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

% *Date of Decision: 16.11.2021*

\+ **O.M.P.(I) (COMM.) 366/2021**

ZEE ENTERTAINMENT ENTERPRISES LTD & ANR. ..... Petitioner

Through: Mr Gopal Jain, Senior Advocate with Mr Kunal Tandon, Mr Kumar Shashank Shekhar, Advocates.

versus

RAILTEL CORPORATION OF INDIA LTD & ANR. ..... Respondents

Through Mr Chetan Sharma, learned ASG with Mr J.K. Singh Mr Ashish, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

[Hearing held through video conferencing]

VIBHU BAKHRU, J. ***(ORAL)***

1. The petitioners have filed the present petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereafter 'the A&C Act'), *inter alia*, praying as under:-

> "a) Pass an order in the nature of an ex-parte ad-interim/interim nature restraining the Respondent No.1 from invoking the Bank Guarantee bearing BG No~240GT02201040006 dated 09.04.2020 for a BG amount of Rs.37.17 Crores issued by Respondent No.2 Bank (pursuant to the letter of

termination dated 11.11.2021), issued by Petitioner No.1 for and on behalf of Petitioner No.2;

(b) Pass an order in the nature of an ex-parte ad-interim/interim nature staying the operation and effect of the termination letter dated 11.11.2021;

(c) Pass an order in the nature of an ex-parte/interim nature restraining the Respondent No.1 from issuing the press release for and in respect of the Termination Letter dated 11.11.2021 and if issued, to direct the

Respondent to withdraw the said Press Release."

2. The respondent (hereafter 'RailTel') had issued a Request for Proposal (RFP) for "*Selection of Digital Entertainment Service Provider (DESP) for delivering Content on Demand (COD) Services on Build Own Operate (BOO) model for Indian Railways"*. It is stated that petitioner no. 2 (Margo Networks Pvt. Ltd. – hereinafter 'Margo') had submitted its bid pursuant to the RFP and was declared successful. Thereafter, RailTel issued a Letter of Award (LoA) dated 14.01.2020 awarding the contract to Margo.

3. In terms of the RFP, it was agreed that the contract to provide COD Services would be for a term of ten years. The contract was on revenue sharing basis whereby Margo had agreed to share revenue from the COD Services subject to payment of an Annual Minimum Guarantee amount (hereafter 'MG'). The MG for the first year was agreed at ₹63 crores. In terms of the RFP, Margo was also required to

furnish a Performance Bank Guarantee equivalent of a value of 50% of the quoted MG within a period of thirty days of issue of the LoA. The parties agreed that for the second year, the MG amount would be increased to the revenue shared during the last applicable financial year if the same was higher than 50% of the MG.

4. Petitioner no.1 (hereafter 'ZEEL') is the holding company of Margo and had furnished the subject Bank Guarantee bearing BG No-240GT02201040006 dated 09.04.2020 issued by respondent no.2 (HDFC Bank) for an amount of ₹37.17 Crores (hereafter referred to as 'the BG in question').

5. Margo states that after issuance of the BG in question, it had sent several emails to the Northern Railways with regard to implementation of the contract to provide COD Services in various trains.

6. Margo states that it had also exchanged correspondence with RailTel in regard to the Performance Bank Guarantee from March, 2020 onwards. The petitioners (ZEEL and Margo) contend that their resources were severely constrained in view of the nationwide lockdown imposed with effect from 23.03.2020, on account of Covid-19 pandemic. Margo also claims that there were significant delays on the part of RailTel on account of delay in receiving permission from the Railways for implementing the COD Services on various trains.

7. Margo made various requests for deferment/waiver of the MG payments but the said request was not entertained and RailTel continued to raise invoices for the MG amount and the interest charges thereon.

8. Margo states that it paid the MG for the first year along with the interest in terms of the RFP. The controversy between the parties is in respect of the MG payment for the second year.

