IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: June 20, 2020

\+ O.M.P. (I) (COMM)87/2020

TECHNIMONT PRIVATE LIMITED & ANR. ..... Petitioners

Through: Mr. Ritin Rai, Sr. Adv. with Ms. Shally Bhasin, Mr. Karan Luthra, Mr. Prateek Gupta, Mr. Abhipsit Misra and Ms. Kritika Bhardwaj, Advs.

versus

ONGC PETRO ADDITIONS LIMITED ..... Respondent

Through: Mr. Nakul Dewan, Sr. Adv. with Mr. K.R. Sasiprabhu, Mr. Aditya Swarup and Mr. Robin V.S., Advs.

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

J U D G M E N T

V. KAMESWAR RAO, J

1. This is a petition filed under Section 9 of the Arbitration & Conciliation Act, 1996 ('Act', for short) with the following prayers:-

"In the circumstances, it is most humbly and respectfully prayed that this Hon'ble Court may be pleased to:

(a) Restrain the Respondent from invoking and/or encashing and/or seeking extension of the following Bank Guarantees furnished by the Petitioners and consequently restrain the Respondent from acting upon or giving effect to the Impugned Communications dated 05.04.2020, 07.04.2020 and 10.04.2020;

S. No.	*BG No.*	*Date of Issue*	*Issuing Bank*	*Amount*	*Valid till*
	Advance Bank Guarantee				
1	*171020560469-LA*	*21.7.2018*	*Standard Chartered*	*Euro*	*14.04.2020*

			Bank	*4,36,367/-*	
2	*171020560450-LA*	*21.7.2018*	*Standard Chartered Bank*	*Euro 62,36,099/-*	*14.04.2020*
	Performance Bank Guarantee				
3	*464840*	*22.7.2011*	*BBVA*	*US$ 8,232,465/- Euro 4,219,234/-*	*14.04.2020*
4	*110126IBGP00064*	*26.07.2011*	*IDBI*	*INR 64,27,00,845/-*	*14.12.2019 Claim Expiry Date- 14.12.2020*
5	*DLG211/11*	*17.06.2011*	*ING NV*	*Euro 17,46,251/- USD 13,42,627/- INR 16,98,57,433/-*	*17.04.2020*

** IDBI Bank Guarantee at Sl. No. 4 in the table above is counter guaranteed by BBVA Bank vide its Counter Bank Guarantee No: 464841 dated 22.07.2011 of an equivalent amount i.e. Rs.64,27,00,845/- and with the same claim expiry date of 14.12.2020.*

(b) Direct the Respondent to deliver up to the Petitioner the originals Bank Guarantees mentioned in Prayer (a) above;

(c) Pass any such other/further order(s) as this Hon'ble Court may deem fit in the facts and circumstances of the present case and in the interest of justice."

2. The facts as noted from the record are, a Petrochemical Complex consisting of several interdependent units viz. Dual Fee Cracker Units ('DFCU', for short), the Polyethylene Unit ('PE unit', for short) the Polypropylene Unit ('PP unit', for short), a Pyrolysis Gasoline Hydrogenation Unit, a Benzene Extraction Unit, Butadiene Extraction Unit and other units

for manufacturing variety of petrochemical and allied products has come up at Dehaj.

3. For the purpose of construction and setting up of the PE unit and the PP unit, the respondent selected the petitioners as the successful bidder. Pursuant thereto, the parties herein entered into two contracts both dated September 02, 2011 for the PE unit and the PP unit respectively.

4. Under the contracts, the petitioners were required to construct, develop and successfully commissioned a PE unit and PP unit within 28 months of the execution of the contract.

5. As per Clause 3.3 of General Conditions of Contract ('GCC', for short), the petitioners were required to furnish performance bank guarantees, guaranteeing the execution and performance of the works under the contracts.

6. In terms of Clause 3.8 of the GCC, the petitioners were also required to furnish advance bank guarantee to secure the mobilization advance paid by the respondent to the petitioners for execution of the contracts. In furtherance of the above, the petitioners furnished bank guarantees to the respondent as mentioned in the prayer clause. It may be stated here that the bank guarantees were reduced from 10% to 5% of the contract value.

7. The scheduled date of completion of commissioning of both the units was on or before October 02, 2013. There is no dispute that the actual date of commissioning of the units was April 14, 2017 (in respect of PE unit) and February 12, 2017 (in respect of PP unit).

8. It is averred by the respondent that the contract included several stages, viz construction and commissioning of the PE unit and the PP unit, to carry out Performance Guarantee Test Runs ('PGTR', for short), post commissioning services for six months, providing as built drawings, supply of test reports, fulfilling of all warranty obligations.

9. It is also averred by the respondent that the contracts also contemplated that the performance of the contracts would be completed only upon issuance of Certificate of Completion and Acceptance of Works (Clause 5.10 of GCC) and Discharge Certificate (Clause 5.14). It is averred by respondent that even before achieving the mechanical completion, pre-commissioning and commissioning of the project on May 18, 2015, the petitioners issued arbitration notices under the relevant provisions of the contracts for several reliefs. However, the petitioners did not proceed with the arbitration proceedings, or sought appointment of the Presiding Arbitrator until it obtained commissioning certificate for the PP and PE units in 2017.

10. It is the conceded case of the parties that disputes and differences arose between them. The primary claim of the petitioners was for damages on account of delay on the part of the respondent in the completion and commissioning of the project.

11. The respondent had also filed counter claims contending it is entitled to liquidated damages for the delay in commissioning of both PE and PP units attributable to the petitioners and also for the losses and damages incurred by the respondent on account of defects and damages discovered in the PE unit. It is the case of the respondent in paragraph 30 of its counter-affidavit that the petitioners were in breach of their obligation to complete the PGTR of the respective units.

