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

% **Reserved on: 12th February, 2018**
Pronounced on: 27th February, 2018

\+ **O.M.P.(I) (COMM.) 201/2017, IA No.6260/2017, 7869/2017**

VIJETA PROJECTS AND INFRASTRUCTURE LTD.

..... Petitioner

Through : Mr.Sandeep Sethi, Sr. Adv. with Mr.Vimal Kirti Singh, Mr.Siddhartha and Ms.Pooja Dhar, Advs.

versus

TATA POWER COMPANY LTD.

..... Respondent

Through : Mr.Dhruv Mehta, Sr. Adv. with Ms.Ranjana Roy Gawai, Mr.Krishna Keshav, Mr.Arjun Asthana and Ms.Rishika Raha, Advs. for R-1
Ms.Manjula Gandhi and Mr.Shivanshu Kumar, Advs. for Bank of India

CORAM:
HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. This petition is under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred as 'the Act') restraining the respondent Tata Power Company Ltd. for invoking the bank guarantees being No.49951PEBG130007 for an amount of Rs.4,29,00,000/- and No.49951PEBG130006 for an amount of Rs.4,00,00,000/-, submitted

through Bank of India, Branch Sahjanad Chowk, Birsa Raj Marg, Harmu, Ranchi, 834012, Jharkhand, India, as also from taking any other coercive action.

2. On 19.5.2017 the Court passed the following order :

> *3. Mr Sethi, learned senior counsel for the petitioner has referred to the bank guarantees in question (BG No. No.49951PEBG130007 for an amount of Rs.4,29,00,000/- and BG No.49951PEBG130006 for an amount of Rs.4,00,00,000/-) and has drawn the attention of this Court to para 3 of the said bank guarantees (identically worded in both the bank guarantees) which reads as under:-*
>
> > *"3.0 In consideration thereof, we, Bank of India, Ranchi Mid Corporate Branch, Sahjanand Chowk, Harmu, Ranchi having our registered office at "Star House" C-5, G-Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051 hereby irrevocably and unconditionally guarantee to pay to you on demand and without demur and without reference to "the Vendor" such amount or amounts not exceeding the sum of `4,29,00,000/- (Rupees four crore twenty nine lakhs only) on receipt of your intimating that "the Vendor has not fulfilled his contractual obligations. You shall be the sole judge for such non-fulfilment and "the Vendor" shall have no right to question such judgment."*
> >
> > *xxx*

6. Be that as it may, it is ex facie, apparent that the letter of invocation is not in terms of the bank guarantee inasmuch as there is no assertion by the respondent "that the vendor has not fulfilled his contractual obligations".

7. It is well settled that a bank guarantee cannot be invoked except in terms thereof (see Hindustan Construction v. State of Bihar: (1999) 8 SCC 436 and Jyoti Structure Ltd. V. Dakshinanchal Vidyut Vitran Nigam Ltd. And Ors.: 2016 SCC OnLine Del 5035.)

3. Notice of this petition was issued and the respondent was restrained from invoking the bank guarantees. The learned senior counsel for the petitioner herein has raised the following issues:-

(a) *the invocation of the bank guarantees was not in terms of the contract with the bank as earlier an MOU was entered into between the parties on 3.3.2010 and guarantees were given under MOU but later the MOU was brought to an end and guarantees were returned and instead the Service agreement dated 10.3.2013 was entered into between the parties and fresh bank guarantees were executed under the service agreement dated 10.7.2013. However, the respondent now intends to encash the bank guarantees given under the Service Contracts against its claims based on the MOU dated 3.2.2010;*

(b) *the service agreement was terminated not on the ground of any default of the petitioner but due to coal blocks being cancelled by the Supreme Court. The agreement between the parties was the petitioner was to arrange 1200 acres of land near the coalmines to set up a power plant for the respondent but since the coal block was cancelled, the agreement was frustrated; and*

(c) *the respondent repeatedly asked the petitioner to extend the bank guarantees saying only in the event of*

not keeping it alive they would invoke it but instead invoked it without the consent of the petitioner.

