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**IN THE HIGH COURT OF JUDICATURE
AT BOMBAY, NAGPUR BENCH, NAGPUR.**

APPEAL AGAINST ORDER NO.85 OF 2011

1) Western Coalfields Limited,
Through it's CMD,
A Govt. Of India Undertaking,
having it's Registered
Office at Coal Estate,
Civil Lines, Nagpur-01.

2) Western Coalfields Limited,
through it's General Manager
(Civil) Coal Estate,
Civil Lines, Nagpur-01. Appellants.
Original Defendant Nos.1 & 2

VERSUS

1) Rajesh s/o Nandlal Biyani,
Proprietor of M/s.Shree
Sai Construction Company,
A Registered Government
Contractor and Civil
Engineers, having it's
Head Office at
"Gokuldharm" D.G.Tukum,
Tadoba Road,
Chandrapur-442 401 (MS). Respondent.
Original respondent No.1.

2) Oriental Bank of Commerce,
(Govt.of India Undertaking)
having it's Branch at
"Gold Sukh" Kasturba Chowk,

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Chandrapur,
Through it's Manager.

..... Respondents.
Original Defendant Nos.3.

Shri A.M.Gordey, Senior Advocate assisted by
Shri Deepak Gupta, Advocate for the
appellants/Original Defendant Nos.1 & 2.
Shri J.P.Pendse, Counsel for the respondent
no.1 original plaintiff.

CORAM : R. K.DESHPANDE, J.

DATE OF RESERVING THE JUDGMENT : 25/08/2011
DATE OF PRONOUNCING THE JUDGMENT : 06/09/2011.

JUDGMENT.

01) This appeal challenges the order 5.4.2011 passed by the Third Joint Civil Judge, Senior Division, Nagpur, allowing the application Exh.5 for grant of temporary injunction, restraining the appellants from invoking the Bank Guarantees furnished on 19.2.2008 filed in Special Civil Suit No.236 of 2011 by the respondent no.1/plaintiff. The appellants are the defendant nos.1 and 2, the respondent no.1 is the plaintiff and the respondent

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no.2 is the Oriental Bank of Commerce and the original defendant no.3.

02) The facts not in dispute are stated below--

On 18.5.2007, the appellants/original defendant nos.1 and 2 awarded the contract for the work of diversion of Motaghat Nallah (Phase-II and Phase-III) at Padmapur Open Cast Mine of Chandrapur area, to the respondent no.1/plaintiff. An Agreement No.08/2007-2008 was entered into between the parties. The total cost of contract was of Rs.13.95 Crores. The period of completion of work prescribed under the contract was from 23.7.2007 to 28.10.2008. On 10.10.2007, two Bank Guarantees of M/s.Mahesh Merchant Bank Limited, Chandrapur, said to be a Scheduled Bank, were furnished by way of performance guarantees, by the plaintiff. During the progress of work, the respondent no.1 substituted the aforesaid two Bank Guarantees by two separate Bank Guarantees dated 19.2.2008 of the Nationalized Bank i.e. Oriental Bank of Commerce (the respondent no.2

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herein). One Bank Guarantee was for Rs.69,79,000/- whereas other was for Rs.1,54,94,580/-. Thus, it was for total amount of Rs.2,24,73,580/- that the two guarantees were furnished and their validity is upto 19.11.2011. The respondent no.1 completed 40% of work to the tune of Rs.5,95,96,000/- upto 28.10.2008 and the balance 60% work, costing Rs.799.86 Lacs, remained incomplete.

03) On 5.3.2009, the appellants issued a show cause notice to the respondent no.1 asking as to why the penal interest should not be recovered on the amount of Rs.2,24,73,580/- for a period of five months during which the contract was continued on the basis of the forged and fake Bank Guarantees of non existent bank i.e. M/s.Mahesh Merchant Bank Limited. The respondent no.1 was called upon to deposit an amount of Rs.16,85,528/- as penal interest @ 18 % per annum, on the said amount for a period of five months. It is not disputed that this amount of penal interest has been recovered from the

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respondent no.1. By communication dated 16.9.2010, the appellants terminated the contract for the reason of furnishing of fake Bank Guarantees of non existent bank by the respondent no.1. Thereafter, by communication dated 17.2.2011, addressed to the Oriental Bank of Commerce, the appellants invoked two Bank Guarantees of total Rs.2,24,73,580/-.

04) On 21.2.2011, the respondent no.1/plaintiff filed Special Civil Suit No.236 of 2011 for a declaration that the invocation of Bank Guarantees by the appellants/defendant nos.1 and 2, was illegal and for further declaration that the communication dated 17.2.2011 is not a valid demand. Further, the relief of injunction is claimed, restraining the defendants from invoking the Bank Guarantees and acting upon the communication dated 17.2.2011. An application (Exh.5) was also filed for grant of temporary injunction under Order 39 Rule 1 and 2 read with Section 151 of the Code of Civil Procedure. The Trial Court granted exparte injunction on 21.2.2011, restraining the

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defendants from encashing the Bank Guarantees pending the decision of the application at Exh.5. The plaint was thereafter amended and in addition to the existing reliefs, a decree for an amount of Rs.5,16,69,618/- was claimed along with the damages of Rs.1.00 Crore, against the appellants.

05) An exparte injunction granted by the Trial Court on 21.2.2011, was as under--

ORDER

1. Defendants No.1 and 2 are hereby restrained from taking step from encashing bank guarantee No.OBC/CHP/BG/02020002808 dtd.19.2.08 for Rs.69,79,000/- valid upto 19.11.11 and bank guarantee No.OBC/CHP/BG/02020002908 dtd.19.2.08 for Rs.1, 94,580/- valid upto 19.11.11 towards additional performance security till their appearance and filing reply to the application at exh.5.

2. Defendant No.3 and its employee etc. are hereby restrained from making any payment to defendant Nos.1 and 2 as per above described bank guarantee till its appearance and filing reply to the application exh.5.

