the provisions of a statute. "If a statute has been passed for some one particular purpose, a court of law will not countenance any attempt which may be made to extend the operation of the Act to something else which is quite foreign to its object and beyond its scope. Present day concept of fraud on statute has veered round abuse of power or mala fide exercise of power. It may arise due to overstepping the limits of power or defeating the provision of statute by adopting subterfuge or the power may be exercised for extraneous or irrelevant considerations. The colour of fraud in public law or administration law, as it is developing, is assuming different shades. It arises from a deception committed by disclosure of incorrect facts knowingly and deliberately to invoke exercise of power and procure an order from an authority or tribunal. It must result

in exercise of jurisdiction which otherwise would not have been exercised. The misrepresentation must be in relation to the conditions provided in a section on existence or non-existence of which the power can be exercised. *But non-disclosure of a fact not required by a statute to be disclosed may not amount to fraud. Even in commercial transactions non-disclosure of every fact does not vitiate the agreement. "In a contract every person must look for himself and ensures that he acquires the information necessary to avoid bad bargain. In public law the duty is not to deceive."* See ***Shrisht Dhawan (Smt.) v. Shaw Brothers, AIR 1992 SC 1555***.

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14. This aspect of the matter has been considered by this Court in ***Roshan Deen v. Preeti Lal, (2002) I LLJ 465 SC***; ***Ram Preeti Yadav v. U.P. Board of High School and Intermediate Education, AIR 2003 SC 4268***; ***Ram Chandra Singh's case (supra)*** and ***Ashok Leyland Ltd. v. State of T.N. and Anr., (2004)3SCC1*** .

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

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

(Emphasis supplied)

45. "Fraud" was defined, in ***Ram Preeti Yadav v. U.P. Board of High School and Intermediate Education***[33] as "conduct either by letter or words, which induces the other person or authority to take a definite determinative stand as a response to the conduct of the former

[33] **(2003) 8 SCC 311**

either by words or letter". In ***U.O.I. v. Chaturbhai M. Patel & Co***[34], the Supreme Court held, relying on the judgement of Lord Atkin in ***A.L.N. Narayanan Chettyar v. Official Assignee, High Court, Rangoon***[35], that "fraud like any other charge of a criminal offence whether made in civil or criminal proceedings, must be established beyond reasonable doubt." The aspect was clarified by holding, further, that "however suspicious may be the circumstances, however strange the coincidences, and however grave the doubt, suspicion alone can never take the place of proof." This position was reiterated in ***Kale v. Deputy Director of Consolidation***[36], which held that "allegations of fraud or undue influence must first clearly be pleaded and then proved by clear and cogent evidence". "Mere pleadings", held the Supreme Court in ***Svenska Handelsbanken v. Indian Charge Chrome***[37], "do not make a strong case of *prima facie* fraud", which had to be shown by "material and evidence". More recently, the Supreme Court, in ***M. Sankaranarayanan v. Deputy Commissioner, Bangalore***[38] echoed the sentiment, by holding that "fraud must be pleaded and proved; it cannot be presumed".

46. I have already set out, hereinabove, the various grounds urged by the petitioner, in support of its prayer for the stay of invocation of the bank guarantees furnished by it, and a mere glance thereat would reveal that no case, of fraud, much less egregious fraud, on the part of Respondent No. 1, can be said to have been made out. No attempt, on the part of Respondent No. 1, to deceive the petitioner, can be said to

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[34] **(1976) 1 SCC 747**
[35] **AIR 1941 PC 93**
[36] **(1976) 3 SCC 119**
[37] **(1994) 1 SCC 502**
[38] **(2017) 13 SCC 661**

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

47. On the second aspect, of the likelihood of irretrievable injustice occurring to the petitioner, were stay of invocation of the bank guarantee not granted, the petitioner seeks to liken the situation to that which was obtained in ***Itek Corpn***[9], to plead that "even if the petitioner succeeds in the arbitration proceedings, it may not be able

to recover the award amount from Respondent No 1". The contention, in my view, is wholly without merit. ***Itek Corpn***[9] involved a situation in which an exporter, in USA, entered into an agreement with the Government of Iran. Certain letters of credit, issued by an American Bank, in favour of an Iranian Bank, constituted part of the contract. The USA exporter sought an order terminating its liability, consequent on the said letters of credit. This, in turn, was sought as, consequent on hostilities between the US and the Iraqi government, all Iranian assets, within the jurisdiction of the US, were blocked by the US government, which also cancelled the export contract. In these circumstances the Court upheld the contention of the US exporter that any claim for damages, against the Iranian purchaser, even if decreed by the Courts in the US, would not be executable in Iran. In these circumstances, as realisation of the letters of credit would result in irreparable harm to the American plaintiff, relief as sought, was granted. There is no parallel, whatsoever, between that case and this. Here, if the plaintiff is to succeed in arbitration, there is no reason why it would not be able to enforce the award against Respondent No. 1 – which, as the learned Solicitor General correctly submits, is a reputed Indian Company – in India. The two cases are as alike as chalk and cheese.

