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

Judgment Reserved on: 22.11.2019

% Judgment Pronounced on: 01.06.2020

\+ CS(COMM.)675/2017

BHARAT HEAVY ELECTRICALS LIMITED. .... Plaintiff

Through Mr.Amit Sibal, Sr.Adv. with Mr.Prashant Mehta and Ms.Vasundhara Bhardwaj, Advs.

versus

EGYPTIAN ELECTRICITY TRANSMISSION COMPANY & ORS. ..... Defendants

Through Mr.Ravinder Sethi, Sr.Adv. with Mr.Ateev Mathur, Mr.Ajay Monga, Ms.Jagriti Ahuja, Mr.Amol Sharma and Mr.AdityaBakshi, Advs. for D-2.
Mr.NareshThanai and Ms.Khushboo Singh, Advs. for D-3.

**CORAM:**
**HON'BLE MR. JUSTICE JAYANT NATH**

**JAYANT NATH, J.**

**IA Nos. 14196/2017 and 11601/2017**

1. This suit is filed by the plaintiff, which is a public sector undertaking seeking a decree of declaration that the bank guarantees issued by defendant No. 2 vide defendant No. 3 in favour of defendant No. 1 stand discharged and that the bank guarantees cannot be invoked/encashed. A decree of permanent injunction is also sought to restrain defendant No. 1, etc. from invoking/encashing or receiving any moneys there under or getting an extension of the bank guarantees. Other connected reliefs are also sought.

2. I may note that along with the suit, the plaintiff filed IA No. 11601/2017 under Order 39 Rules 1 and 2 CPC. This court on 03.10.2017 restrained the defendants and directed them to maintain status quo regarding the bank guarantees. Defendants No. 2 and 3 were also restrained from transmitting to defendant No. 1 the funds of the bank guarantees in question. Despite this interim order, defendant No. 3 has on 20.12.2017 released the amounts to defendant No. 1 claiming that they were advised that despite interim order of this court, defendant No. 3 was obliged to release the money to defendant No.1.

3. Defendant No. 2 has filed IA No. 14196/2017 under Order 7 Rule 11 CPC seeking rejection of the plaint on the grounds which are stated in the written statement.

4. The case of the plaintiff is that in 2004, defendant No. 1 invited two tenders for purchase of 23 and 125 MVA, 220/66/11 KV Power Transformers. Defendant No. 1 nominated the plaintiff for execution of the contract. The parties, namely, the plaintiff and defendant No. 1 entered into a contract on 12.09.2006. As per the terms and conditions of the contract, the plaintiff was required to submit an advance payment guarantee in the form of a bank guarantee. The plaintiff was also required to submit a performance guarantee for 10% of the total contract price which was to remain valid till the end of warranty period. The details of the bank guarantees given are spelt out in the plaint.

5. It is further the case of the plaintiff that the supply of transformers pertaining to both the contracts were completed by the plaintiff by May 2008.Subsequently, the transformers were commissioned successfully under the supervision of the engineers of the plaintiff. It is also stated that after commissioning and erection of the transformers, the same were working to the satisfaction of defendant No. 1 as is evident from various certificates issued by defendant No. 1. Defendant No. 1 is also said to have issued completion

certificate in respect of the supervision of commissioning and erection of various transformers.

6. It is the case of the plaintiff that all work pertaining to the contract was completed way back in 2008 and only very minor work which does not affect the operation of the transformers or performance of the sub-stations was left. This related to supervision of erection of firefighting system. The firefighting equipments had been supplied in full as per the contract in 2008-2009. However, it is pleaded that defendant No. 1 did not provide shut down schedule for installation of firefighting system till 2012. It is further pleaded that defendant No. 1 did not provide the shutdown schedule as the sub-stations were in commercial operation and any shut down would lead to loss of revenue to defendant No. 1.

7. As the entire work was completed, the plaintiff requested defendant No. 1 to issue a taking over certificate and close the contract. However, the said defendant No. 1 wrongly withheld the issuance of the taking over certificate.

8. It is pleaded that the officials of the plaintiff visited various sites from 19.03.2012 to 20.05.2012. Firefighting equipments of 90% sites were completed. The balance could not be completed due to cancellation of shut down. The total value of all such firefighting systems including equipments does not exceed even 0.25% of the total contract value. Hence, the value of the pending work as per the approved billing break-up is miniscule/negligible. However, defendant No. 1 has, it is pleaded, fraudulently sought to invoke bank guarantees of the value of Rs. 28 crores.

9. On 11.03.2015, the plaintiff sent a letter to defendant No. 1 seeking release of the withheld payment to the tune of USD 4.08 million and Egyptian Pound 3.94 million and also seeking release of the bank guarantees of USD 4.31 million and Egyptian Pound of 0.68 million which had been illegally withheld by defendant No. 1. Defendant No.1 sent a reply on 21.04.2015 stating that the contract has yet not been completed. It is stated that the said

letter dated 21.04.2015 is baseless as the letter fails to mention the exact tasks which are not complete. The letter was malafide. It is pleaded that the plaintiff has been writing repeatedly to the defendant for the past two years to close the contract but there has been no response.

10. On 28.09.2017, defendant No. 1 invoked the advance guarantees and performance bank guarantees, it is stated, in a fraudulent manner completely contrary to the terms of the said bank guarantees. It is pleaded that the said invocation has caused irreparable harm and injury to the plaintiff. Various reasons are given as to why defendant No. 1 cannot be permitted to encash the bank guarantees in question. The following pleas are raised by the plaintiff:-

(i) It is pleaded that the performance bank guarantees stand discharged as per the terms and conditions of the contract itself. It is pleaded that under Clause 12 of the contract agreement, the performance guarantee was to remain valid till the end of the warranty period. The warranty period for each transformer was 48 months of cumulative and successful operation after the date of issuance of the taking over certificate or 54 months from the date of delivery for each transformer. It is stated that the transformers were supplied way back in May 2008 and the warranty period expired after 54 months from May 2008. Hence, the bank guarantees cannot be invoked after expiry of the warranty period.

(ii) It is stated that the performance guarantees also provide that the same shall get discharged on issuance of the final certificate. Given the fact that all the works under the contract have been completed, all the performance bank guarantees get discharged as the final certificate issued/is deemed to be issued upon the stations being put in commercial operation.