2. Issue notices to defendants No.1 to

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3 as to why above ex-parte ad-interim injunction should not be confirmed till the decision of suit on P.F. r/o 8.3.11.

3. Plaintiff is directed to comply mandatory provision of O.39 R.3(a)(b) of Civil Procedure Code within stipulated period of 24 hours.

4. Steno copy be provided to the party.

*Nagpur (S.S.Deodhar)
Date : 21.2.2011 3rd Jt.C.J.Sr.Dn., Nagpur.*

The Trial Court by an order impugned passed on 5.4.2011, confirmed the exparte injunction granted and continued the same, pending the decision of the suit. The appellants are restrained from invoking the Bank Guarantees and the defendant no.3 (respondent no.2 Bank) is restrained from making payment of Bank Guarantees. The Trial Court has held that the copies of two Bank Guarantees of Nationalized Bank, viz; the Oriental Bank of Commerce, issued on 19.2.2008, are placed on record and the same are valid upto 19.11.2011. Out of these two Bank Guarantees, one is for an amount of Rs.1,54,94,580/-, which was valid

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upto 19.11.2011 and the other is for an amount of Rs.69,79,000/-, which was valid upto Rs.19.5.2009. The letters dated 27.4.2009 and 28.4.2009, issued by the appellants/defendant nos.1 and 2 show that the Bank Guarantees are accepted and the respondent no.1 has extended its validity upto 19.11.2011.

06) The finding is recorded by the Trial Court that the invocation was on the ground of submission of fake Bank Guarantees of non existent Bank and not on the ground of delay in completion of the work. It is held that the case of the plaintiff is that the said act was done by his Power of Attorney holder and when the plaintiff came to know that the said Bank Guarantees are not in order, he voluntarily replaced the same and submitted the fresh Bank Guarantees issued by the Oriental Bank of Commerce (the respondent no.2), a Nationalized Bank, which are accepted by the appellants along with the extensions of their validity period. It has further been held that at this stage, it cannot be said that the fake

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Bank Guarantees were furnished only with a view to obtain the work. The appellants have recovered the penal interest on account of submission of fake Bank Guarantees for a period of five months and criminal investigation will take its own course.

07) The Trial Court has further held that the appellants/defendant nos.1 and 2 are required to show that they are entitled to recover the security amount from the respondent no.1/plaintiff because of the failure to execute the contract or negligence on the part of the plaintiffs in executing the same, however, no such case has been made out. The Trial Court has recorded a finding that the respondent no.1/plaintiff has prima-facie shown that there is no fault on his part, in delay caused in completion of the work and it is the appellants/defendant nos.1 and 2 and the State Government, who were unable to remove the hindrances, as a result of which the respondent no.1/plaintiff could not execute the work. The Trial Court has, therefore, held that there is no question

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of recovery of any damages from the security deposit in respect of which the Bank Guarantees were provided and hence, the refusal to grant an injunction would result in frustrating the claim of the plaintiffs. Hence, the order has been passed.

08) From the pleadings of the parties, the finding recorded by the Trial Court and the arguments advanced before this Court, the undisputed factual position needs to be culled out. The respondent no.1 has completed 40% of work to the tune of Rs.5,95,96,000/- upto 28.10.2008. The invocation of the Bank Guarantees in question is not on the ground that the respondent no.1 has failed to complete 60% of work, costing of Rs.799.86 Lacs, upto 28.10.2008. It is the specific stand of the appellants in their written statement that non-completion of balance 60% of work by the respondent no.1 upto 28.10.2008, is totally irrelevant for the purposes of the controversy involved in the present case. The Bank Guarantees have been invoked only for the reason that

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the respondent no.1 has submitted fake Bank Guarantees for total amount of Rs.2,24,73,580/- from the non existent of M/s.Mahesh Merchant Bank Limited, Chandrapur.

09) It is also not in dispute that on account of loss of interest for submission of fake Bank Guarantees on 10.10.2007 to 19.10.2008 i.e. for a period of five months, the appellants have recovered the amount of penal interest of Rs.16,85,220/- @ of 18% per annum on total amount of Bank Guarantees Rs.2,24,73,580/-. It is also not in dispute that the offences are registered against the respondent no.1 and others under Section 420, 468, 469, 470, 471 read with Section 34 of the Indian Penal Code and the prosecution is in progress.

10) The Trial Court has recorded the finding that on the basis of the report of the Committee appointed by the appellants for removal of hindrances and the finding is recorded about the failure of the

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appellants to discharge their obligations in respect of (i) the forest land clearance for execution of the work, (ii) the problems of villages of Ketadi and Mashala have not been resolved, (iii) the P.W.D. State Highway Road Bridge of Chandrapur Tadoba Road, Near Padmapur Village is not completed, (iv) the M.S.E.B. Bridge near Ketadi Village and also pipeline works (Qty.81000 m³ approx)is not yet completed. It has further recorded the finding that the Committee appointed by the appellants has reported that it is unlikely that the State Government authorities will resolve the issue and allow to restart the work in near future. It is also the finding that the appellants and the State Government are unable to remove the hindrances. All these findings recorded by the Trial Court, have not been assailed in this appeal.

11) Shri A.M.Gordey, the learned Senior Counsel, has invited my attention to the preamble of the Bank Guarantees to urge that it is unconditional and

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payable without any demur by the respondent no.2 Bank. He has also invited my attention to the Condition No.1 under the Bank Guarantee, which states that the Bank has agreed that the appellant Company shall be the sole judge as to whether the respondent no.1 has failed/neglected in performing any of the terms and conditions of the said contract and the decision of the appellant Company is made final and binding upon the parties. He further submits that the appellant, in whose favour the Bank Guarantees are furnished by the respondent no.2 Bank, cannot be prevented by way of an injunction, to enforce the Bank Guarantees on the pretext that the conditions of the agreement entered between the appellant and the respondent no.1 have not been fulfilled. He submits that the respondent no.1 Company cannot be the aggrieved person having any locus to raise any dispute in respect of non-fulfillment of the terms of the Bank Guarantees. He further submits that any dispute in respect of failure/negligence in performing the terms and conditions of contract

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between the appellant beneficiary and the respondent no.1 Company is immaterial and of no consequence.