9. Margo states that RailTel did not accept any of its proposals, however, agreed to defer the payment of the balance 50% of the first year's MG till 01.03.2021 and the second year's MG till 31.03.2021. The petitioners state that in the given compelling circumstances, Margo furnished the undertaking on 10.02.2021 as desired by RailTel and undertook to ensure the MG payments to RailTel in accordance with the terms and conditions of the LoA issued on 14.01.2020. In view of the said undertaking, RailTel also agreed to extend the term of the contract for a further period of one year, till 13.01.2031.

10. However, on 09.07.2021, Margo sent a letter stating that its earlier undertaking was null and void in wake of the second wave of Covid-19 pandemic and it sought further deferment of the MG payments as well as extension of the term of the contract in question.

11. RailTel did not accept the same and, by a letter dated 05.08.2021, withdrew its agreement to extend the term of the contract for further period of one year as Margo had not complied with the terms of its undertaking. RailTel referred to various clauses of the RFP and further called upon Margo to pay the second MG by 16.08.2021 and also put Margo to notice that in case of non-compliance, RailTel would be left with no option but take action including forfeiture of the Earnest Money Deposit (EMD) in terms of Clause 2.24.1.3 of Section II of the RFP

and, to terminate the Contract on account of occurrence of an Event of Default as contemplated under Clause 3.29 of the RFP.

12. Margo responded to the said notice by a letter dated 10.08.2021 and claimed that it had not violated any terms of the RFP and there was no amount due and payable by it because there was no contract in force between the parties. Margo claimed that the timeline for payment of the first year's MG and the timelines for payment of MGs for the further period would trigger only on execution of the Agreement and in absence thereof it was not liable to pay the second year's MG.

13. By a letter dated 11.11.2021, RailTel terminated the contract between the parties and called upon Margo to comply with the Exit Management Schedule under Section III of the RFP. RailTel also issued a letter dated 11.11.2021 to HDFC Bank invoking the Bank Guarantee in question.

14. In the aforesaid context, the petitioners have filed the present petition.

Submissions

15. Mr Jain, learned senior counsel appearing for the petitioners contended that the invocation of the BG in question was liable to be interdicted in view of the *Force Majeure* event of the outbreak of Covid-19. He referred to Clause 3.25 of the General Conditions of Contract (GCC) and on the strength of the Sub-clause (ii) of Clause 3.25 of the GCC submitted that an outbreak of a pandemic would constitute

a *Force Majeure* event. He submitted that in terms of Clause 3.25 (c) of the GCC, a party who has given notice of a *Force Majeure* event would be excused from performance or punctual performance of its obligations under the Contract so long as the relevant *Force Majeure* event continues. He submitted that the pandemic is still raging and therefore, Margo is absolved of performance of its obligations in terms of the LOA.

16. He further submitted that in terms of Clause 3.25 (h) of the GCC, the parties had agreed that in case of *Force Majeure*, all parties were obliged to endeavour to agree on an alternate mode of performance in order to ensure continuity of the service and implementation of the obligations as well as to minimise any adverse consequences of *Force Majeure*. He submitted that in terms of the said clause, RailTel was obliged to engage with Margo to arrive at an amicable solution for implementing the contract and it was not open for RailTel to terminate the contract in question. Next, he submitted that there was no default on the part of Margo as the parties had not entered into a definitive agreement and its payment obligations would commence only after the parties had entered into the agreement.

17. He referred to an order dated 20.04.2020 passed by a Coordinate Bench of this Court in ***M/s Halliburton Offshore Services Inc. v. Vedanta Limited & Anr.: OMP (I) (COMM) 88/2020*** (***Halliburton - 1***) and submitted that this Court had recognized that the restrictions imposed pursuant to the outbreak of Covid-19 was a *Force Majeure* event and created special equities in favour of the parties. The Court

had accordingly issued an *ad interim* order interdicting invoking or encashment of a bank guarantee issued in that case. He also referred to the subsequent judgement dated 29.05.2020 passed in the said matter [***Halliburton - 2***] and submitted that in the said case, the Court had vacated the *ad interim* order but had directed that the amount recovered be kept in a separate joint account. He submitted that a similar order may also be passed in this case.