4. Learned counsel for the petitioner referred to various documents to bring home his point viz. the bank guarantees were not invoked in terms of the contract. He referred to two bank guarantees for Rs.4.29 crores and Rs.4 crore respectively in respect of service agreement dated **10.7.2013** were to be valid *till the date of achieving minimum contiguity of 50 acres within overall land of 500 acres under the service agreement or till validity of the guarantee whichever is earlier* and secondly *to be valid till the date of possession of the entire land required for the project or till the validity of the guarantee whichever is earlier*.

5. One of the terms of the guarantee was the respondent to intimate in its letter of invocation *the vendor has not fulfilled his contractual obligations*. The learned counsel for the petitioner has referred to e-mail dated 11.5.2017 sent at 12:39:05 hours written by bank to the petitioner, as under:

> *Respected Sir/Mam,*
>
> *Kindly find the attached letter of invocation and scanned BG copies. Request you to kindly encash the same and credit the amount.*
>
> *Thanks*
>
> *Regards,*
>
> *Pravin Chaudhary*

6. Learned counsel for the petitioner also refer to a letter dated 12.5.2017 written by the respondent to the Branch Manager, Bank of India attached to email dated 11.05.2017 sent at 12:39:05 and it is as under :

Dear Sir,

You have issued the below-mentioned Bank Guarantee on behalf Vijeta Projects & Infrastructure Ltd.

BG #	*Amount*	*Expiry*	*Claim Date*
49951PEG130007	*4,29,00,000/-*	*08.06.2017*	*08.09.2017*
49951PEG130006	*4,00,00,000/-*	*08.06.2017*	*08.09.2017*

We have separately requested the party to extend the bank guarantee before expiry of the same. In the absence of any other communication from our end, you may treat this letter as an encashment request and effect payment to us of the guarantee amount forthwith to our following Bank a/c.

Beneficiary Name : The Tata Power Co. Ltd.
Bank Name : HDFC Bank Ltd.
Branch Name : Fort branch, Mumbai
Account No. : 00600110000763
IFSC Code : HDFC0000060

In case you receive confirmation of extension of the bank guarantee from our end on or before the date of expiry our encashment notice be considered as withheld. It will stand withdrawn as soon as extended BG is received by us.

Yours faithfully,

Authorized Signatory

7. Then an e-mail dated 15.5.2017 at 11.48 AM from respondent to petitioner :

> *Respected Sir/Mam,*
>
> *Kindly find the attached BG invocation request letter. Request you to kindly proceed further for encashment and credit the amount to our account. Required documents are attached herewith.*
>
> *Thanks*

8. Then an e-mail dated 15.5.2017 written by the bank to the petitioner herein which is as under :

> *Respected Sirs/ Madam*
>
> *Please refer trailing email received from TATAPOWER.*
>
> *It appears that, the benefeciary has invoked the BG worth Rs. 8.29 Crores.*
>
> *Please arrange to remit the funds at your earliest.*

9. Learned counsel for the petitioner also referred to a letter dated 15.5.2017 at 5:36:12 from respondent to bank which is as under :

> *Respected Sir/Mam*
>
> *Kindly ignore the attached mail sent you earlier regarding the BG invocation. Further updates will be sent to you as and when required.*

Thanks

10. It is submitted by the learned Senior counsel for the petitioner besides the above documents no other document was received by the petitioner and hence was not filed with the petition and since none of the e-mails/letters above show the petitioner has not fulfilled its obligations, the bank did not encash the bank guarantees and rather intimate this fact to the petitioner and the petitioner then came to this Court and obtained an interim order. It is submitted the email dated 15.05.2017 at 11:48 hours having an attachment also could not be opened by the bank and hence the letter attached to the said email could not be filed which now has been filed by the respondent to allege the petitioner has concealed the said letter and obtained an interim order and the courier receipt annexed as Annexure R-1 (colly) show the said letter of invocation was received by the bank on 18.05.2017 at 4:25 hours but whereas the petition was filed on the same date itself.