12) In support of the proposition, Shri A.M.Gordey, the learned Senior Counsel, has relied upon the following decisions --

(i)Himadri Chemicals Industries Limited Vs. Coal Tar Refining Co., (2007) 8 SCC 110.

(ii)Vinitec Electronics Private Ltd. Vs. HCL Infosystems Ltd., (2008) 1 SCC 544.

(iii)Mahatma Gandhi Sahakari Sakhar Karkhana Vs. National Heavy Engineering Co-op. Ltd., 2007 DGLS (soft) 750 : 2007(6) S.C.C.470.

(iv)Mak Impex Chemicals P.Ltd. and another Vs. Union of India and others, AIR 2003 Bombay 88.

(v)Maytas Infra Limited Vs. Utility Energytech & Engineers Pvt.Ltd. & anr., 2009 B.C.I.133.

(vi)and the decision in Appeal Against Order No.6/2011 delivered by me on 26.7.2011 in the matter of Coal India Ltd. and another Vs. Chintamani Agrotech (India) Ltd. and others,

13) Inviting my attention to the letter dated

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18.5.2011 issued by the appellant awarding the contract to the respondent no.1, Shri A.M.Gordey, the learned Senior Counsel, has urged that the specific condition in the contract was that the respondent no.1 shall submit the valid Bank Guarantees of a Nationalized/Scheduled Bank by way of performance/additional performance security. The respondent no.1 has submitted the fake Bank Guarantees of non existent Bank and thus, it was the violation of the terms and conditions of the contract for which, the Bank Guarantees were invoked. He further submits that the respondent no.1 has carried out the work only to the extent of Rs.595.93 Lacs, which is the 40% of the total work and the balance 60% of the work costing of Rs.799.86 Lacs remained incomplete. He further submits that incomplete work is to be awarded to the another contractor and considering the inflation, the said cost is assessed at Rs.1182.52 approximately and as such an additional expenditure of Rs.382.66 Lacs, is legally recoverable from the respondent no.1. He submits that it is thus

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a failure/negligence in performing the terms and conditions of the contract by the respondent no.1, that the amount as assessed has become recoverable for which the Bank Guarantees have been invoked.

14) The contention of Shri J.P.Pendse, the learned Counsel for the respondent no.1, is that the preamble of the Bank Guarantees clearly indicate that the contract of the Bank Guarantees in question, is a conditional and contingent contract depending upon the fulfillment of the conditions specified therein. According to him, there should be a demand in writing stating that there is a specified amount which is due and payable by the respondent no.1 for the reason of the failure/negligence in performing the terms and conditions contained in the contract by the respondent no.1. Referring to the letter dated 17.2.2011, impugned in the Special Civil Suit No.236 of 2011, he has urged that there is nothing on record to show that any amount is due and payable by the respondent no.1 to the appellant for the reason of

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failure/negligence in performing the terms and conditions contained in the contract. He further submits that there is no demand as contemplated in the preamble of the said agreement, made in the impugned communication dated 17.2.2011. According to him, the terms of the contract of Bank Guarantees have to be strictly construed and the compliance in respect thereof needs to be seen. He submits that in the absence of compliance with the terms of the Bank Guarantees, the invocation causes an irretrievable injury to the respondent no.1. He further submits that the violation of the terms of the guarantee has to be regarded as species of the same genus as fraud, which disentitles a beneficiary to enforce the Bank Guarantee.

15) In support of the plea that the Bank Guarantees are conditional, Shri J.P.Pendse, the learned Counsel for the respondent no.1, has relied upon the decisions in the cases of--

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(a) **Hindustan Construction Co. Ltd. Vs. State of Bihar and others with State of Bihar and others Vs. Hindustan Construction Co. Ltd. and others, reported in (1999) 8 SCC 436.**

(b) **Vinitec Electronics Private Ltd. Vs. HCL Infosystems Ltd., (2008) 1 SCC 544.**

(c) **National Aluminium Co. Ltd., Vs. M/s.R.S.Builders (India) Ltd. and others, reported in AIR 1991 Orissa 314.**

16) In the decision of the Apex Court in **Hindustan Construction Co. Ltd. Vs. State of Bihar and others**, the order passed by the Single Judge of this Court granting injunction restraining the defendants from invoking the Bank Guarantees was restored by modifying the decision of the Division Bench of this Court vacating the injunction granted by the learned Single Judge in respect of the performance guarantee. Paras-9, 10 and 14 of the said judgment are relevant and the same are reproduced below--

Para-9 : *“What is important, therefore, is that the bank guarantee should be in unequivocal terms, unconditional and*

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recite that the amount would be paid without demur or objection and irrespective of any dispute that might have cropped up or might have been pending between the beneficiary under the bank guarantee or the person on whose behalf the guarantee was furnished. The terms of the bank guarantee are, therefore, extremely material. Since the bank guarantee represents an independent contract between the bank and the beneficiary, both the parties would be bound by the terms thereof. The invocation, therefore, will have to be in accordance with the terms of the bank guarantee, or else, the invocation itself would be bad."

Para-10 : "In the instant case, the whole matter can be disposed of purely on the basis of the terms of the bank guarantee."