18. Next, he submitted that this court had expanded the scope of special equities as a ground for interdicting invocation of a bank guarantee. He referred to the decision of the Division Bench of this Court in ***Hindustan Construction Co. Ltd. v. National Hydro Electric Power Corporation Ltd. : 2020 SCC OnLine Del 1214*** and drew the attention of this Court to paragraph number 21 of the said judgment and submitted that earlier the bank guarantees would not be interdicted except in cases of established fraud; however, the Courts had now expanded the said scope to include the consideration as to which party was in breach of the contract.

19. Mr Jain also referred to the order dated 31.12.2020 passed by a Coordinate Bench of this Court in ***ISGEC Heavy Engineering Ltd. v. Indian Oil Corporation Ltd. & Anr.: OMP (I) (Comm) 442/2020***. He submitted that in that case, the question of fraud was not urged, however, the court proceeded to examine the question of special equities and following the decision of the Division Bench of this Court in ***Hindustan Construction Co. Ltd. v. National Hydro Electric Power Corporation Ltd.*** (*supra*) passed an *ad interim* order directing that

status quo be maintained regarding encashment of the bank guarantee.

20. Mr Sharma, learned ASG appearing for RaiTel countered the aforesaid submissions. He referred to Clause 3.26 of the GCC and submitted that the parties had agreed that the *Force Majeure* event would not excuse performance of the payment obligations.

Reasons and Conclusion

21. At the outset, it is necessary to note that there is no dispute that the BG in question is an unconditional bank guarantee. The law relating to interdicting an unconditional bank guarantee is now far too well settled. It has been authoritatively held by the Supreme Court in several cases that the bank guarantees can be interdicted only in exceptional cases of egregious fraud and special equities.

22. In ***U.P. Cooperative Federation Limited v. Singh Consultants and Engineers Pvt. Ltd.: 1988 (1) SCC 174***, Sabyasachi Mukharji J had observed as under:-

> **17.** This question was again considered by the Queen's Bench Division by Mr Justice Kerr in *R.D. Harbottle (Mercantile) Ltd.* v. *National Westminster Bank Ltd.* [(1977) 2 All ER 862] In this case injunction was sought on a question in respect of performance bond. The learned Single Judge Kerr, J. gave the following views:
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> > "(*i*) Only in exceptional cases would the courts interfere with the machinery of irrevocable obligations assumed by

banks. In the case of a confirmed performance guarantee, just as in the case of a confirmed letter of credit, the bank was only concerned to ensure that the terms of its mandate and confirmation had been complied with and was in no way concerned with any contractual disputes which might have arisen between the buyers and sellers. Accordingly, since demands for payment had been made by the buyers under the guarantees and the plaintiffs had not established that the demands were fraudulent or other special circumstances, there were no grounds for continuing the injunctions....

(*ii*) If it was right to discharge the injunctions against the bank, the fact that the Egyptian defendants had taken no part in the proceedings could not be a good ground for maintaining those injunctions. Further, equally strong considerations applied in favour of the discharge of the injunctions against the Egyptian defendants, and their failure to participate in the proceedings did not preclude the court from discharging the injunctions against them."

18. In my opinion the aforesaid represents the correct state of the law. The court dealt with three different types of cases which need not be dilated here.

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> **34.** On the basis of these principles I reiterate that commitments of banks must be honoured free from interference by the courts. Otherwise, trust in commerce internal and international would be irreparably damaged. It is only in exceptional cases that is to say in case of fraud or in case of irretrievable injustice be done, the court should interfere.