11. The learned senior counsel for the petitioner referred to the various terms and conditions of MoU dated 03.02.2010 to say in the said MoU there was a time lag of purchasing of 1200 acres of land which the petitioner had agreed to purchase for the respondent in different tranches. The agreement had a duration of 25 months and it also gave the mode of making payment in advance. The agreement could have been extended at the option of the respondent herein but could be terminated if either party commits a material breach of its obligations or if the petitioner failed to execute the sale deed of first tranche of land 300 acres; or 1200 acres by expiring of third purchase period or failure to execute the sale deed etc.

and in case the entire land was not purchased by the petitioner then the petitioner was to refund the advance payment to the respondent and would purchase back the entire land if the sale deeds have not been executed.

12. There is no controversy the said MoU expired on 03.02.2013 by afflux of time and the bank guarantees which were given by the respondent to the petitioner were returned. It was only thereafter service agreement dated 10.07.2013 was executed. The service agreement do clarify *as per the MoU the petitioner has transferred 338.4 acres of land in favour of the respondent and to speed up the land acquisition process both the parties agreed to enter into this service agreement in place of MoU dated 03.02.2010 wherein the role of the petitioner was left only to liaison work and of documentation for the sale deed of various lands*. Two performance guarantees, as aforesaid, one of Rs.4.9 crores and another of Rs.4 crores were given by the petitioner. The learned counsel for the petitioner referred to a letter dated 06.08.2015 of the respondent stating interalia the cancellation of coal block project and the respondent was not inclined to procure more land hence the contract was frustrated. It is argued since the MoU had come to an end the respondent could not have claimed any amount towards it, especially when the bank guarantees qua such MoU have already been returned after entering into the service agreement dated 10.07.2010. It is further argued as per minutes of meeting dated 11.12.2015 between the petitioner and the respondent the amount payable by the petitioner under MoU was around (Rs.28,80,00,000-Rs.21,93,96,187) Rs.6,86,03,813/-. It is alleged there

is no dispute the petitioner has achieved minimum contiguity of 50 acres within overall land of 500 acres under the service agreement and hence there was no occasion for the respondent to encash the bank guarantees since it was pertaining to the Service Agreement and not pertaining to MoU which has come to an end by efflux of time. The learned counsel for the petitioner referred to the *Gangotri Enterprises Ltd. vs. Union of India* 2016(11) SCC 720 to highlight his contention the bank guarantees could not be encashed in lieu of dues outstanding against some other contract. Para 40 of the judgment is relevant and it runs as under:

> *"**40**. On perusal of the record of the case, we find that firstly, arbitration proceedings in relation to the contract dated 22.08.2005 are still pending. Secondly, the sum claimed by the respondents from the appellant does not relate to the contract for which the Bank Guarantee had been furnished but it relates to another contract dated 22.08.2005 for which no bank guarantee had been furnished. Thirdly, the sum claimed by the respondents from the appellant is in the nature of damages, which is not yet adjudicated upon in arbitration proceedings. Fourthly, the sum claimed is neither a sum due in praesenti nor a sum payable. In other words, the sum claimed by the respondents is neither an admitted sum and nor a sum which stood adjudicated by any Court of law in any judicial proceedings but it is a disputed sum and lastly, the Bank Guarantee in question being in the nature of a performance guarantee furnished for execution work of contract dated 14.07.2006 (Anand Vihar works) and the work having been completed to the satisfaction of the respondents, they had no right to encash the Bank Guarantee."*

13. I have heard the argument of the senior counsel for the petitioner. A perusal of the documents would reveal the e-mail dated 11.05.2017 sent at 12:39:05 hours to the bank by the respondent attached to it is the letter of invocation and scanned bank guarantee copies and it requested the bank to encash the same and credit the amount. The letter dated 11.05.2017 is also annexed giving details of the bank guarantees to be encashed, giving the beneficiary name, bank name, branch name, account number and IFSC code by the respondent to the bank and also requested it in case the bank guarantees are not extended before the expiry, this e-mail/letter would be treated as request for encashment and payment be made in the name of the beneficiary in the bank as stated in the letter. Though at about 05:36:12 hours the respondent yet wrote an e-mail and asked the bank to ignore it till further updates are sent by the respondent to the bank. A fresh invocation made vide e-mail dated 15.05.2017 at about 11.48 AM having attachment could not be opened by the bank. Though the bank wrote to the petitioner the following letter on receipt of the e-mail dated 15.05.2017 which is as under :