Para-14 : "This condition clearly refers to the original contract between HCCL and the defendants and postulates that if the obligations, expressed in the contract, are not fulfilled by HCCL giving to the defendants the right to claim recovery of the whole or part of the "advance mobilisation loan", then the Bank would pay the amount due under the guarantee to the Executive Engineer. By referring specifically to clause 9, the Bank has qualified its liability to pay the amount covered by the guarantee relating to "advance mobilisation loan" to the Executive Engineer only if the obligations under the contract were not fulfilled by HCCL or HCCL has misappropriated any portion

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of the "advance mobilisation loan". It is in these circumstances that the aforesaid clause would operate and the whole of the amount covered by the "mobilisation advance" would become payable on demand. The bank guarantee thus could be invoked only in the circumstances referred to in clause 9 whereunder the amount would become payable only if the obligations are not fulfilled or there is misappropriation. That being so, the bank guarantee could not be said to be unconditional or unequivocal in terms so that the defendants could be said to have had an unfettered right to invoke that guarantee and demand immediate payment thereof from the Bank. This aspect of the matter was wholly ignored by the High Court and it unnecessarily interfered with the order of injunction, granted by the Single Judge, by which the defendants were restrained from invoking the bank guarantee."

It has been held that in order to ascertain whether the Bank Guarantees are conditional or unconditional, the terms of the Bank Guarantees are extremely material. The Bank Guarantees represent an independent contract between the Bank and the beneficiary, and the parties would be bound by the terms thereof. The invocation therefore, will

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have to be in accordance with the terms of the Bank Guarantees or else the invocation itself would be bad. The matter has to be disposed of purely on the basis of the terms of the Bank Guarantees. If the Bank Guarantees furnished were conditional then the defendants have no unfettered right to invoke the Bank Guarantees and to the demand immediate payment thereof from the Bank.

17) In the decision of Vinitec Electronics Private Ltd. Vs. HCL Infosystems Ltd., the question considered was whether the Bank Guarantees furnished were unconditional and irrevocable. Paras-16 and 22 of the said judgment are relevant and hence, the same are reproduced below--

Para-16 : *"Shorn of all the embellishments, the question that really arises for our consideration is as to whether bank guarantee furnished is an unconditional and irrevocable one or a conditional one? It may not be necessary to refer in detail the terms and conditions of the contract except to analyse the original clause of the bank guarantee dated 10.8.2001 and as*

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well as the subsequent amendment of the relevant clause in the said bank guarantee on 20.8.2001."

Para-22 : "In the present case the amended clause does not refer to any of the clauses specifically as such but on the other hand the Bank had undertaken responsibility to pay any sum or sums within the guaranteed limit upon receipt of written demand from the Company. The operative portion of the bank guarantee furnished by the Bank does not refer to any of the conditions for payment under the bank guarantee. It is true that the bank guarantee furnished makes a reference to the principal agreement between the parties in its preamble. Mere fact that the bank guarantee refers to the principal agreement in the preamble of the deed of guarantee does not make the guarantee furnished by the Bank to be a conditional one unless any particular clause of the agreement has been made part of the deed of guarantee."

It is thus reiterated that the clauses in the Bank Guarantee are relevant and material for determination as to whether the Bank Guarantees furnished are unconditional, irrevocable one or conditional one. On the interpretation of clauses, it has to be decided as to whether the Bank Guarantees furnished are unconditional or conditional. However,

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a word of caution is that the mere fact that the Bank Guarantee refers to the principal agreement, does not make the Bank Guarantee to be conditional one, unless any particular clause of the agreement has been made part of the deed of guarantee.

18) The Division Bench of the Orissa High Court has also dealt with the question of conditional Bank Guarantee in its judgment in **National Aluminium Co's case** cited supra, and the relevant portion of the paras-6, 7, 8 and 11 of the said judgment delivered by Hon'ble Shri B.L.Hansaria, C.J., (as he then was) are reproduced below--

Para-6 : "If the bank guarantee be conditional, the same becomes enforceable upon the fulfilment of the condition stipulated and in such a case the beneficiary must allege in the demand that the condition has been fulfilled. The latest decision of the Calcutta High Court is the one rendered in *National Thermal Power Corporation Ltd. vs. Hind Galvanizing and Engineering Co. Ltd.*, AIR 1990 Cal 421, in which the Bench has stated that as long as the demand of the beneficiary is in terms of the bank guarantee, it

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is not a defence that under the parent contract the beneficiary of the guarantee is not entitled to the amount from the bank."

Para-7 : "In *Synthetic Foams Ltd. vs Simplex concrete Piles (India) Pvt. Ltd.*, AIR 1988 Delhi, 207, a learned single Judge has stated that misrepresentation, suppression of material facts and violation of the terms of the guarantee can be regarded as species of the same genus as fraud which would disentitle a beneficiary to enforce the bank guarantee. It had been earlier stated in *M/s.B.L.R.Mohan v. Punjab State Co-operative Supply & Marketing Federation Ltd.*, AIR 1982 Delhi 357, by another learned single Judge that the demand under the bank guarantee must be in strict accord with the terms of the guarantee."

Para-8 : "We may also refer to a recent decision of the Punjab & Haryana High Court in *National Project Construction Corporation Ltd. v. M/s.Sadhu and Company*, AIR 1990 P & H 300, that the demand under the bank guarantee has to be in accordance with the eventualities mentioned in the deed of guarantee, and it is conclusive as regards the amount due and payable by the bank."

Para-11 : "But then, the bank guarantees at hand cannot be regarded as absolutely unconditional inasmuch as the payment under guarantees is dependent upon the contractor committing default in performing any of the terms and conditions of the contract or in the payment of any money

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due to the owner or in case the amount at the specified rates cannot be deducted from the running bills of the contractor by the owner towards the payment of Mobilisation Advance. As to the fulfilment of those conditions, we would state that the statement of the beneficiary would be taken at its face value unless the contractor be in a position to establish that the stand of the beneficiary is actuated by fraud, misrepresentation, deliberate suppression of material facts or the like which would give rise to special equities in favour of the contractor. So, in the absence of a case of fraud, misrepresentation, deliberate suppression of material facts or the like, to establish which a heavy onus lies on the contractor, a bank guarantee like the one at hand has to be honoured by the bank and the beneficiary cannot be restrained from enforcement. Further, decision about fraud, etc. has to be arrived at by the court approached by the contractor to restrain the beneficiary from enforcing the bank guarantee. The court cannot await for this purpose the finding of the arbitrator."