23. K. Jagannatha Shetty J. in his concurring opinion had further explained as under:

> **"**53. Whether it is a traditional letter of credit or a new device like performance bond or performance guarantee, the obligation of banks appears to be the same. If the documentary credits are irrevocable and independent, the banks must pay when demand is made. Since the bank pledges its own credit involving its reputation, it has no defence except in the case of fraud. The bank's obligations of course should not be extended to protect the unscrupulous seller, that is, the seller who is responsible for the fraud. But, the banker must be sure of his ground before declining to pay. The nature of the fraud that the courts talk about is fraud of an "egregious nature as to vitiate the entire underlying transaction". It is fraud of the beneficiary, not the fraud of somebody else. If the bank detects with a minimal investigation the fraudulent action of the seller, the payment could be refused. The bank cannot be compelled to honour the credit in such cases. But it may be very difficult for the bank to take a decision on the alleged fraudulent action. In such cases, it would be proper

> for the bank to ask the buyer to approach the court for an injunction."

24. In ***Svenska Handelsbanken v. M/s Indian Charge Chrome and Ors.: (1994) 1 SCC 502***, the Supreme Court held as under:

> "… in case of confirmed bank guarantees/irrevocable letters of credit, it cannot be interfered with unless there is fraud and irretrievable injustice involved in the case and fraud has to be an established fraud….
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> … irretrievable injustice which was made the basis for grant of injunction really was on the ground that the guarantee was not encashable on its terms….
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> … there should be prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Mere irretrievable injustice without prima facie case of established fraud is of no consequence in restraining the encashment of bank guarantee."

25. Undeniably a bank guarantee cannot be interdicted unless the court is persuaded to accept that not granting of an injunction would cause irretrievable injustice. However, as explained by the Supreme Court in ***Svenska Handelsbanken v. M/s Indian Charge Chrome and Ors.*** (*supra*), mere irretrievable injustice without a *prima facie* case of established fraud would be of no consequence in restraining the encashment of the bank guarantees.

26. In ***Larsen & Tourbo Limited v. Maharashtra State Electricity Board and Others: (1995) 6 SCC 68***, the Supreme Court reiterated the

aforesaid view. The relevant extract of the said decision is set out below:-

> "5. Before we adjudicate the rival pleas urged before us by counsel for the parties, it will be useful to bear in mind the salient principles to be borne in mind by the court in the matter of grant of injunction against the enforcement of a bank guarantee/irrevocable letter of credit. After survey of the earlier decisions of this Court in *United Commercial Bank* v. *Bank of India* [(1981) 2 SCC 766] , *U.P. Coop. Federation Ltd.* v. *Singh Consultants & Engineers (P) Ltd.* [(1988) 1 SCC 174] , *General Electric Technical Services Co. Inc.* v. *Punj Sons (P) Ltd.* [(1991) 4 SCC 230] and the decision of the Court of Appeal in England in *Elian and Rabbath* v. *Matsas and Matsas* [(1966) 2 Lloyd's Rep 495, CA] and a few American decisions, this Court in *Svenska Handelsbanken* v. *Indian Charge Chrome* [(1994) 1 SCC 502] , laid down the law thus: (SCC pp. 523-27, paras 60-72)
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> > "… in case of confirmed bank guarantees/irrevocable letters of credit, it cannot be interfered with unless there is fraud and irretrievable injustice involved in the case and fraud has to be an established fraud….
> >
> > … irretrievable injustice which was made the basis for grant of injunction really was on the ground that the guarantee was not encashable on its terms….
> >
> > … there should be prima facie case of fraud and special equities in the

> form of preventing irretrievable injustice between the parties. Mere irretrievable injustice without prima facie case of established fraud is of no consequence in restraining the encashment of bank guarantee."

27. In ***Himadari Chemicals Industries Ltd. v. Coal Tar Refining Company: 2007 (8) SCC 110***, the Supreme Court referred to the earlier decisions and summarized the principles regarding interdiction of a bank guarantee as under:

> "14. From the discussions made hereinabove relating to the principles for grant or refusal to grant of injunction to restrain enforcement of a Bank Guarantee or a Letter of Credit, we find that the following principles should be noted in the matter of injunction to restrain the encashment of a Bank Guarantee or a Letter of Credit :-
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> (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.
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> (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."