(iii) It is further stated that all the works under the contract have been completed and the plaintiff has to recover a huge amount from defendant No. 1. Defendant No. 1 has withheld over Rs.40 crores of the dues of the plaintiff

of the work which has already been performed by the plaintiff. Now, the said defendant No. 1 has fraudulently sought to invoke all the bank guarantees.

(iv) It is further stated that the bank guarantees issued for advance payment receipt have also been fraudulently sought to be encashed as the plaintiff has already adjusted from the various invoices raised by the plaintiff the said advance. It has been specifically agreed under the contract that the advance payment guarantees cover only the advance payment given to the contractor/plaintiff and shall be valid until the advance payment is fully adjusted from the running invoices of the plaintiff. It is pleaded that the entire advances standfully adjusted.

(v) It is further pleaded that the invocation of the bank guarantees is not in terms of the bank guarantees.

(vi) It is also pleaded that Egypt is undergoing a war like situation which constitutes a force majeure situation. Defendant No. 1 in its own communication has admitted the existence of force majeure prevailing in Egypt. Hence, it is pleaded that the encashment of bank guarantees has to be stayed. In any case, it would cause irreparable harm and injury to the plaintiff in case the reliefs as prayed are not granted by this court.

(vii) It is further pleaded that neither the bank guarantees nor the contract between the plaintiff and defendant No. 1 provide jurisdiction of any specific court to deal with disputes. The contract between the parties is governed by Egyptian Law. Certain counter-bank guarantees are also governed by Egyptian law. The advance guarantees are not governed by any specific law and therefore, the same would be governed by Indian Law. The plaintiff has in the plaint reserved its right to lead specific expert evidence at the stage of trial to prove the position under Egyptian Law about the issue presently under adjudication in the present suit.

(viii) It is also pleaded that this court has territorial jurisdiction to try and entertain the suit. All communications were exchanged on behalf of the

plaintiff from Delhi. Bank guarantees were issued by defendant No. 2 to defendant No. 1 from the branch of the bank within the territorial jurisdiction of this court. The omnibus guarantee provides for privity of the contract between the plaintiff and defendant No.2 was also issued from Delhi. The plaintiff and defendant No. 2 work for gain within the jurisdiction of this court. All works under the contract were performed by the plaintiff within the territory of this court. All invoices were issued by the plaintiff from Delhi. All payments under the contract were received by the plaintiff in Delhi. Other such facts are stated to plead that this court has territorial jurisdiction.

11. Defendant No. 2 and 3 have filed their written statements. Defendant No. 1 has neither entered appearance nor filed its written statement.

12. Defendant No. 3 in its written statement pleads that it was the plaintiff who requested defendant No. 2 for issuance of bank guarantees in favour of defendant No. 1. Defendant No. 2 in turn requested defendant No. 3 to issue bank guarantees in favour of defendant No. 1 based on the counter guarantees issued by defendant No. 2 to defendant No. 3. It is pleaded that defendant No. 3 is an independent banking company in Egypt. Details of the bank guarantees issued in favour of defendant No. 1 by defendant No 3 on the strength of the counter guarantees issued by defendant No. 2 are spelt out in the written statement. It is pleaded that defendant No. 3 had an unconditional obligation to pay the guaranteed amount to defendant No. 1.Likewise, upon complying the demand, defendant No 2 had an unconditional obligation to pay to defendant No. 3. It is further pleaded that defendant No. 3 is a banking company incorporated and working exclusively in Egypt and is bound to follow the law of Egypt. Defendant No. 3 sought an opinion from its lawyer in Egypt and was advised that it was bound to release the guaranteed amount to defendant No. 1 despite the interim orders passed by this court. Therefore, it is pleaded that defendant No. 3 was unable to withhold the payment. Defendant No. 1 invoked the bank guarantees on 19.09.2017. Defendant No. 3 invoked the counter-

guarantees furnished by defendant No. 2 on 28.09.2017. Defendant No. 3 released funds to defendant No. 1 on 20.12.2017. It is reiterated that this court has no jurisdiction to deal with the guarantees issued by defendant No. 3 or the counter-guarantees issued by defendant No. 2.

13. Defendant No.2 has repeated the pleas raised by defendant No. 3. Defendant No. 2 has rightly not pleaded on the merits of the dispute between the plaintiff and defendant No. 1. Defendant No. 2 has raised the following preliminary objections about the maintainability of the suit:-

(i) It has been pleaded that the suit is not maintainable as the counter-guarantees issued by defendant No. 2 are governed by laws of Egypt. Hence, it is pleaded that the parties are bound to submit to the jurisdiction of Egyptian court. It is pleaded that if Indian courts are to apply Egyptian law then the Egyptian law is required to be proved as a matter of fact, for which purpose the said law is required to be specifically pleaded by the plaintiff in the plaint. It is claimed that the plaintiff has made false averments regarding similarity of Egyptian law and Indian law which is insufficient pleadings. Further, reliance is placed on the doctrine of Forum Non Conveniens. As the law applicable is the Egyptian law, it is the Egyptian court which would be more appropriate to apply the governing law. Hence, this court should invoke the doctrine of Forum Non Conveniens and dismiss the suit.

(ii) It is further pleaded that the counter-guarantees issued by defendant No. 2 and the performance bank guarantees and the advance payment guarantees issued by defendant No. 3 are required to be performed at Egypt and therefore, it is the courts in Egypt i.e. the place of performance of the contract which would have the territorial jurisdiction.

(iii) It is further pleaded that defendant No.1 and defendant No. 3 are not amenable to the jurisdiction of this court.

(iv) It is pleaded that no cause of action has arisen within the jurisdiction of this court and therefore, the suit is liable to be dismissed. Mere issuance of

counter guarantees by defendant No. 2 would not give rise to any cause of action in Delhi nor it would confer any jurisdiction in the courts in Delhi.

(v) It is further pleaded that the settled position in law is that obligations arising out of a guarantee are not ordinarily to be interpreted by the court except in cases of fraud which is clearly apparent to the issuing bank on the face of a beneficiary's demand or in case of an irretrievable injury. It is pleaded that no such position is made out.