It has been held that if the Bank Guarantees be conditional, the same become enforceable upon fulfillment of the conditions stipulated and in such a case, the beneficiary must allege in the demand, that the conditions have been fulfilled. The

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violation of the terms of guarantee can be regarded as the species of the same genus as fraud, which disentitles a beneficiary to enforce the Bank Guarantees. The demand for Bank Guarantees must be in strict accord with the terms of the Bank Guarantees and it has to be in accordance with the eventualities mentioned in the deed of guarantee.

19) In the context of the aforesaid position of law laid down by the Apex Court, Section 126 of the Indian Contract Act, 1872, regarding contract of guarantee needs to be seen. The said provision of Section 126 is, therefore, reproduced below--

Section 126. 'Contract of guarantee', 'surety', 'principal debtor' and 'creditor'- "A 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety'; the person in respect of whose default the guarantee is given is called the 'principal debtor', and the person to whom the guarantee is given is called the 'creditor'. A guarantee may be either oral or written."

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A contract of guarantee is a contract to perform the promise or discharge the liability of a third person in case of his default. The person who gives the guarantee is called 'surety'; the person in respect of whose default the guarantee is given is called the 'principal debtor', and the person to whom the guarantee is given is called the 'creditor'.

20) Section 31 of the Indian Contract Act, 1872, defines the contingent contract and the same is reproduced below--

Chapter III : OF CONTINGENT CONTRACTS

"Section 31. "Contingent contract" defined.- A "contingent contract" is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen."

Section 32 of the said Act, deals with the enforcement of the contracts contingent on an event happening, and the same is also relevant hence,

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reproduced below--

"Section 32. Enforcement of contracts contingent on an event happening.-- Contingent contracts to do or not to do anything if an uncertain future event happens, cannot be enforced by law unless and until that event has happened.

If the event becomes impossible, such contracts become void."

A contract of guarantee is an independent contract between the Bank and the beneficiary thereof and if it is a contract, which permits the creditor to invoke the Bank Guarantee upon happening of an uncertain future event, then it becomes a 'contingent contract' as defined under Section 31 and it cannot be enforced by law unless and until that event has happened, in view of the provision of Section 32. Till happening of an event, it merely remains a contract which is unenforceable. In case of such contingent contract, the beneficiary has no unfettered right to invoke the Bank Guarantees and to demand immediate payment. The terms of such contract

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will have to be strictly construed and if it prescribes the manner in which performance is to be claimed, it will have to be seen as to whether the performance is claimed, in the manner so prescribed. If the invocation is not in accordance with the terms and the manner prescribed, it would be bad. The violation of the terms can be regarded as the species of the same genus as fraud which disentitles a beneficiary to invoke the Bank Guarantees.

21) In the light of the aforesaid position of law, it is required to be found out from the terms of the Bank Guarantees in question as to whether it is a contingent or conditional contract or an unconditional or irrevocable contract. A Proforma of Bank Guarantee in lieu of security deposit relied upon by both the parties in support of their rival contentions contained under an Agreement No.08/2007-2008, is reproduced below--

On Stamp of Rs.100

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PROFORMA OF BANK GUARANTEE IN LIEU OF SECURITY DEPOSIT.

**M/s. Western Coalfields Limited,
Coal Estate, Civil Lines, Nagpur.**

Dear Sir,

1. In consideration of M/s. Western Coalfields Limited, having its Registered Office at Nagpur (hereinafter called "The Company" which expression shall unless repugnant to the subject or context includes its successors and assigns) having agreed under the terms and conditions contained in letter no..... dated Issued in favour of M/s..... for (hereinafter referred to as 'the contract' to accept the Deed of guarantee as herein provided for Rs..... from the Schedule/Nationalized Bank (whose branches are scheduled at Nagpur) in lieu of security deposit to made by M/s..... (here in after called "the Contractor") or in lieu of deduction to be made from the contractor's bill for due fulfillment of the terms and conditions contained in the said contract by the contractor, we the Bank (hereinafter referred to as the said Bank) having its Registered Office at do hereby undertake and agreed to pay the company to the extent of Rs..... On demand stating that the amount claimed by the company is due and payable by the contractor for the reasons of failure/negligence in performing the terms and conditions contained in the contract by the buyer and to

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unconditionally pay the amount claimed by the company on demand without any demur to the extent aforesaid.

1. We Bank agree that the company shall be the sole judge as to whether the said contractor has failed/neglected in performing any of the terms and conditions of the said contract and the decision of the company in this behalf shall be final and binding on us.

2. We the said Bank further agree that the Guarantee herein contained shall remain in full force and effect upto And any claim received after the said date shall in no case bind the Bank.

3. The Company shall have the fullest liberty without affecting in any way the liability of the Bank under this guarantee or indemnity from time to time vary any of the terms and conditions of the said contract or to extend the time of performance by the said contractor or to postpone any time and from time to time any of the powers exercisable by it against the said contractor and either to enforce or to forbear from enforcing nay of the terms and conditions governing the said contract or securities available to the company and the said Bank shall not be released from its liability under these presents.

5. Notwithstanding anything contained herein the liability of the said Bank under this guarantee is restricted to Rs..... and this Guarantee shall

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come into force from the date hereof and shall remain in full force and effect till Unless the written demand or claim under this guarantee is made by the Company with us on or before..... all rights of the company under this guarantee shall cease to have any effect and we shall be relieved and discharged from our liabilities hereunder.