28. In ***Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineering Works (P) Ltd. And Anr.: AIR 1997 SC 2477***, the Supreme Court held as under:

"**21.** Numerous decisions of this Court rendered over a span of nearly two decades have laid down and reiterated the principles which the courts must apply while considering the question whether to grant an injunction which has the effect of restraining the encashment of a bank guarantee. We do not think it necessary to burden this judgment by referring to all of them. Some of the more recent pronouncements on this point where the earlier decisions have been considered and reiterated are *Svenska Handelsbanken* v. *Indian*

Charge Chrome [(1994) 1 SCC 502] , *Larsen & Toubro Ltd.* v. *Maharashtra SEB* [(1995) 6 SCC 68] , *Hindustan Steel Workers Construction Ltd.* v. *G.S. Atwal & Co. (Engineers) (P) Ltd.* [(1995) 6 SCC 76] and *U.P. State Sugar Corpn.* v. *Sumac International Ltd.* [(1997) 1 SCC 568] The general principle which has been laid down by this Court has been summarised in the case of *U.P. State Sugar Corpn.* [(1997) 1 SCC 568] as follows: (SCC p. 574, para 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."

> Dealing with the question of fraud it has been held that fraud has to be an established fraud. The following observations of Sir John Donaldson, M.R. in *Bolivinter Oil SA* v. *Chase Manhattan Bank* [(1984) 1 All ER 351, CA] are apposite:
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> "…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."

29. Mr Jain's contention that special equities creates a separate exception for grant of an injunction of a bank guarantee is also unpersuasive. In ***Consortium of Deepak Cable India Limited & Abir Infrastructure Private Limited (Dcil-Aipl) Thr Abir v. Teestavalley***

Power Transmission Limited: 2014 SCC Online Del 4741, the Division Bench of this Court held as under: -

> "145. The legal position which can be summarized would be that a bank guarantee is an independent contract between the bank and the beneficiary and disputes pertaining to bank guarantees have to be resolved de-hors the terms of the main contract between the parties or disputes relatable to the main contract between the parties. Where a bank guarantee is a conditional guarantee invocation thereof would have to be in strict conformity with the conditions on which the guarantee is issued. In such a case an injunction can be granted against payment under the bank guarantee if it is found that the condition upon which the guarantee was issued has not been complied with or met. But where the guarantee is unconditional and/or the bank has agreed to make payment without demur or protest, on the beneficiary invoking the bank guarantee the bank is obliged to honour the same for the reason like letters of credit, a bank guarantee if not honoured would cause irreparable damage to the trust in commerce and would deprive vital oxygen to the money supply and money flow in commerce and transaction which is necessary for economic growth. Disputes pertaining to the main contract cannot be considered by a court when a claim under a bank guarantee is made and the court would be precluded from embarking on an enquiry pertaining to the prima facie nature of the respective claim of the litigating parties relatable to the main dispute. The dispute between the parties to the underlying contract has to be decided at the civil forum i.e. a civil suit if there exists no arbitration clause in the contract or before the arbitral tribunal if there exists an

arbitration clause in the contract. Pendency of arbitration proceedings is no consideration while deciding on the issue of grant of an interim injunction. That certain amounts have been recovered under running bills and have to be adjusted for is of no concern in matters relating to invocation of bank guarantee. That there are serious disputes on questions as to who committed the breach of the contract are no circumstances justifying granting an injunction pertaining to a bank guarantee. Plea of lack of good faith and/or enforcing the guarantee with an oblique purpose or that the bank guarantee is being invoked as a bargaining chip, a deterrent or in an abusive manner are all irrelevant and hence have to be ignored. There are only two well recognized exceptions to the rule against permitting payment under a bank guarantee. The same are:-

A. A fraud of egregious nature;

B. Encashment of the bank guarantee would result in irretrievable harm or injustice of an irreversible kind to one of the parties.