> *"Respected Sirs/ Madam*
> *Please refer trailing email received from TATAPOWER.*
> *It appears that, the beneficiary has invoked the BG worth Rs. 8.29 Crores.*
> *Please arrange to remit the funds at your earliest."*

14. The stand taken by the bank viz., files were corrupt and its stand taken in its reply to the IA No.7869/2017 in paras No.6 **(c)** and **(d)** are relevant and its notes :-

> *"**c)** further, on 15.05.2017 at 05.36 hrs., Bank of India again received an e-mail from the Respondent - Tata Power Company Limited, stating to ignore the earlier mails sent to us regarding invocation of the Bank Guarantee and we would be further updated, as and when required, by the Respondent. As such, Bank of India- proposed Respondent No.2 ignored the mail dated 11.05.2017 and 12.05.2017 and closed the matter. A copy of the said e-mail dated 15.05.2017 at 05.36 hrs. is annexed hereto as Annexure C.*
> ***d)** again, on 15.05.2017 at 11.48 AM, Bank of India received an e-mail from the Respondent - Tata Power Company Limited allegedly invoking the Bank Guarantee on the basis of alleged letters for invocation of the said Bank Guarantee. In the said e-mail although the alleged letter for invocation of the Bank Guarantee along with other requisite documents were stated to be attached, however, the said attachments did not open with Bank of India for the reason "A POLICY VIOLATED FILE WAS DETECTED AND REMOVED.TXT". As such, the Bank of India, pending further action, as an abundant precaution forwarded the said mail to the Petitioner and requested it to arrange for the remittance of funds provided under the said Bank Guarantees. **However**, as the alleged invocation was not clear and as per the terms of the said Bank Guarantees, Bank of India - proposed Respondent No.2 did not honour it. A copy of the said e-mail dated 15.05.2017 at 11.48 AM is annexed hereto as Annexure D."*

15. Now, the question is if the attachment were not opened then how bank authorities came to know the invocation was not as per the terms of the bank guarantees and why did they intimate the petitioner to arrange

the funds. The record shows the respondent even sent an intimation to the bank through the courier as alleged in reply to the main petition in para No.3, which notes as under:-

> *"3.As explained hereinafter in detail, the Petitioner had breached its contractual obligations under the MOU dated 03.02.2010 and Service Agreement dated 10.07.2013. In view of the same, the Respondent vide its email dated 11.05.2017, addressed to Bank of India, Ranchi MCB, invoked the PBG(s) furnished under clause 1.4 (f) & (g) of the Service Agreement dated 10.07.2013 and attached a letter of invocation of PBG(s) dated 12.05.2017, with the email dated 11.05.2017.* ***However****, the invocation of PBG(s) by the email dated 11.05.2017 was subsequently withdrawn by the Respondent on 15.05.2017 and a fresh email dated 15.05.2017 was addressed to Bank of India, Ranchi MCB invoking the PGB(s) furnished under clause 1.4 (f) & (g) of the Service Agreement dated 10.07.2013 and attached a letter of invocation of PBG(s) dated 12.05.2017, along with the email dated 15.05.2017. It is pertinent to mention here that the above said fresh invocation letter dated 12.05.2017 attached with the email dated 15.05.2017 was also sent via courier, bearing Waybill No.33722731976, to the banker on 15.05.2017 which was duly received by the banker on 18.05.2017."*

16. Despite the courier being duly received by the bank on 18.05.2017 it did not encash the bank guarantee and an injunction was granted on 19.05.2017 and hence urged by the respondent the bank was rather in collusion with the petitioner. The fresh letter dated 12.05.2017 of invocation/encashment of the Bank Guarantees issued to the Bank of India on behalf of the petitioner notes the *vendor has not fulfilled his*

contractual obligations. (Page 41 of the reply to main petition). The proof of delivery of such letter of BLUE DART DHL shows it was delivered on 18.05.2017 at 04.25 PM to the Bank but despite this, the bank did not encashed the bank guarantee but waited till 19.05.2017 till the stay was granted.