48. Which leaves us with the third circumstance, in which stay of invocation of an unconditional bank guarantee can be legitimately directed by the court, i.e. the existence of special equities. Again, the petitioner has, undoubtedly, averred, in the petition, that such "special

equities" do exist; the justifiability of the averment, however, requires to be examined.

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

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

51. Extrapolating from the principle enunciated in ***Fenner India Ltd***[23] in the context of irretrievable injury, I have already opined, hereinbefore, that "special equities" must be so special as to override the twin considerations of the sanctity of the terms of the bank guarantee, and the deleterious effect which the grant of injunction, against honouring of unconditional bank guarantees, would have on the commercially transacting public. The Supreme Court has held, in ***Meet Singh v. State of Punjab***[39], that the word "special" means

[39]**(1980) 3 SCC 291**

"distinguished by some unusual quality, peculiar or out of the ordinary" and that it "has to be understood in contradistinction to the word 'general' or 'ordinary'." Viewed in this background, Respondent No. 1 is entitled, on the express terms of the bank guarantees, to their invocation in its favour, subject to Respondent No. 1 submitting the required signed statements. The Performance Guarantee goes so far as to specifically stipulate that Respondent No. 1 was not required to prove or establish the breach of contract, on the part of the petitioner, before being entitled to the invocation of the bank guarantee. These are strong equities in favour of Respondent No. 1, and the sanctity attached to bank guarantees, and to the credibility of the banking system which provides such guarantees, serves to augment the equities. Can these equities be offset by the mere fact that the petitioner may have a yet to be established claim, against Respondent No.1, so as to justify restraining the Bank from honouring the covenants of the bank guarantees? The answer, in my opinion, has necessarily to be in the negative.

52. As none of the three circumstances, in which stay of invocation of unconditional bank guarantees, can be granted by the Court, exists in favour of the petitioner in the present case, in my view, the prayer for stay of invocation has, necessarily, to fail.

53. Several submissions were advanced by Mr. Nayar, and refuted by the learned Solicitor General, regarding the issue of whether, in fact, the petitioner was in breach of the terms of the contract and, therefore, whether Respondent No.1 was justified in terminating the

contract. These disputes, in view of the law laid down in the judgements of the Supreme Court, to which I have adverted hereinbefore, cannot impact the present proceedings, especially as the bank guarantee constitutes a distinct contract, between the bank and the beneficiary. Following some of the decisions cited hereinabove, a coordinate Single Bench of this Court has in ***IVRCL Ltd***[2], rejected the prayer for stay of invocation of the bank guarantees, as advanced in the said case. A reading of the decision reveals that, *prima facie*, the covenants in the contract between the parties, were similar to those which exist in the present case. Needless to say, the learned Solicitor General placed reliance on the said decision.

54. Mr. Nayar, however, relied, instead, on a later decision, of the same learned Single Judge, in ***Larsen & Toubro Ltd***[1]. This case, again, involved a contract with clauses similar to those in the present case, and here, the Court allowed the prayer for stay of invocation of the bank guarantees in question. A careful reading of the said decision reveals that the learned Single Judge has, in that case, even while acknowledging the fact that bank guarantees constitute independent contracts, as well as the judicial interdictions against stay of invocation of bank guarantees, granted relief on the ground that the covenants, of the contract between the parties, did not permit the respondents to *invoke* the bank guarantees at that stage. Mr. Nayar sought to submit that there was no way in which the said decision could be distinguished, on facts, from the present and that, therefore, in the interests of judicial consistency, the approach adopted in the said case deserves to be adopted in the present case, as well. Apropos

IVRCL Ltd[2] – which, too, involved similar facts, but in which no relief was granted – it is sought to be contended that ***Larsen & Toubro Ltd***[1], having been rendered at a later in point of time, by the same learned Single Judge, ought to prevail.