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147. <u>There is no separate third exception of a special equity justifying grant of an injunction to restrain the beneficiary from receiving under an unconditional bank guarantee and if there exists any third exception of a special equity the same has to be of a kind akin to irretrievable injustice or putting a party in an irretrievable situation</u>."

[underlined for emphasis]

30. As is apparent from the above extract from the decision in ***Consortium of Deepak Cable India Limited & Abir Infrastructure Private Limited (Dcil-Aipl) Thr Abir v. Teestavalley Power***

Transmission Limited (*supra*), special equities cannot be considered as a totally separate exception but is more akin to the requirement of irretrievable injustice. 'Special equities' are in a sense special circumstances, which would justify granting the exceptional relief for interdicting a bank guarantee as not granting the said relief would cause irretrievable harm or injury to the party who has otherwise established a compelling case. It is necessary to bear in mind that unconditional Bank Guarantees are furnished in the course of commercial transactions to enable the beneficiary to invoke the same without recourse to any adjudicatory process. Thus clearly, commercial disputes arising in relation to the transactions do not present any special equities.

31. In ***BSES Ltd. v. Fenner India Ltd.: (2006) 2 SCC 728***, the Supreme Court had observed as under:

> "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'."

32. The decision of the Division Bench of this Court in ***Hindustan Construction Co. Ltd. v. National Hydro Electric Power Corporation Ltd.*** (*supra*) cannot be read in the manner as contended by Mr Jain. The said judgment is not an authority for the proposition that the principles as authoritatively settled by the Supreme Court in various decisions mentioned above have been diluted or no longer held good. The observations made by the Division Bench that the scope of what constitutes special equities has been expanded and must be read in its context. The Division Bench had specifically noted that the courts have granted injunction on the grounds of special equities where there were extraordinary circumstances and the same "*include cases of irretrievable injury, extraordinary special equities including the impossibility of the guarantor being reimbursed at a later stage if found entitled to the money and the invocation of the BG being not in terms of the BG itself.* "

33. It is well settled that in cases where invocation of the bank guarantee is not in terms of the bank guarantee, the courts would intervene and would interdict payment against such an invocation. This is not a case of special equities but constitutes a sperate ground. The concept of irretrievable injury or extraordinary special equities cannot be expanded to take into its fold disputes regarding the interpretation or performance of the underlying contract. A dispute between the parties relating to performance of obligations under the contract does not give

rise to any special equities warranting interdiction of a bank guarantee. As noticed above, there must be special circumstances that places the party seeking such an injunction in a position where it would suffer irretrievable injury if the injunction as sought for is not granted.

34. In ***UP State Sugar Corporation v. Sumac International Ltd.: 1997 (1) SCC 568***, the Supreme Court authoritatively held that: -

> "16. Clearly, therefore, the existence of any dispute between the parties to the contract is not a ground for issuing an injunction to restrain the enforcement of bank guarantees. There must be a fraud in connection with the bank guarantee. In the present case we fail to see any such fraud. The High Court seems to have come to the conclusion that the termination of the contract by the appellant and his claim that time was of the essence of the contract, are not based on the terms of the contract and, therefore, there is a fraud in the invocation of the bank guarantee. This is an erroneous view. <u>The disputes between the parties relating to the termination of the contract cannot make invocation of the bank guarantees fraudulent</u>..".
>
> [underlined for emphasis]

35. In the facts of the present case, it is undeniable that the outbreak of Covid-19 has resulted in severe commercial difficulties and has put businesses under immense strain. Undisputedly, there was a reduction in the number of commuters using the trains operated by the Railways. This would undoubtedly result in fall of revenues that may have been contemplated by Margo. However, a loss of revenue is not a ground for excusing performance of a contract. It is settled law that the commercial

difficulties do not frustrate a Contract or absolve a party from performing its obligations. In ***Alopi Parshad and Sons Ltd. v. Union of India*****: *(1960) 2 SCR 793,*** the Supreme Court had held as under:

> "22. There is no general liberty reserved to the courts to absolve a party from liability to perform his part of the contract, merely because on account of an uncontemplated turn of events, the performance of the contract may become onerous. That is the law both in India and in England, and there is, in our opinion, no general rule to which recourse may be had, as contended by Mr Chatterjee, relying upon which a party may ignore the express covenants on account of an uncontemplated turn of events since the date of the contract."