5. The said contractor hereby covenants with the company that the Company shall retain a sum of Rs..... or such sum as may be arrived at based on the executed value of the work, as security deposit for the fulfillment of the contract to the satisfaction of the Company.

IN WITNESS WHEREOF THE parties herein have set their hands and seals the date and year above written.

In consideration of the appellant M/s. Western Coalfields Limited, (the company) having agreed under the terms and conditions contained in the letter dated 18.5.2007 issued in favour of the contractor (M/s. Shree Sai Construction Company, the respondent no.1) the deed of guarantee has been executed by the Bank (Oriental Bank of Commerce, the respondent no.2) for the fulfillment of the terms and

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conditions contained in the contract by the contractor (the respondent no.1). The preamble of the Bank Guarantee recites that the Bank (respondent no.2) has undertaken and agreed to pay the Company (M/s.Western Coalfields Limited), the amount stipulated in each of the two Bank Guarantees on demand stating that the amount claimed by it is due and payable by the contractor for the reasons of failure/negligence in performing the terms and conditions contained in the contract by the contractor (respondent no.1) and to unconditionally pay the amount claimed by it on demand without any demur.

22) From the contents of the Bank Guarantee it is clear that the contract is already formed containing the terms and conditions. Hence, the terms of contract are extremely material and the same are required to be looked into. The obligation of the respondent no.2 Bank to make the payment of the amount covered by the Bank Guarantees arises, only on

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the demand to be made in writing and this is apparent from clause 5 under the Bank Guarantee, which speaks about the written demand or claim under the Bank Guarantee. The demand in writing must state exactly the amount assessed as due and payable by the respondent no.1 Company for the reason of failure/negligence of the respondent no.1 Company in performing certain specified terms and conditions contained in the contract between the appellant and the respondent no.1. If the demand is not in writing stating the actual amount which is assessed and found to be due and payable for the reason stated in the Bank Guarantees, then there is no obligation to make payment. Unless there is a failure/negligence in performing the terms and conditions of contract, the amount which becomes due and payable by the respondent no.1 cannot be assessed and claimed. Hence, it is a 'contingent contract' as defined under Section 31 of the Contract Act and it becomes enforceable only upon happening of the event specified therein, as per Section 32 of the Contract

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Act.

23) The question is whether, in fact there is such compliance of the conditions stipulated under the Bank Guarantees in the present case. Undoubtedly, it is by letter dated 17.2.2011, that there is a demand made by the appellants to the respondent no.2 Bank for payment of the amount of Bank Guarantees which has been impugned in the civil suit. The said letter is relevant and the same is, therefore, reproduced below--

Ref No.NGP/WCL/Civil/66-67/1106

Date 17.02.2011

*To,
The Branch Manager
The Oriental Bank of Commerce,
"Gold Sukh", Kasturba Chowk, Shree Ram
Market, Chandrapur-442 401.*

Sub : Encashment of Bank Guarantees.

*Ref : A) BG NO.02020002908 dated
19.02.2008 for Rs.1,54,94,580/-
and
B) BG No.02020002808
dated 19.02.2008 for
Rs.69,79,000/-.*

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Dear Sir,

Enclosed find herewith photo copies of BG No.0202002808 dated 19.02.2008 for Rs.69,79,000/- and BG No.0202002908 dated 19.02.2008 for Rs.1,54,94,580/- both valid upto 19.11.2011 for encashment.

You are hereby requested to send us an amount of Rs.2,24,73,580/- which is total amount of both the BG's duly encashed through Demand Draft drawn in favour of M/s.Western Coalfields Limited payable at Nagpur.

On receipt of DD for the above amount, the original Bank Guarantees shall be returned to you.

Yours faithfully,

Sd/-

17.2.11

General Manager (Civil Incharge)

Copy to information to :

1. Director (Tech) P & P
2. Director (Fin)

Perusal of the contents clearly reflect that there is no demand in writing as envisaged by the Bank Guarantees in question. What is the exact amount i.e. claimed by the appellant, which according to it,

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has become due and payable from the respondent no.1, has not been stated. In fact, there is no assessment of the amount which is said to have become due and payable in terms of the Bank Guarantees. It is not stated as to whether such amount has become due and payable for the reasons of failure/negligence in performing any of the specified terms and conditions contained in the contract between the appellant and the respondent no.1. The cause of action for seeking enforcement of the obligation on the part of the respondent no.2 Bank to make the payment of the amount covered by the Bank Guarantees, has not at all been disclosed. The claim for seeking enforcement is also not in the manner prescribed under the contract of Bank Guarantees. There is nothing to show that the events specified for invocation of Bank Guarantees have occurred. Hence, the invocation is not in accordance with the terms and conditions prescribed, the same is, therefore, bad and unenforceable. It is not a case of mere reference to the terms of the contract entered between the appellant and the

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respondent, but it is a case where the appellant Company is required to process its claim by assessing the amount due and payable by the respondent no.1 for the reason of failure/negligence to perform the terms and conditions contained in the contract, which forms a condition precedent to seek enforcement of Bank Guarantees. It is not a case of conferment of an unfettered right to demand immediate payment upon the appellant.

24) The requirement of unconditional payment of the amount of Bank Guarantee without any demur, has nothing to do with the compliance of the conditions of Bank Guarantees and it only prohibits the respondent no.2 Bank from raising any dispute as to compliance or fulfillment of the terms and conditions of the contract between the appellant and the respondent no.1 Company. The respondent no.2 Bank cannot insist for proof of failure or negligence of respondent no.1 Company in performing the terms and conditions contained in the contract. It is in this

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background that the Condition No.1 has been incorporated in the Bank Guarantees agreeing, that the appellant Company shall be the sole judge as to whether the said contractor has failed/neglected in performing any of the terms and conditions of the said contract and the decision of the appellant Company in this behalf shall be binding upon the respondent no.2 Bank. Hence, on the basis of condition no.1 in the Bank Guarantee it cannot be urged that it is an unconditional Bank Guarantee and confers an unfettered right upon the appellant to invoke the Bank Guarantees and to demand immediate payment.