14. I may first deal with IA No. 14196/2017 which is filed by defendant No. 2 under Order 7 Rule 11 CPC for rejection of the plaint.

**IA No.14196/2017**

15. I have heard learned senior counsel for the plaintiff, learned senior counsel for defendant No. 2 and learned counsel for defendant No. 3.

16. Mr. Ravinder Sethi, learned senior counsel for defendant No. 2 has reiterated the submissions made in the written statement. He has also pleaded as follows:-

(i) He pleads that the contract in question is governed by the laws of Egypt as it has been provided in the contract. Hence, it is the courts in Egypt only which would have jurisdiction. Further, it is pleaded that the counter-guarantees issued by HSBC India, namely, defendant No. 2 in favour of defendant No. 3 i.e. HSBC, Egypt are governed by Egyptian law. The performance of the guarantees was to be done in Egypt. Hence, it is the Egyptian courts which would have territorial jurisdiction.

(ii) It is further pleaded that defendant No. 1 company and defendant No. 3 are foreign entities and not amenable to the jurisdiction of this court.

(iii) It is further pleaded that no cause of action has arisen within the territory of this court. It is further pleaded that even otherwise, this is a fit case to invoke

the doctrine of Forum Non Conveniens as the best suited courts to apply the Egyptian law are the courts in Egypt.

17. Learned senior counsel for defendant No. 2 has relied upon the judgments of the Supreme Court in the case of ***South East Asia Shipping Co.Ltd. vs. Nav Bharat Enterprises Pvt. Ltd & Ors., (1996) 3 SCC 443***and ***Hellenic Electricity Distribution Network Operator vs. Bharat Heavy Electricals Ltd., (2016) 157 DRJ 71***. Reliance is also placed on the judgment of the Division Bench of this court in the case of ***Bharat Heavy Electricals Ltd. vs. Electricity Generation Incorporation & Ors., FAO (OS)(COMM) 185/2017*** decided on 17.10.2017 to support his contentions.

18. Mr. Amit Sibal, learned senior counsel appearing for the plaintiff has rebutted the aforenoted submissions. He pleads as follows:-

(i) It is pleaded that part of cause of action has arisen within the territory of Delhi and hence, in terms of Section 20(c) of the CPC, this court would have the territorial jurisdiction to adjudicate the present suit. In this context, reliance is placed on the judgment of the Supreme Court in the case of ***A.B.C.Laminart Pvt. Ltd. &Anr. vs. A.P. Agencies, Salem, 1989 (2) SCC 163***. Reliance is also placed on various paras of the plaint to plead that various events have taken place within the territorial jurisdiction of this court which demonstrate that part of the cause of action has arisen within the jurisdiction of this court. It is pleaded that the following events took place in Delhi:-

a. All works under the contract were performed at the office of the plaintiff in Delhi.

b. All invoices were issued by the plaintiff from Delhi.

c. All payments under the contract were received by the plaintiff in Delhi.

d. Future payments were to be received in Delhi.

e. The bank guarantees issued by defendants No. 2 to 3 were issued from the branch of defendant No. 2 in Delhi.

f. The omnibus guarantee which is the center to the dispute was also issued in Delhi. The said guarantees were entered into by several parties all of which are Indians.

g. The bank guarantees were to be also paid from Delhi

19. Reliance is placed on the judgment of the Madras High Court in the case of ***W.S. Industries (India) Ltd. Vs. Indian Overseas Bank and Ors., (2001) SCC OnLine MAD 1001*** to plead that this court would have territorial jurisdiction to decide the suit in question. Reliance is also place on the judgment of the Supreme Court in the case of ***Union of India vs. Seppo Rally OY & Anrs., (1999) 8 SCC 357*** pleading that where a bank guarantee is issued or invoked or encashed, that court would have territorial jurisdiction. Reliance is also placed on the judgment of this court in the case of ***Milk Food Ltd. Vs. Union Bank of India, (143) 2007 DLT 693*** to plead the same.

20. I may now deal with the contentions of the parties. The first plea raised by the learned senior counsel for defendant No. 2 is that as per the agreement between the parties dated 02.05.2006 and 12.09.2006, the contract is governed by the laws of Egypt. Some of the bank guarantees are also governed by the laws of Egypt. Based on this submission, it is pleaded that this court would have no territorial jurisdiction to hear the present matter. It has, in addition, also been strongly urged that no part of the cause of action has arisen within the territory of this court. The plea of the plaintiff that the bank guarantees/counter-guarantees have been issued by defendant No. 2 from Delhi is meaningless as issuing of a bank guarantee/counter guarantee does not constitute a cause of action. To the said effect, defendant No. 2 has relied upon the judgment of the Supreme Court in the case of ***South East Asia Shipping Co. Ltd. vs. Nav Bharat Enterprises Pvt. Ltd., (supra)*** and the judgment of the Division Bench of this court in the case of ***Hellenic Electricity Distribution Network Operator vs. Bharat Heavy Electricals Ltd. & Ors., (supra)***.In the

alternative, reliance is also placed on the doctrine of Forum Non Conveniens to plead that this court should return the plaint to be filed in an appropriate court.

21. On the issue of territorial jurisdiction of this court, reference may be had to the judgment of the Supreme Court in the case of ***Modi Entertainment Networks and Ors. Vs. W.S.G. Cricket PTE Ltd., (2003) 4 SCC 341*** whereinthe Supreme Court held as follows:-

> "11. In regard to jurisdiction of courts under the Code of Civil Procedure (CPC) over a subject-matter one or more courts may have jurisdiction to deal with it having regard to the location of immovable property, place of residence or work of a defendant or place where cause of action has arisen. Where only one Court has jurisdiction it is said to have exclusive jurisdiction; where more courts than one have jurisdiction over a subject-matter, they are called courts of available or natural jurisdiction. The growing global commercial activities gave rise to the practice of the parties to a contract agreeing beforehand to approach for resolution of their disputes thereunder, to either any of the available courts of natural jurisdiction and thereby create an exclusive or non-exclusive jurisdiction in one of the available forums or to have the disputes resolved by a foreign court of their choice as a neutral forum according to the law applicable to that court. It is a well-settled principle that by agreement the parties cannot confer jurisdiction, where none exists, on a court to which CPC applies, but this principle does not apply when the parties agree to submit to the exclusive or non-exclusive jurisdiction of a foreign court; indeed in such cases the English Courts do permit invoking their jurisdiction. Thus, it is clear that the parties to a contract may agree to have their disputes resolved by a Foreign Court termed as a 'neutral court' or 'court of choice' creating exclusive or non-exclusive jurisdiction in it."