55. The argument is, unquestionably, attractive. In order to examine its merit, however, one would have to juxtapose the reasoning, of the learned Single Judge in ***Larsen & Toubro Ltd***[1], with the facts of the present case.

56. The impugned notice of termination, dated 3rd July, 2020, was issued under Sub-Clause 15.2(a) of the Contract. The said sub-clause clearly entitles the employer, i.e. Respondent No.1, to terminate the contract, if the petitioner, fails to comply with Clause 4.2, or with the notice issued under Sub-Clause 15.1. The decision in ***Larsen & Toubro Ltd***[1] does not, however, indicate that any such notice, invoking Sub-Clause 15.2(a) was issued in that case.

57. The learned Single Judge has, in holding that the circumstances, which contractually entitled the respondents to invoke the bank guarantees, had not arisen, in that case, noticed Sub-Clause 4.2(d), which entitled the employer to make a claim under the performance security, for amounts to which the employer was entitled under the contract, in the event of circumstances, which entitled the employer to terminate the contract under Clause 15.2, irrespective of whether the notice of termination had, or had not, been given. This is the clause which has been invoked by Respondent No. 1, specifically, in the present case. The learned Single Judge has held that the

circumstances, in which the respondent could invoke the performance security, having been contractually delineated in Clause 4.2, the respondent was bound by the said clause. Sans the existence of such circumstances, therefore respondent would, in the opinion of the learned Single Judge, not be entitled to invoke the performance security, in the form of the bank guarantees furnished by the petitioner. The fact that none of the said circumstances existed, in the case before him, constitutes one of the grounds on which the learned Single Judge granted relief, in ***Larsen & Toubro Ltd***[1].

58. I confess, with respect, my inability to subscribe to the above view, as it conflicts with the following statement of the law, contained in ***Mahatma Gandhi Sahakra Sakkare Karkhane***[24]:

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

To my mind, *in view of the afore-extracted categorical exposition of the law, it is clear that the condition, in the agreement between the parties, under which the bank guarantees could be enforced, cannot be cited as a ground to stay the invocation and encashment thereof.*

This principle of the law, as enunciated in ***Mahatma Gandhi Sahakra Sakkare Karkhane***[24], was quoted, with approval, by the Supreme Court, in ***Vinitec Electronics***[12], which went on, on the basis thereof, to hold that "*what is relevant are the terms incorporated in the guarantee executed by the bank".*

59. There is yet another reason, pertinently highlighted by the learned Solicitor General, why, even on facts, the decision in ***Larsen & Toubro Ltd***[1] cannot come to the aid of the petitioner. The notice of termination, dated 3rd July, 2020, was issued in exercise of the power conferred by Sub-Clause 15.2(a) of the Contract. This sub-clause entitled Respondent No. 1 to terminate the contract in the event of failure, on the part of the petitioner, to comply with a Notice to Correct, issued under Sub-Clause 15.1. There is no dispute about the fact that, in the present case, as many as ten such Notices to Correct were issued, by Respondent No. 1 to the petitioner. In ***Larsen & Toubro Ltd***[1], *per contra*, it is specifically found that "*for the first time*, the defects in the work have been alleged by the Respondent No. 1 only by its letter dated 28.06.2019, that is, *after the invocation of the Bank Guarantees*". The learned Single Judge also goes on to observe that Respondent No. 1 (in the said case) had "not been able to refute the said submission of the petitioner". In these circumstances, it was held that, at least *prima facie*, the stage of invoking Sub-Clause 4.2(d) of the Contract, had not arisen, on the date of invocation of the Bank Guarantees. Even on facts, therefore, ***Larsen & Toubro Ltd***[1] is distinguishable.

60. Mr. Nayar has also placed reliance on the order, dated 26th July, 2007, of the Division Bench of this Court in FAO(OS) 77/2006 (***Satluj Jal Vidyut Vikas Nigam Ltd v. Hindustan Construction Co Ltd***), the judgement of the Division Bench of this Court in ***Satluj Jal Vidyut Nigam Ltd v. Jai Prakash Hyundai Consortium***[7] read with the order, dated 3rd April, 2006, of the Supreme Court in SLP (C) 5456/2006 (***Satluj Jal Vidyut Nigam Ltd v. Jai Prakash Hyundai Consortium***), the judgement of a learned Single Judge of this Court in ***Continental Construction Ltd v. Satluj Jal Vidyut Nigam Ltd***[8]**.**

61. The judgement dated 26th July, 2007 in FAO (OS) 77/2006 merely followed the earlier decision of the Division Bench of this Court in ***Satluj Jal Vidyut Vikas Nigam Ltd***[7], as the said decision had been upheld by the Supreme Court *vide* its order dated 3rd April, 2006 (*supra*).