17. I would like to refer to the rejoinder of petitioner herein and at its page No.40 the bank rather had written a letter dated 15.07.2017 to the petitioner wherein they *interalia* had stated the following:-

> *"d. On 15.05.2017, we have received the email having date 15.05.2017 at 5.36 hrs, having subject ignore the mail and narration as 'Kindly ignore the attached mail sent to you earlier regarding the BG invocation. Further updates will be sent to you as and when required'. Therefore we have ignored the mail dated 11.05.2017 and 12.05.2017 and treated the matter closed.*
> *e. On 15.05.2017 we have received the mail sent on 15.05.2017 at 11.48AM with subject BG invocation request along with three files having the file names as 'A_POLICY_VIOLATED_FILE WAS_DETECTED_AND_REMOVED.TXT'. Thus the invocation was not clear and was not clear and was not as per the terms of guarantee."*

18. Hence, all this show that the bank did not act fairly and despite the receipt of the letter by courier they did not invoke the Bank Guarantee till 19.05.2017 when the interim order was granted, hence the petition needs to be dismissed at the threshold on this score only.

19. Yet another issue, though not relevant in the context, but since raised is if there could be second invocation of the Bank Guarantees. The High Court of Punjab and Haryana i*n M/s International Transmission*

Limited through its authorised representative Raghunath Madhukar Gawli vs. ISOLUX Corsan India Engineering and Constructions Private Limited & Another FAO (CARB) No.3/2017 (O&M) decided on 28.09.2017 had observed :-

> *"6. Mr. Mittal, however, made an oral application to restrain payment even pursuant to this fresh letter of invocation dated 13.09.2017. He submitted that second invocation of a guarantee is not permissible. According to him the guarantee having been invoked once, the first respondent's right to invoke the guarantee stood exhausted. Though this application was without amending the pleadings we entertained it.*
> *7. There is nothing in principle or in law that prevents a creditor from invoking a guarantee more than once. It often happens that by an error the language of the letter invoking the guarantee is not strictly in terms of the guarantee itself. The creditor is thereby not prevented from rectifying that error. To restrain a subsequent invocation of a guarantee, it would be necessary to establish that the second or subsequent invocation had itself prejudiced the principal debtor i.e. the appellant. In the present case nothing to this effect has been indicated. If the invocation is fraudulent or if special equities arise in favour of the principal debtor, he would be entitled to an injunction restraining the invocation of the guarantee. The mere fact that the guarantee had been invoked earlier does not render the subsequent invocation void. The cause of action to invoke a guarantee is not extinguished once it is invoked."*

20. Lastly, the learned senior counsel for the petitioner raised concern over the fact the amount due under the Memorandum of Understanding is claimed under the Service Contract which per terms of bank guarantee is

illegal. It is an admitted fact the respondent intended to buy different land admeasuring 900 to 1200 acres so they appointed the petitioner to purchase the land for it for taking requisite permissions; to transfer immovable title of the land in favour of the respondent; large sums were given to the respondent and under the MOU some 388 acres of land was given to the respondent. There was later an amendment to the MOU as the respondent wanted the contiguity of the land, hence Service Agreement was entered into as respondent wanted direct transfer of the land in their name. The Service Agreement dated 10.07.2013 though replaced the MOU dated 03.02.2010 but was in its continuity, since delays were taking place due to various decisions of the Supreme Court, so a letter of closure was issued and reconciliation of the dues was done.

21. Clauses No.5 and 6 of the Service Agreement dated 10.07.2013 is relevant and it runs as under :

> *"5. As per the above MoU, First Party transferred 338.4114 acres of Land in Favor of Second Party.*
>
> *6. To speed up the land acquisition process, Both Parties mutually agree to enter in to the service agreement in place of the Memorandum of Understanding dated 3rd February, 2010."*

22. Though the agreement along with all its schedules constitute an understanding between the parties and it superseded the Memorandum of Understanding but the clause above would show it was merely an extension of the earlier MOU.