22. It is an admitted fact in this case that there is no clause in the agreement conferring exclusive jurisdiction to hear the dispute by the courts of Egypt. In the absence of such a clause, in my opinion, the issue would arise as to whether any part of cause of action has arisen within the territory of this court to permit this court to adjudicate the present suit. If part of cause of action has arisen

within the territory of this court, then this court would be a court of natural jurisdiction and would have the territorial jurisdiction to adjudicate the matter. It has been submitted by the plaintiff and averred in the plaint that a part of cause of action has arisen within the territory of this court. The following facts are pleaded to claim that a part of the cause of action has arisen within the territory of this court:-

(i) It has been pleaded that all works under the contract were performed by the plaintiff in Delhi.

(ii) All invoices were issued by the plaintiff from Delhi

(iii) All payments under the contract were received in Delhi.

(iv) Bank Guarantees were issued by defendant No. 2 to defendant No. 3 from a branch situated in Delhi.

(v) The omnibus guarantee which has been entered into between several parties, which are all Indians, is stamped in Delhi and was issued in Delhi.

(vi) Bank Guarantees were to be paid from Delhi.

23. Given the stated averments in the plaint, I may look at the judgment of the Supreme Court in the case of ***A.B.C. Laminart Pvt. Ltd. vs. A.P. Agencies, Salem,(supra)*** wherein the Supreme Court held as follows:-

> "12. A cause of action means every fact, which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the Court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded It does not comprise evidence necessary to prove such facts, but every fact necessary for the plaintiff to prove to enable him to obtain a decree. Everything which if not proved would give the defendant a right to immediate judgment must be part of the cause of action. But it has no relation whatever to the defence which may be set up by the defendant nor does it

depend upon the character of the relief prayed for by the plaintiff.

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"15. In the matter of a contract there may arise causes of action of various kinds. In a suit for damages for breach of contract the cause of action consists of the making of the contract, and of its breach, so that the suit may be filed either at the place where the contract was made or at the place where it should have been performed and the breach occurred. The making of the contract is part of the cause of action. A suit on a contract, therefore, can be filed at the place where it was made. The determination of the place where the contract was made is part of the law of contract. But making of an offer on a particular place does not form cause of action in a suit for damages for breach of contract. Ordinarily, acceptance of an offer and its intimation result in a contract and hence a suit can be filed in a court within whose jurisdiction the acceptance was communicated. The performance of a contract is part of cause of action and a suit in respect of the breach can always be filed at the place where the contract should have performed or its performance completed. If the contract is to be performed at the place where it is made, the suit on the contract is to be filed there and nowhere else In suits for agency actions the cause of action arises at the place where the contract of agency was made or the place where actions are to be rendered and payment is to be made by the agent. Part of cause of action arises where money is expressly or impliedly payable under a contract. In cases of repudiation of a contract, the place where repudiation is received is the place where the suit would lie. If a contract is pleaded as part of the cause of action giving jurisdiction to the Court where the suit is filed and that contract is found to be invalid, such part of cause of the action disappears. The above are some of the connecting factors."

24. It is clear from the above judgment that a cause of action means every fact which, if traversed, it would be necessary for the plaintiff to prove in order

to support his right for a judgment. The Supreme Court held that a part of cause of action arises at the place where money is expressly or impliedly payable under a contract. The plaintiff has pleaded in the plaint that payments have been received from defendant No. 1 by the plaintiff in Delhi. He has also pleaded that balance amount was also payable in Delhi. Hence, as per the plaint, a part of the cause of action has arisen within the territory of Delhi.

25. Further, the plaintiff has also pleaded that as the bank guarantees were issued from Delhi, a part of the cause of action arose within the territory of Delhi. The plaintiff has relied on the judgment of the Madras High court in ***W.S. Industries (India) Ltd. Vs. Indian Overseas Bank and Ors., (supra)*** and the judgment of the Supreme Court in the case of ***UOI vs. Seppo Rally OY & Anr.(supra)*** to claim that the bank guarantees issued from Delhi would also give rise to a part of cause of action arising in Delhi.

26. In the case of ***UOI vs. Seppo Rally OY & Anr.(supra)***, the case before the Supreme Court was that a plea was raised that the Delhi State Consumer Disputes Redressal Commission had no territorial jurisdiction to entertain the complaint as no cause of action arose in Delhi. The office of the bank was at Bombay and the branch office who issued the bank guarantee was at Saharanpur. In those facts, the Supreme Court held as follows:-

> "12. Under Section 17 of the Act a State Commission has jurisdiction to decide complaints of the value between rupees five and twenty lakhs but there is no such provision as contained in Sub-section (2) of Section 11 of the Act applicable to State Commission. Section 18 of the Act does not make provision of Sub-section (2) of Section 11 applicable to the State Commission. Each State has its own State Commission. There is purpose for it. First appeal of the District Forum situated within the State lies to the State Commission and then State Commission can take cognizance of the dispute arising within that State. It cannot be the intention of the Legislature that dispute arising in one State could be taken cognizance by State Commission of other State. We have to have purposive interpretation of the

> provisions and we have to hold that similar provisions as contained in Sub-section (2) of Section 11 with modifications as may be necessary, shall be applicable to the State Commission. In fact these are the basic provisions conferring territorial jurisdiction on a tribunal otherwise it will lead to absurd situations. We must read into Section 17 the same provisions as contained in Sub-section (2) of Section 11 of the Act subject to such modifications as may be applicable to a State Commission. It may also be noticed that under Sub-clause (ii) of Clause (a) of Section 17 appeals against orders are heard by the State Commission against the orders of any District Forum within that State. In the present case M/s. Dany Dairy and Food Engineers Ltd. approached the Saharanpur Branch of the Bank to provide Bank Guarantee which it did. The Bank Guarantee was invoked at Sharanpur and payment was also made by the Sharanpur Branch of the Bank. Saharanpur Branch is situated within the State of U.P. No part of the cause of action has arisen in Delhi. It is difficult to agree with the view of the State Commission and also of the National Commission that the State Commission at Delhi had jurisdiction in the matter."