36. In the present case, Clause 3.26 of the GCC expressly provided for the performance of obligations that could be excused. Clause 3.26 is set out below:-

> "3.26. **Excused Performance**
>
> If either Party is wholly or partially unable to perform its obligations hereunder because of a Force Majeure event, that Party will be excused from whatever performance is affected by the Force Majeure event, to the extent so affected, provided that the affected Party gives the other Party written notice of the occurrence of the Force Majeure Event as soon as practicable and in any event within seven (7) days after the occurrence of the Force Majeure event, giving full particulars of such occurrence, including an estimation of its expected duration, impact on the performance of such Party's obligations hereunder.
>
> Provided that:

> a. suspension of performance shall be of no greater scope and of no longer duration than is reasonably required by reason of the Force Majeure event; and
>
> b. the affected Party shall exercise all reasonable efforts to mitigate or limit damages to the other Party.
>
> c. Notwithstanding anything to the contrary, the obligation of the Bidder/ DESP to pay the Minimum Guarantee shall continue despite the Force Majeure event and any non-payment shall not be excused.
>
> d. the financial inability to make payments under the Contract Agreement shall not be a Force Majeure event."

37. In terms of Sub Clause (c) of the proviso, the parties had clearly agreed that the *Force Majeure* event would not excuse performance of a bidder to pay the minimum guarantee.

38. In ***Satyabrata Ghose v. Mugneeram Bangur & Co. And Anr.*: *AIR 1954 SC 44,*** the Supreme Court had observed**:**

> "17. It must be pointed out here that if the parties do contemplate the possibility of an intervening circumstance which might affect the performance of the contract, but expressly stipulate that the contract would stand despite such circumstance, there can be no case of frustration because the basis of the contract being to demand performance despite the happening of a particular event, it cannot disappear when that event happens. As Lord Atkinson said in *Matthey* v. *Curling* [(1922) 2 AC

> 180 at 234] "a person who expressly contracts absolutely to do a thing not naturally impossible is not excused for non-performance because of being prevented by the act of God or the King's enemies … or *vis major*". This being the legal position, a contention in the extreme form that the doctrine of frustration as recognised in English law does not come at all within the purview of Section 56 of the Indian Contract Act cannot be accepted."

39. In view of the express stipulation that a *Force Majeure* event would not excuse performance of the payment obligations, the contention that Margo is absolved of its liability under the LOA to pay the MG is *prima facie* difficult to accept.

40. The order in ***ISGEC Heavy Engineering Ltd. v. Indian Oil Corporation Ltd. & Anr***. (*supra*) is an *ad interim* order and is of little assistance to the petitioner as the said petition was eventually dismissed by the Court, *albeit*, on the ground of jurisdiction. The reliance placed by Mr Jain on ***Haliburton-I*** (*supra*) is also misplaced. The said order is an *ad interim* order, which was subsequently vacated in ***Haliburton-II*** (*supra*).

41. The contention that Margo does not have any obligation to pay any amount is *prima facie* unsubstantial considering that the petitioner had furnished an undertaking on 11.02.2020 to pay the MG. The said undertaking was furnished after the outbreak of Covid-19.

42. In view of the above, the prayer for interdicting the BG in question is rejected.

43. Notice is issued limited to the question of the termination letter dated 11.11.2021. Reply, if any, be filed within a period of one week from today. Rejoinder, if any, be filed on or before the next date of hearing.

44. List on 30.11.2021.

VIBHU BAKHRU, J

NOVEMBER 16, 2021
pkv

Click here to check corrigendum, if any