25) Shri A.M.Gordey, the learned Senior Counsel appearing for the appellant, has invited my attention to the para-7 of the written statement, which is reproduced below--

***“Para-7) :** The defendants submits that the plaintiff only has carried out the work to the extent of Rs.595.93 Lakhs and the work to that extent of*

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Rs.799.86 Lakhs is still incomplete which has to be awarded to another contractor and considering the inflation the said cost is assessed at Rs.1182.52 Lakhs approx and as such the additional expenditure is arrived at Rs.382.66 Lakhs which is legally recoverable from the plaintiff and as such to secure the amount from the plaintiff, the Bank Guarantees are invoked. It is worthwhile to submit that the said figure is tentative and is likely to increase manifold. The defendants have also not calculated the damage that may be caused due to the delay in completion of the project and if all the said assessments are made, the amount recovered is nothing but pea-nuts comparing to the size of the work awarded to the plaintiff."

It is urged that it is the amount of Rs.382.66 Lacks, which has become due and payable by the respondent no.1 for the reason of failure/negligence in performing the terms and conditions in the contract. Prima-facie, it is not possible to accept this argument for several reasons. Firstly, this is not the demand in writing reflected in the letter dated 17.2.2011 invoking the Bank Guarantees which is already reproduced above.

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Secondly, it is an undisputed factual position, that the invocation of the Bank Guarantees is not on the ground that the respondent no.1 has failed to complete 60% of work. On the contrary, specific stand is that non-completion of 60% of work is totally irrelevant for the purposes of the controversy involved in the case. Thirdly, the finding recorded by the Trial Court about the failure of the appellants to discharge their obligations in respect of four items as are specified in para-10 above, has not been assailed along with the further finding that the appellants and the State Government are unable to remove the hindrances so as to enable the respondent no.1 to complete the work. Fourthly, unless the hindrances are removed by discharging the obligations by the appellants and the State Government, it may not be possible for any other contractor to complete the remaining incomplete work to the extent of 60% of work. Fifthly, the contract to complete the balance 60% of work is yet to be awarded to any other contractor and lastly the amounts so assessed, is not

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for the reason of the alleged failure/negligence on the part of the respondent no.1 in performing the terms and conditions of the contract.

26) Shri A.M.Gordey, the learned Senior Counsel appearing for the appellants and Shri J.P.Pendse, the learned Counsel for the respondents have taken me through the judgments relied upon by Shri A.M.Gordey, the learned Senior Counsel, which are listed in earlier paras and delivered by the Apex Court and by this Court. In all these judgments, the finding is recorded that the Bank Guarantees in question were unconditional and in the light of such proof of fact, that the Apex Court has laid down the principles for grant of injunction in the matter of invocation of the Bank Guarantees, which are contained in para-14 of the decision in the case of **Himadri Chemicals Industries Limited Vs. Coal Tar Refining Co., (2007) 8 SCC 110**, which is reproduced below--

"Para-14 : From the discussions made hereinabove relating to the principles

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for grant or refusal to grant of injunction to restrain enforcement of a bank guarantee or a letter of credit, we find that the following principles should be noted in the matter of injunction to restrain the encashment of a bank guarantee or a letter of credit:

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

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

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

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

(v) Fraud of an egregious nature which would vitiate the very foundation of such a bank guarantee or letter of

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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."

There cannot be any dispute about the proposition of law laid down by the Apex Court in the aforesaid judgment, which follows several earlier judgments of the Apex Court. The law of precedents is well settled. A decision is an authority for what it actually decides and not for what logically follows from it. Every judgment must be read as applicable to the particular of facts proved or assumed to be proved and the exposition of law therein, is governed or qualified or controlled by the facts, which are held to be proved. The judgment is required to be understood in the light of the facts of that case and no more can be read into it, then what it actually says. Once it is held in the facts of the present case that it is a contingent contract of Bank Guarantees, then the law down by the Apex Court in

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the judgments relied upon by Shri A.M.Gordey, the learned Senior Counsel, ceases to apply.

27) The contention of Shri A.M.Gordey, the learned Senior Counsel, is that the respondent no.1 is not competent to make any grievance about the non-fulfillment of the terms of the Bank Guarantees for the reason that he is not a party to the contracts of Bank Guarantees. According to him, it is only the respondent no.2 Bank which can make a grievance about non-fulfillment of the terms of the Bank Guarantees. He submits that the respondent no.1 is neither a person aggrieved nor has any *locus standi* to complain about the violation of the terms of the Bank Guarantees. The contention cannot be accepted. The respondent no.1 is the principal debtor within the meaning of Section 126 of the Contract Act. It is at his instance that the conditional Bank Guarantees have been furnished by the respondent no.2 Bank in favour of the appellant creditor. It is the liability of the respondent no.1 which is being discharged by

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the respondent no.2 Bank. Hence, the respondent no.1 has right to know and complain about the non-fulfillment of the conditions of the Bank Guarantees. Merely because the respondent no.2 Bank has not raised any objection about non-fulfillment of the terms of the Bank Guarantees, that will not prevent the respondent no.1 from raising any objection in respect of it. Ultimately, the respondent no.2 would obviously recover the amount that shall be paid to the appellant, from the respondent no.1. Hence, the respondent no.1 is competent and has locus to challenge the invocation of the Bank Guarantees by the appellants.