27. Hence, the Supreme Court held that the bank guarantee was provided by the bank at Saharanpur, was invoked at Saharanpur Branch of the bank and payment was also made by the Saharanpur Branch. Hence, the court concluded that no part of cause of action arose in Delhi.

28. I may also look at the judgment of the Madras High Court in the case of ***W.S. Industries (India) Ltd. Vs. Indian Overseas Bank and Ors., (supra)***. The Court on this issue held as follows:-

> "13. The copies of the bank guarantees are also filed and performance guarantee has been executed in Egypt on account of the plaintiff company at Madras. The documents relating to the counter guarantee are also filed. In one of the fax messages, it is stated that the guarantee will be subject to Egyptian laws. It is therefore evidently clear that most of the documents were executed outside the jurisdiction of this court and under the circumstances,

learned counsel for defendants Nos. 1 and 2 contended that this court has no jurisdiction to entertain the suit. However, learned counsel for the plaintiffs contended that D1 bank is situated within the jurisdiction of this court and so far as the other defendants are concerned already leave to sue has been taken. Apart from that the goods were transported only from the harbour at Chennai and as part of the cause of action had arisen within the jurisdiction of this court, there is no substance in the objection raised by D1 and D2.

14. Learned counsel for the plaintiffs contended that it is alleged that the purchase order was placed in Egypt and received by the plaintiffs. So far as D1 is concerned no leave is necessary. In respect of other defendants leave has already been ordered by this court on July 17, 2000, and July 18, 2000, and they have not filed any application to revoke the leave already granted. They have also not entered appearance under the provisions as contemplated under Order 5, Rule 11 of the O. S. Rules. The applicability of law has no relation to the ousting of a jurisdiction of this court. Clause 12 of the Letters Patent provides for the High Court having jurisdiction where the cause of action arises wholly or with the leave of the court in part, or if the defendant dwells or carries on business within jurisdiction. If the cause of action arises wholly within the jurisdiction of court then irrespective of the residence of the defendants, the High Court would have jurisdiction. On the contrary if the cause of action arises wholly outside the jurisdiction and still if all the defendants reside within, even then the court would have jurisdiction. Further, where the cause of action is inseparable, then where some of the defendants reside within jurisdiction and some do not and the cause of action is found common to all of them by the residence of one of the defendants, it is enough to hold that a cause of action is in part arising within jurisdiction and moreover, the performance of the contract has been completed by handing over the consignment to the carrier nominated by the purchasers, and which is on an FOB basis. It is also clear from the bill of lading issued by the carrier for the delivery of cargo to the carrier was made at Madras port for delivery to the purchaser in Egypt. In view of Section 39 of the Sale of Goods Act, 1930, delivery to a carrier for

transmission to the buyer is delivery of goods to the buyer. There were no circumstances to show that the plaintiff has chosen the forum mala fide or that if the suit were to go on, the other party would be so handicapped in his defence that it would lead to injustice.

15. Learned counsel for the plaintiff also relied on South East Asia Shipping Co. Ltd. v. Nav Bharat Enterprises Pvt. Ltd., (1996) 3 SCC 443, wherein it is stated that the cause of action consists of a bundle of facts which give cause to enforce the legal injury for redress in a court of law. The cause of action means, therefore, every fact, which if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court. In other words, it is a bundle of facts, which taken with the law applicable to them, gives the plaintiff a right to claim relief against the defendant. It must include some act done by the defendant since in the absence of such an act, no cause of action would possibly accrue or would arise. The principle in this decision can be made applicable to the case on hand. Further according to the case cited, mere execution of the bank guarantee at Delhi would not give rise to cause of action there. No cause of action having arisen within the jurisdiction of the Delhi High Court, suit was not maintainable. The contract was executed in Bombay and performance of the contract was also required to be done in Bombay but the bank guarantee executed by the respondent at Delhi was transmitted to Bombay for performance of the contract. As the suit was filed for perpetual injunction before the Delhi High Court on its original side from enforcing the bank guarantee, it was held that the suit was not maintainable. If this analogy is taken into consideration, although the bank guarantee was executed at Egypt, considering the fact that the goods were transported only from Madras and as D1 bank is also within the jurisdiction of this court, prima facie, it is clear that this court has got jurisdiction to entertain the suit. Apart from that in respect of the defendants other than Dl, leave to sue was also granted. They have not chosen to file any application to revoke the leave already granted. The contesting defendants have also filed counters as well as written statements and submitted to the jurisdiction of this court. Under the circumstances, I am of the view that there

> is no force relating to the jurisdiction issue raised by D1 and D2."

29. Hence, the court came to the conclusion that as the goods were transported from Madras and defendant No. 1 bank was based in Madras, prima facie the concerned court at Madras had territorial jurisdiction to entertain the suit.

30. As noted defendants No. 2 and 3 have strongly urged that mere issuance of bank guarantee/counter-guarantee by a bank in Delhi will not give rise to any cause of action in Delhi. They have relied upon various judgments to plead the aforesaid.

31. I may look at one of the said judgments. The Supreme Court in the case of ***South East Asia Shipping Co. Ltd. vs. Nav Bharat Enterprises Pvt. Ltd. & Ors.(supra)*** held as follows:-

> "3. It is settled law that cause of action consists of bundle of facts which give cause to enforce the legal injury for redress in a court of law. The cause of action means, therefore, every fact, which if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the Court. In other words, it is a bundle of facts, which taken with the law applicable to them, gives the plaintiff a right to claim relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action would possibly accrue or would arise. In view of the admitted position that contract was executed in Bombay, i.e., within the jurisdiction of the High Court of Bombay, performance of the contract was also to be done within the jurisdiction of the Bombay High Court; merely because bank guarantee was executed at Delhi and transmitted for performance to Bombay, it does not constitute a cause of action to give rise to the respondent to lay the suit on the original side of the Delhi High Court. The contention that the Division Bench was right in its finding and that since the bank guarantee was executed and liability was enforced from the bank at Delhi, the Court got jurisdiction, cannot be sustained."