62. The judgement of the Division Bench of this Court in ***Satluj Jal Vidyut Vikas Nigam Ltd***[7] is prior, in point of time, to the decision of the Supreme Court in ***Mahatma Gandhi Sahakra Sakkare Karkhane***[24], as well as the latter decision in ***Vinitec Electronics***[12], which clearly held that an injunction, from enforcement of a bank guarantee, cannot be granted on the ground that the condition for enforcement of the bank guarantee in terms of the agreement between the parties has not been fulfilled.

63. It is not possible, therefore, to rely on the decision of the Division Bench of this Court in ***Satluj Jal Vidyut Vikas Nigam Ltd***[7]

in preference to the latter decision of the Supreme Court in ***Mahatma Gandhi Sahakra Sakkare Karkhane***[24] and ***Vinitec Electronics***[12].

64. The Supreme Court order, dated 3rd April, 2006, merely dismissed the SLP, preferred by Satluj Jal Vidyut Vikas Nigam Ltd. against the judgement of the Division Bench and did not, therefore, declare any law within the meaning of Article 141 of the Constitution of India.

65. The decision of the single Bench of this Court in ***Continental Construction Ltd***[8], for its part, held thus:

> "20. Favourable determination by the internal determinative mechanism, findings by appellate forum partially having attained finality, the claim of the respondents solely being of liquidated damages after the maintenance period was over, the bank guarantee having become liable to discharge in terms of Clause 48 and particularly a motivated arbitrary attempt on the part of the respondent to frustrate the benefit of the decided matters or results of the adjudicative process by enforcing encashment, are the factors which would show that the bank guarantee itself has not been invoked as per terms of the bank guarantee and the petitioners at least prima facie have been able to make out a case of special extraordinary equities in their favor. "

As such, the learned Single Judge proceeded, in this case, on the premise that facts disclosed the existence of special equities in favour of the contractor. This case is also, therefore, distinguishable.

66. Before parting with this judgement, I deem it appropriate to reiterate the fact that, unlike the situation which existed in ***Larsen & Toubro Ltd***[1], in which steps towards invocation of the bank guarantees had already been taken by the respondent in that case, the petitioner has chosen to approach this Court against the 14 day notice of termination of the contract, issued under Sub-Clause 15.2(a) thereof. Neither was the contract terminated, nor was any step taken towards invocation of the Bank Guarantees, at the time when the present petition was filed before this Court. There is no prayer, to restrain Respondent No. 1 from terminating the contract. There is no prayer, seeking an injunction against Respondent No. 1 from acting on the impugned letter dated 3rd July, 2020. What is sought, directly, is a restraint, against Respondent No. 1, from invoking/encashing the bank guarantees furnished by the petitioner, and to restrain the banks from releasing any payment to the respondent (wrongly referred to, in prayer (b) in the petition, as "the petitioner"), against such bank guarantees. The only additional prayer is for a restraint, against Respondent No. 1 from making any statement, to any third party, to the effect that the petitioner had delayed the works or had been unable to complete the works in time. Quite obviously, this additional prayer cannot be granted in a proceeding under Section 9 of the 1996 Act. In essence, therefore, the petition is premature. I have, nevertheless, proceeded on merits, with the issue of whether Respondent No. 1 had the right to invoke, and encash, the bank guarantees furnished by the petitioner only because the submissions, advanced before me, make it clear that such invocation and encashment is the inevitable sequitur to

the termination of the contract which, in turn, would inexorably follow on the issuance of the impugned notice dated 3rd July, 2020.

Conclusion

67. For the reasons stated above, I am of the view that the prayers, in the petition, cannot be granted.

68. The petition is, therefore, dismissed, with no orders as to costs.

69. Needless to say, all observations in this judgement, are intended only to ascertain whether a case for grant of interim protection, by the Court, in exercise of its jurisdiction under Section 9 of the 1996 Act, exists or not, and are not to be treated as an expression of opinion, even *prima facie*, on the merits of the dispute, which may find its way, eventually, to the Arbitral Tribunal, or on the merits of any application that either party may choose to move before such Tribunal.

70. Pending applications, if any, do not survive for consideration, and are disposed of as such.

C. HARI SHANKAR, J.

SEPTEMBER 30, 2020
HJ