28) Now, coming to the contention of Shri A.M.Gordey, the learned Senior Counsel, that there is failure to comply with the conditions regarding submission of valid Bank Guarantees of a Nationalized/Scheduled Bank by way of performance/additional performance security, it is not in dispute that the respondent no.1 has submitted

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two fake Bank Guarantees of non existent Bank namely M/s.Mahesh Merchant Bank Limited, Chandrapur, on 10.10.2007. The first Bank Guarantee of Rs.69,79,000/- was by way of security for performance of contract towards 5% of value of awarded contract and the another was for Rs.1,54,94,580/- towards additional performance security deposit and retention money to be recovered from the running bills. Undisputedly, these two Bank Guarantees have been substituted by two fresh Bank Guarantees of the same amount on 19.2.2009 issued by the respondent no.2 Oriental Bank of Commerce, a Nationalized Bank, which are valid upto 19.11.2011.

29) The claim of the respondent no.1 plaintiff is that his Power of Attorney obtained fake Bank Guarantees and submitted it to the appellant and as soon as it was discovered, the respondent no.1 on his own submitted fresh Bank Guarantees dated 19.2.2009 of the Nationalized Bank. The case of the appellant is that the fact of submission of fake Bank

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Guarantees was discovered by the appellant. Keeping aside such dispute at this stage, the fact remains that the appellant has accepted the submission of fresh Bank Guarantees, which are valid and operating till 19.11.2011 and the penal interest of Rs.16,85,220/- @ 18 % per annum on the total amount of Bank Guarantees of Rs.2,24,73,580/- has been recovered from the respondent no.1 for the period five months from 10.10.2007 to 19.2.2008. The termination of contract is by letter dated 16.9.2010 for the reason of furnishing fake Bank Guarantees of the non existent Bank by the respondent no.1. Though the discovery about the submission of fake Bank Guarantees was on 19.2.2009 or may even be prior to that, the termination is after lapse of 17 months. The Bank Guarantees have not been invoked at the time of termination of contract on 16.9.2010, but it is after a lapse of five months on 17.2.2011. Thus, prima-facie it is a case of forgiveness and recovery resulting into condonation of the violation of the said term under the contract without resulting any

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financial loss or implications to the appellant.

30) The Trial Court has prima-facie accepted the case of the respondent no.1 plaintiff that the act of submitting fake Bank Guarantees was done by the Power of Attorney holder and as soon as it came to the notice of the respondent no.1, he voluntarily replaced the same with valid Bank Guarantees of a Nationalized Bank i.e. the respondent no.2. The finding is recorded that the extension of the period of such Bank Guarantees has also been accepted by the appellant and at this stage, it cannot be said that the fake Bank Guarantees were furnished only with a view to obtain the work. The Trial Court has held that the appellants have covered the penal interest on account of the submission of the Bank Guarantees for a period of five months and the criminal investigation pending against the respondent no.1 will take its own course. No fault can be found with such a view taken by the Trial Court.

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31) The entire conduct of the appellant and the conspectus of facts depict that the invocation of the Bank Guarantees is, prima-facie not for the purpose or the reason stated in the Bank Guarantees, but is for some extraneous reasons, may be to cover up the lapses on the part of the appellant in performing their obligations. The contention of Shri J.P.Pendse, the learned Counsel for the respondent no.1, that the invocation of the Bank Guarantees could have been only during the subsistence of contract or at the most while terminating the contract on 16.9.2010, sounds correct. Undisputedly, the invocation of the Bank Guarantees is after lapse of five months from the date of termination of contract. Prima-facie in my view, the invocation of the Bank Guarantees much after the date of termination of contract, is an after thought and not bonafide. The Trial Court has recorded the finding that there is no fault on the part of the appellant, in delay caused in completion of the work and it is the appellants/defendant nos.1

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and 2 and the State Government, who were unable to remove the hindrances as a result of which the respondent no.1/plaintiff could not execute the work. The Trial Court has held that in such a situation, there is no question of recovery of any damages from the security deposit in respect of which the Bank Guarantees have been furnished and refusal to grant an injunction would result in frustrating the claim of the respondent no.1/plaintiff. In the background of the facts of this case, I do not find any fault with such a finding recorded by the Trial Court.

32) Once it is held that the Bank Guarantees are conditional or contingent and enforceable only upon happening of certain events and that those events have not yet happened, the Division Bench of the Orissa High Court in its judgment in National Aluminium Co's case cited supra, has held that the violation of the terms of the guarantee can be regarded as species of the same genus as fraud, which

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disentitles a beneficiary to enforce the Bank Guarantees. Once it is held that the invocation of the Bank Guarantees is not for the purposes or the reasons mentioned in the Bank Guarantees, the refusal to grant an injunction would result in causing an irretrievable injury to the respondent no.1 as he would be deprived of huge amount of Bank Guarantees for the purposes of his business. Prima-facie, it would amount to an unjust enrichment of the appellants/defendant nos.1 and 2. Hence, no fault can be found with the order of injunction passed by the Trial Court. However, it will be with a rider that one month before the expiry of the validity period of both the Bank Guarantees, the respondent no.1 shall produce renewal of validity period of Bank Guarantees, during the pendency of the suit. If such renewal is not produced before the Trial Court, prior to the period of 30 days of the expiry of the validity period, the order of injunction granted by the Trial Court and confirmed by this Court, shall stand automatically vacated without further orders

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from Court and any payment, if any, made by the Bank to the appellants/defendant nos.1 and 2 shall be subject to the decision in the suit. In such eventuality if the ultimate decision in the suit goes in favour of the respondent no.1/plaintiff, then there shall be an order of refund with interest @ 6% per annum from the date of receipt of payment by the appellants/defendant nos.1 and 2.

O R D E R

For the reasons stated above, the appeal is partly allowed. The order of injunction passed on 21.2.2011 and confirmed on 5.4.2011, by the Third Joint Civil Judge, Senior Division, Nagpur, in Special Civil Suit No.236 of 2011 is maintained subject to the condition that during the pendency of the civil suit, the respondent no.1 shall renew the Bank Guarantees in question, 30 days before the expiry of its validity period and failure to produce, the extension/renewal of validity period shall result in automatically vacating the order of injunction passed by the Trial

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Court, without reference to the Court. No order
as to costs.

JUDGE

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