23. If one may peruse the letter dated 6th August, 2015 written by the respondent to the petitioner it is in reference to both the MOU dated 3rd February, 2010 and the Service Agreement dated 10.07.2013 and it notes:

> *Dear Mr.Singh ,*
>
> *xxx*
>
> *You are requested to submit your final claim with supporting documents of technical & financial reconciliation, for full & final settlement of the Contract, within 16 days from the date of this letter.*
>
> *Please consider this as a formal notice for closure of this contract.*
>
> *Thanking you,*
>
> *The Tata Power Company Limited*

24. The petitioner then authorised S/Sri Lal Dharmendra Nath Shah Deo, Vijay Bahadur Singh, Anup Shah Deo, Supryo Chatterjee(CS), Kumar Saurav and Paraveen Kumar (CA) as well as I.B.Jha, advisor. The reconciliation was done between the parties and the reconciliation statement is at page 152 of the reply of the respondent. Such reconciliation is signed by the representatives of the petitioner as well as of the respondent and they had settled the accounts and the net amount payable by the petitioner to the respondent was Rs.8,37,41,285/-.

25. In rejoinder of the petitioner in para 2(I)(e) it is averred:-

> *2(I)*
> *(a) to (d) xxxx*
> *(e) The reliance on the Minutes of Meeting held on 11.12.2015 regarding alleged admission of the*

> *sum of Rs. 8,37,41,285/- by the petitioner payable to the respondent is misconceived, misplaced and false. The representatives of the petitioner participating in the Minutes of Meeting on both the two dates i.e. on 02.12.2015 and 11.12.2015 had no authority to accept any financial liabilities. This is clear from letter no.VPIL/2015/515 dated 31.10.2015 (annexed as Annexure-11) of the respondent's reply at page- 150, where it is stated in no uncertain terms that "the persons to participate in the meeting were authorized on behalf of the petitioner (Vijeta Projects and Infrastructure Ltd.) to hold discussions with the respondent (Tata Power Company Ltd.). It is abundantly clear that mere signing the Minutes of Meeting held on 11.12.2015, in no way amounted to acceptance of liability of Rs. 8,37,41,285/- as contented by the respondent, especially in light of the reconciliation statement issued by the Respondent prior to this meeting, i.e., on 17.09.2014.*

26. The petitioner has thus alleged the representatives of the petitioner who participated in the minutes of the meetings dated 02.12.2015 and 11.12.2015 had no authority to accept the financial liability but I may here refer to a letter dated 16.12.2015 written by the petitioner to the respondent with subject "*claim of VPIL under MOU dated 03.02.2010 since replaced by service agreement dated 10.07.2013*." Such letter is signed by the authorised signatory of the petitioner itself. This letter itself says the MOU was replaced by the Service Agreement for reasons stated in paras 4 and 5 of the Service Agreement dated 10.07.2013 (supra). The letter is as follows:

> *Sir,*

This has to reference to your letter at Ref (1) whereunder, after summary closure of the service agreement, we were requested to submit our final claims towards full and final settlement of the contract.

In response to your above letter, we, vide our letter at Ref (2), broadly touched upon all the issues for deciding the respective right and obligation of the parties to be considered by TATA Power limited; to be followed by claim from our side.

As desired in your letter dated 06.08.15 we are now submitting herewith a claim for Rs. 11,89,82,610/- (Rs.Eleven Crore Eighty Nine lacs Eighty Two Thousand Six Hundred And Ten) being the amount toward actual expenditures as incurred by us during the execution of the MOU dated 03.02. 2010 as well as service agreement dated 10.07.2013.

We hope that our claim may be considered on due merit it deserve.

Thanking you

Your faithfully

For Vijeta Projects and Infrastructures Ltd.

27. The aforesaid letter shows the claims being made by the petitioner not only for the amount due under MOU but also under the Service Agreement in one go and it says *the service agreement was an extension of the MOU*. Further the petitioner had given a chart of cost incurred towards the land purchase as per MOU and per Service Agreement. The correspondence show the petitioner never differentiated between the

MOU and Service Agreement and this fact makes this case different from *Gangotri*'s case *where the parties entered into two contracts and for dues of one contract, the bank guarantee of another contract for which no bank guarantee was furnished were sought to be encashed*.