32. I may note that the court concluded in the above judgment that no part of cause of action had arisen within the jurisdiction of the Delhi High Court. Merely because the bank guarantees were executed at Delhi and transmitted for performance to Bombay did not give rise to a cause of action to lay a suit on the original side of the Delhi High Court.

33. I need not dwell further on this aspect as to whether issuance and invocation of the bank guarantee would give rise to a cause of action in favour of the plaintiff. This is so as the scope of the present enquiry being an application under Order 7 Rule 11 CPC is of limited nature. While dealing with an application under Order 7 Rule 11 CPC, this court is obliged to only look at the averments made in the plaint and presume them to be correct. The defence taken by the defendants in the written statement is not to be gone into. In this context reference may be had to the judgment of the Supreme Court in the case of ***Exphar SA & Anr. Vs. Eupharma Laboratories Ltd. & Anr.,*** **(2004) 3 SCC 688**. The Court held as follows:-

> "9. Besides when an objection to jurisdiction is raised by way of demurrer and not at the trial, the objection must proceed on the basis that the facts as pleaded by the initiator of the impugned proceedings are true. The submission in order to succeed must show that granted those facts the Court does not have jurisdiction as a matter of law. In rejecting a plaint on the ground of jurisdiction, the Division Bench should have taken the allegations contained in the plaint to be correct. However, the Division Bench examined the written statement filed by the respondents in which it was claimed that the goods were not at all sold within the territorial jurisdiction of the Delhi High Court and also that the respondent No. 2 did not carry on business within the jurisdiction of the Delhi High Court. Having recorded the appellants' objections to these factual statements by the respondents, surprisingly the Division Bench said:
>
> > "Admittedly the goods are being traded outside India and not being traded in India and as such there is no question of

> infringement of trademark within the territorial limits of any Court in India what to of Delhi".
>
> 10. Apart from the ex-facie contradiction of this statement in the judgment itself, the Division Bench erred in going beyond the statements contained in the plaint."

34. Clearly, the allegations contained in the plaint have to be taken to be correct for adjudicating the present application.

35. In this case I have already noted that an averment is made in the plaint that payments have been received by the plaintiff from defendant No. 1 in Delhi. Payments as per the contract were payable in Delhi. As noted above, it is settled position of law that a cause of action arises in the area of the court where payment is payable under the contract. Hence, based on this averment made in the plaint, for the purpose of adjudication of the present application, prima facie part cause of action arose in Delhi. In my opinion, this plaint cannot be rejected at this stage on the ground that this court does not have territorial jurisdiction.

36. The application is without merit and the same is dismissed.

**IA No.11601/2017**

37. This is an application filed by the plaintiff under Order 39 Rules 1 & 2 CPC. As already noted above, this court had on 03.10.2017 passed an interim order directing the defendants to maintain *status quo* regarding the bank guarantees. Other directions were also passed. However, admittedly defendant No.3, despite the interim orders passed by this court and being aware of the interim order, has released the money to defendant No.1 on 20.12.2017. It is now defendants No.2 and 3 who are pressing for vacation of the stay so that defendant No.2 can honour its counter guarantees given to defendant No.3. It has been claimed that defendants No.2 and 3 though both are called Hong Kong and Shanghai Banking Corporation Bank, are two separate legal entities. Defendant No.3 is describing itself as HSBC Bank, Egypt and claims it was

separately incorporated in Egypt. However, the courts attention has not been brought to any document that shows that defendants No. 2 and 3 are separate legal entities.

38. The case of the plaintiff for grant of an interim injunction during the pendency of the accompanying suit is based on various contentions. It has been firstly pleaded that the bank guarantees in question are all conditional bank guarantees and could not have been invoked by defendant No.1. It is pleaded that under clause 12 of the contract, the performance bank guarantees were to be valid till the end of the warranty period. Clause 10 of the contract read with minutes of the meeting dated 14.03.2006 and 15.03.2006 provides that the period of warranty would be 48-54 months from the date of delivery of each transformer. It is claimed that all the transformers were supplied and put in commercial operation in 2008.Thus, even assuming the warranty period was for 54 months, the same expired in 2012-13 at the latest. Invocation of the guarantees subsequent to 2012-13 is clearly illegal and that the bank guarantees cannot be encashed. It is also claimed that the performance bank guarantees were valid till issuance of the final certificate which has been duly issued by defendant No.1.

Regarding issuance of the advance bank guarantee, it is the case of the plaintiff that the same was provided and were valid until the advance payment is adjusted against the dues of the plaintiff. The payments received by the plaintiff were reduced by an amount of 10% on each invoice. Hence, as supplies were fully complete and all 23 transformers were put in commercial operation in 2008, defendant No.1 has received equipment and has utilised the advances received. These stand already adjusted. The invocation of the advance bank guarantee was hence fraudulent.

39. It has been secondly pleaded that the invocation of the bank guarantee is fraudulent and the acts of defendant No.1 fall within the established exception for grant of an injunction. It is reiterated that the transformers were supplied by

May 2008 and have been commissioned. Only some minor work of supervision of erection of fire fighting system remains, value of which is 0.25% of the total contract value, which could not be completed due to war like situation in Egypt. It is claimed that the engineers of the plaintiff visited Egypt in 2012 for carrying out supervision of the erection of the fire fighting equipment and 14 sites out of 16 sites were completed. Defendant No.1 did not provide shut down to the transformers for the balance sites. However, all 16 sites are in commercial operation since 2008. It is also claimed that the amount withheld by defendant No.1 is more than the amount payable for liquidated damages for the delay under clause 11 of the agreement. It is further pleaded that defendant No.1 has illegally withheld over Rs.40 crores of the plaintiff.

40. It has thirdly been pleaded that Egypt is/was undergoing a war like situation and hence, it is pleaded that this constitutes a force majeure situation. Further, due to a war like situation in Egypt, irreparable harm and injury would be caused to the plaintiff in case the reliefs as prayed for are not granted by this court as the plaintiff would find it extremely difficult to recover the said money given the current situation in Egypt. It is pleaded that defendant No.2 in its written statement has not denied the war like situation existing in Egypt. Hence, it is pleaded that special equity lies in favour of the plaintiff and an injunction ought to be passed in favour of the plaintiff.

41. I have heard the learned senior counsel for the parties.

42. Learned senior counsel for the plaintiff has reiterated the above pleas. He has reiterated that the Egyptian law on bank guarantee is virtually identical to the Indian law. He relies upon judgment of the Supreme Court in the case of ***Hari Shankar Jain v. Sonia Gandhi, (2001) 8 SCC 233*** to plead that the plaintiff will tender an opinion of experts in the course of evidence to prove the issue of foreign law. He also relied upon various judgments including the judgment of the Supreme Court in ***Gangotri Enterprises Ltd. v. Union Bank of India & Ors., (2016) 11 SCC 720, Hindustan Steelworks Construction Ltd. v.***

***Tarapore & Co. & Anr., (1996) 5 SCC 34*** and the judgment of a Co-ordinate Bench of this court in the case of ***Bharat Heavy Electricals Ltd. v. Ethiopian Power Electrical Corporation and Ors.***, **2018 SCC OnLine Del 12543** to plead for continuing of the interim injunction order till disposal of the suit.

43. Learned counsel appearing for defendant No.2 on 25.07.2019 while arguing the two applications had made a submission that his submissions made in IA No.14196/2016 be also considered as his submissions for the present application.

44. I may look at the legal position regarding injunction for encashment of bank guarantees. Reference may be had to the judgment of the Supreme Court in the case of ***U.P. State Sugar Corporation v. Sumac International Ltd., (1997) 1 SCC 568***. The court held as follows:

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

in some cases. In the case of *U.P. Coop. Federation Ltd.* v. *Singh Consultants and Engineers (P) Ltd.* [(1988) 1 SCC 174] which was the case of a works contract where the performance guarantee given under the contract was sought to be invoked, this Court, after referring extensively to *English and Indian cases* on the subject, said that the guarantee must be honoured in accordance with its terms. The bank which gives the guarantee is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contractual obligation or not, nor with the question whether the supplier is in default or not. The bank must pay according to the tenor of its guarantee on demand without proof or condition. There are only two exceptions to this rule. The first exception is a case when there is a clear fraud of which the bank has notice. The fraud must be of an egregious nature such as to vitiate the entire underlying transaction. Explaining the kind of fraud that may absolve a bank from honouring its guarantee, this Court in the above case quoted with approval the observations of Sir John Donaldson, M.R. in *Bolivinter Oil SA* v. *Chase Manhattan Bank* [(1984) 1 All ER 351]

> "The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear both as to the fact of fraud and as to the bank's knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it charged."

This Court set aside an injunction granted by the High Court to restrain the realisation of the bank guarantee.

13. The same question came up for consideration before this Court in *Svenska Handelsbanken* v. *Indian Charge Chrome* [(1994) 1 SCC 502] . This Court once again reiterated that a confirmed bank guarantee/irrevocable letter of credit cannot be interfered with unless there is established fraud or irretrievable injustice involved

in the case. Irretrievable injury has to be of the nature noticed in the case of *Itek Corpn.* v. *First National Bank of Boston* [566 Fed Supp 1210] . On the question of fraud this Court confirmed the observations made in the case of *U.P. Coop. Federation Ltd.* [(1988) 1 SCC 174] and stated that the fraud must be that of the beneficiary, and not the fraud of anyone else.

14. On the question of irretrievable injury which is the second exception to the rule against granting of injunctions when unconditional bank guarantees are sought to be realised the court said in the above case that the irretrievable injury must be of the kind which was the subject-matter of the decision in the *ItekCorpn. case* [566 Fed Supp 1210] . In that case an exporter in USA entered into an agreement with the Imperial Government of Iran and sought an order terminating its liability on stand by letters of credit issued by an American Bank in favour of an Iranian Bank as part of the contract. The relief was sought on account of the situation created after the Iranian revolution when the American Government cancelled the export licences in relation to Iran and the Iranian Government had forcibly taken 52 American citizens as hostages. The US Government had blocked all Iranian assets under the jurisdiction of United States and had cancelled the export contract. The Court upheld the contention of the exporter that any claim for damages against the purchaser if decreed by the American Courts would not be executable in Iran under these circumstances and realisation of the bank guarantee/letters of credit would cause irreparable harm to the plaintiff. This contention was upheld. To avail of this exception, therefore, exceptional circumstances which make it impossible for the guarantor to reimburse himself if he ultimately succeeds, will have to be decisively established. Clearly, a mere apprehension that the other party will not be able to pay, is not enough. In *Itek case* [566 Fed Supp 1210] there was a certainty on this issue. Secondly, there was good reason, in that case for the Court to be prima facie satisfied that the guarantors i.e. the bank and its customer would be found entitled to receive the amount paid under the guarantee."

45. Reference may also be had to the judgment of Supreme Court in the case of ***Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Co., (2007) 8 SCC 110***. The court held as follows:

> **"**14. ….
> i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional Bank Guarantee or Letter of Credit is given or accepted, the Beneficiary is entitled to realize such a Bank Guarantee or a Letter of Credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.
>
> (ii) The Bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.
>
> (iii) The Courts should be slow in granting an order of injunction to restrain the realization of a Bank Guarantee or a Letter of Credit.
>
> (iv) Since a Bank Guarantee or a Letter of Credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of Bank Guarantees or Letters of Credit.
>
> (v) Fraud of an egregious nature which would vitiate the very foundation of such a Bank Guarantee or Letter of Credit and the beneficiary seeks to take advantage of the situation.
>
> (vi) Allowing encashment of an unconditional Bank Guarantee or a Letter of Credit would result in irretrievable harm or injustice to one of the parties concerned."

46. I need not deal with the number of other judgments relied upon by the learned senior counsel for the parties. The legal position is quite clear that a bank guarantee is an independent contract between a bank and the beneficiary. A bank is obliged to honour its guarantee if it is unconditional and an irrevocable one. Disputes between the beneficiary and the party at whose instance the bank guarantee was given are immaterial. There are only two exceptions to the above rule. Firstly, when there is a clear fraud of an egregious

nature of which the bank has notice and secondly, when there are special equities in favour of the party seeking injunction such as irreparable injury or that irretrievable injustice would occur if injunction was not granted.