28. Nevertheless, these disputes are not necessary to be decided in this petition. Since the law on encashment of bank guarantees is clear as held in *Dwarikesh Sugar Industries Limited vs Prem Heavy Engineering Works (Pvt) Limited & Another* (1997) 6 SCC 450 wherein the Supreme Court observed:-

> *"21. xxxxx The general principle which has been laid down by this court has been summarised in the case of U.P. State Sugar Corporation's case as follows:*
>
> > *"The law relating to invocation of such bank guarantees in by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficial 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 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 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 the advantage, he can be restrained from doing so. The second exception relates to case 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 of the guarantee and the adverse effect of such an injunction on commercialdealings in the country."

Dealing with the question of fraud it has been held that fraud has to be an established fraud. The following observation of sir John Donaldson, M.R. in Bolivinter oil SA V. Chase Manhattan Bank (1984) 1 All ER 351, are apposite:

"...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 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."

(emphasis supplied)

The aforesaid passage was approved and followed by this court in U.P. cooperative Federation Ltd. Vs. Singh consultants and Engineers (P) Ltd. [(1988) 1 SCC 174].

22. The secondly exception to the rule of granting injunction, i.e., the resulting of irretrievable injury, has to be such a circumstance which would make it impossible for the guarantor to reimburse himself, if he ultimately succeeds. This will have to be decisively established and it must be proved to the satisfaction of due Court that there would be no possibility whatsoever of the recovery of the amount from the beneficiary by way of restitution."

29. Further this Court in *TRF Limited vs Energo Engineering Projects Limited & Another* 2017 SCC OnLine Del 7011 noted as:-

"56. It might appear on first blush that in some of the decisions of the High Courts as well as the Supreme Court a different line of reasoning has been adopted but, in fact, it does not appear to be so. In Hindustan Construction Company Limited v. State of Bihar (supra), the Court interfered with the enforcement of the BG only because of the

particular wording of the BGs involved in that case which required certain conditions to be fulfilled. Even in Gangotri Enterprises Limited v. Union of India (supra) which has extensively been referred to by Mr. Sibal, the underlying contract and the precise wording of the BGs weighed with the Supreme Court in holding that the Courts below were in error in declining to grant the injunction against the encashment of the BGs in question. It was held that every case has to be decided with reference to the facts. In Gangotri Enterprises Limited v. Union of India (supra), the facts were held to be more or less similar to the facts in Union of India v. Raman Iron Foundry (1974) 2 SCC 231. In particular, in Gangotri Enterprises Limited v. Union of India (supra), certain circumstances were noticed which persuaded the Court to proceed to grant the injunction. These were noted in para 42 as under:

> *"42. On perusal of the record of the case, we find that firstly, arbitration proceedings in relation to the contract dated 22.08.2005 are still pending. Secondly, the sum claimed by the respondents from the appellant does not relate to the contract for which the Bank Guarantee had been furnished but it relates to another contract dated 22.08.2005 for which no bank guarantee had been furnished. Thirdly, the sum claimed by the respondents from the appellant is in the nature of damages, which is not yet adjudicated upon in arbitration proceedings. Fourthly, the sum claimed is neither a sum due in praesenti nor a sum payable. In other words, the sum claimed by the*

respondents is neither an admitted sum and nor a sum which stood adjudicated by any Court of law in any judicial proceedings but it is a disputed sum and lastly, the Bank Guarantee in question being in the nature of a performance guarantee furnished for execution work of contract dated 14.07.2006 (Anand Vihar works) and the work having been completed to the satisfaction of the respondents, they had no right to encash the Bank Guarantee."

30. Thus, in view of the above submissions the petitioner fails on all the counts. The petition along with pending applications is thus dismissed.

31. No order as to costs.

YOGESH KHANNA, J

FEBRUARY 27, 2018
VLD/M