47. A perusal of the facts stated above would show that the claim of the plaintiff is that defendant No.1 has behaved in a manner that amounts to a fraud. The transformers in question were installed way back in 2008 and are fully operational. A miniscule amount of work is left to be completed, namely, supervision of installation of fire fighting equipment in two of the sites due to refusal of defendant No. 1 to give a shut down. Further, the defendant has withheld large dues payable to the plaintiff being over Rs.40 crores.

48. Do the above facts amounts to fraud played by defendant No. 1? Can it be said that defendant No. 1 has prima facie indulged in any deception, fraudulent act or has made a promise without any intention of performing it? It is clear that none of these facts prima facie tantamount to a fraud to justify grant of an interim injunction in favour of the plaintiff based on the first noted exception.

49. The second question that arises is as to whether an injunction can be granted based on any special equity. It is the case of the plaintiff that a war like situation continues to exist in Egypt on account of which it will not be possible for the plaintiff to recover its dues.

50. I may look at some of the salient facts which have been pleaded. The two facts that stand out from the documents placed on record are that firstly the transformers are functional since 2008 and that the bank guarantees are sought to be encashed now in 2017. The plaintiff has pointed out that the transformers are fully functional. The plaintiff has placed on record certificates of erection, commissioning and energization of the transformers in question issued by defendant No. 1. It is stated that some minor work regarding supervision of erection of fire fighting system remains for only two sites, that also because the defendant No. 1 was reluctant to shut down the transformers in question.

It is also the case of the plaintiff that the term of the bank guarantee has expired as the warranty period was only 54 months from date of delivery and the same expired in 2012-13. Reliance has been placed on the minutes of the meeting dated 14.03.2006 and 15.03.2006. Clause 4 of the minutes provides for a warranty of 48 months from the date of commissioning or 54 months from the date of delivery of each transformer.

It is also pleaded that defendant No.1 has withheld large amount of dues of the plaintiff amounting to above of Rs.40 crores and the question of encashment of the advance bank guarantees would not arise.

51. Would special equities exist in favour of the plaintiff in these facts and circumstances? The plaintiff pleads that a war like situation exists in Egypt. In this context, reference may also be had to a communication placed on record issued by defendant No.1 dated 31.04.2015, which is stating that the contract is yet not closed as BHEL, the plaintiff has not finished some work. The communication admits as follows "the political disturbance in Egypt began in 2011 while both the contracts should have been implemented much earlier". There is a clear admission by defendant No.1 of some political disturbance in 2011 in Egypt. No doubt further evidence in this regard would be required.

52. I also cannot help again noticing the act of Defendant No.3. Claiming that it is a foreign entity and not subject to jurisdiction of this Court, it has despite being aware of the interim orders of this Court dated 3.10.2017, chosen to release the money to defendant No.1.

53. In my opinion, the plaintiff has based on the above noted facts made out a *prima facie* case. On account of the facts noted above, there is a strong possibility that the plaintiff may find it difficult to recover its dues. Plaintiff is a Government of India enterprise and would be put extreme hardship if it were unable to recover its dues. In the above circumstances, these are issues which would have to be gone into by this court at a later stage while disposing of the suit based on the evidence led by the parties.

54. Accordingly, special equities exist in favour of the plaintiff. Prima facie exceptional circumstances appear to exist which may make it difficult for the plaintiff to recover its dues. In my opinion, if the injunction is not continued, it would cause grave and irreparable loss and damage to the plaintiff.

55. In this context, reference may be had to the judgment of a Coordinate Bench of this court in ***Bharat Heavy Electricals Ltd. v. Ethiopian Electrical Power Corporation and Ors.(supra)***. That was also a suit filed by the plaintiff seeking permanent injunction to restrain defendant No.2 from encashing the bank guarantees in question. That was a case where defendant No.1 was an entity based in Ethiopia and parties had entered into an agreement for design, supply, erection and commissioning of sub-stations and power transformers. Defendant No.1 had encashed the bank guarantee. Defendant No.1 had not entered appearance and his right to file written statement was closed. The bank in question, namely, defendant No.2 had filed a written statement. The plea of the plaintiff in that case also was that despite completion of work and successful operation of sub-stations, defendant No.1 did not provide taking over certificate to the plaintiff and coerced the plaintiff into keeping the bank guarantee alive. It was claimed that the bank guarantee was fraudulently invoked and that all the works of the contract were completed and a very minor portion of the work remained. The court held as follows:-

> "13. Further defendants No.1 to 3 are located in Ethiopia and since there is no established legal system in Ethiopia and there exist political turmoil, civil war like situation in Ethiopia currently, it would be impossible for the plaintiff to recover the amounts under the bank guarantee, if it were allowed to be encashed, (see para 38 of the plaint). Under the terms of the main contract, the venue of arbitration is in Ethiopia and the contract is subject to Ethiopian law. Without an efficient legal system the plaintiff will be unable to recover any money from the defendant no.1. The plaintiff shall suffer irreparable harm and injury in case the injunction as sought for is not granted as it shall be impossible for the plaintiff to recover its dues from defendant no.1.

> 14. This Court in Bharat Heavy Electricals Limited vs. Public Electricity Corporation &Ors. in CS(COMM) 1507/2016 has granted permanent injunction on the bank guarantees on similar facts and circumstances when the matter has proceeded without any opposition from the main contesting party, the injunction was granted considering the crisis in Yemen."

56. It is clear that the facts of the present case are somewhat akin to the above case where the court held that the plaintiff will be unable to recover its claim from defendant No. 1.

57. Plaintiff has made out a prima facie case. Balance of convenience is in favour of the plaintiff. I accordingly confirm the interim order passed by this court on 03.10.2017 subject to the following:-

i) The plaintiff shall not object to appointment of a local commissioner at its cost for recording of the evidence after framing of issues.

ii) The learned local commissioner so appointed by this court, after framing of issues, will complete recording of evidence within nine months thereafter.

iii) No adjournment would be sought by the plaintiff before the learned local commissioner for recording of evidence.

58. The application is disposed of as above.

**CS(COMM.)675/2017**

59. List before the Joint Registrar on 16.9.2020.

**JAYANT NATH, J.**

**JUNE 01, 2020/rb**