12. It is noted that the arbitration proceedings were finally heard between September 15, 2017 to September 18, 2017. At the time of the culmination of proceedings, the bank guarantees were alive. It appears, that as the validity of some of the bank guarantees were expiring on December 14, 2019, the respondent addressed e-mails dated December 06, 2019 to the petitioners. It

also appears, that the petitioners extended the validity of all the five bank guarantees.

13. On January 06, 2020, the Arbitral Tribunal rendered its award ('Award', hereinafter). It is the case of the petitioners, that the majority awarded an amount of Rs.162 Crores to them and dismissed the respondent's counter-claim in its entirety. Suffice would it be to state, application for clarifications were filed on March 06, 2020. The respondent filed the petition under Section 34 of the Act challenging the impugned Award. On March 07, 2020, the respondent wrote an e-mail to the petitioners asking them to extend the validity of the bank guarantees on the ground that the disputes between the parties about the obligation under the contracts are pending before the Court under Section 34 of the Act.

14. It is the case of the respondent that as the petitioners failed to extend the bank guarantees, that were expiring, the respondent, invoked the bank guarantees by e-mails dated March 09, 2020 and March 10, 2020. Aggrieved by the invocation of the bank guarantees, the petitioners filed OMP(I)(COMM) 73/2020 before this Court. The petition was disposed of by this Court on March 13, 2020. Paragraphs 5 and 6 of the order reads as under:-

> *"5. Noting the submissions, this court deem it appropriate to dispose of the petition by directing the petitioners to extend the validity of the aforesaid three bank guarantees for a period of one month within which time, the respondent shall get their petition under Section 34 listed and seek appropriate orders.*
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> *6. A question arose, as to who shall bear the expenses for extending the validity of the three bank guarantees. Mr. Nayar states, as similar claim(s) of the petitioners was also allowed in favour of the petitioner*

by the Arbitral Tribunal it should be the respondent who shall bear the cost."

15. Pursuant thereto, the petitioners filed an application in OMP(I)(COMM) 73/2020 seeking clarification of order dated March 13, 2020. The application for clarification was dismissed stating that the said order is clear. The petitioners filed an appeal challenging the orders dated February 13, 2020 and March 17, 2020 before the Division Bench, being FAO(OS)(COMM) 58/2020. It appears, the Division Bench clarified that even though the petitioners have not extended the bank guarantee provided by IDBI Bank, in view of the fact that the claim expiry period of the said bank guarantee was expiring only in December 2020, the respondent is suitably protected. The appeal was accordingly disposed of.

16. The Section 34 petition of the respondent herein being OMP(COMM) 424/2020, was listed for hearing on March 23, 2020, when this Court passed the following order: -

"1. This is a petition challenging the Award dated January 06, 2020, as corrected on February 11, 2020.

2. The award is by majority members. Mr. Dewan challenges the award on various grounds and presses for the interim relief. He also, on instructions, states that subject to the awarded amounts being paid by the petitioner to the respondents and simultaneously, the respondents furnishing bank guarantee(s) for the said amounts, the operation of the impugned award be stayed.

3. This submission of Mr. Dewan is acceptable to Mr. Sethi, on instructions.

4. Accordingly, the petitioner shall pay to the respondents, the amounts as per the award in five days. The respondents shall simultaneously, on

receipt of the amounts, furnish to the petitioner bank guarantee(s) for the amounts received. The bank guarantee(s) shall be kept alive till further orders of this Court. On such payment / receipt of the amounts, the operation of the impugned award dated January 06, 2020 as corrected on February 11, 2020 shall remain stayed.

5. The payment to be made by the petitioner to the respondents, in terms of this order shall be subject to the outcome of this petition.

6. Parties to file their written submission before the next date of hearing with advance copy to the other side.

7. Renotify on 24th September, 2020.

Dasti."

17. It is a conceded position, that the parties have implemented the order dated March 23, 2020 by discharging each other's obligation by April 21, 2020. As the validity of the bank guarantees was expiring, the respondent on April 05, 2020 wrote a letter to the petitioners and called upon them to extend the validity of the bank guarantees. The said letter was responded to by the petitioners by stating (i) the order dated March 13, 2020 only directed extension of bank guarantees (a) 464840; (b) DLG211/11; (c) 1101261BGP00064; (ii) the bank guarantees were to be extended for a period of one month to enable the respondent obtain orders in their petition under Section 34; (iii) the direction regarding extension of bank guarantee issued by IDBI stood modified vide order dated March 19, 2020 of the Division Bench, therefore there is no requirement to extend the bank guarantee; (iv) the respondent had failed to obtain any orders regarding extension of bank guarantees furnished by the petitioners in its petition under Section 34 of the Act.

18. In response to the aforesaid letter of the petitioners, the respondent vide its letter dated April 07, 2020, decided to invoke the bank guarantees on failure on the part of the petitioners to extend the same on or before April 09, 2020. The petitioners responded to the aforesaid letter of the respondent vide letter dated April 09, 2020, which was also responded to by the respondent on April 10, 2020. In any case, the petitioners filed this petition on April 12, 2020. The matter was initially listed on April 15, 2020 when this Court passed the following order:-

> *"1. This petition has been taken up by video conferencing in view of the emergent nature of the controversy involved, consequent to listing thereof having been allowed by the Registry.*
>
> *2. The petitioners, in this petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as " the Act"), seeks an order restraining the respondent from invoking or encashing the following Performance Bank Guarantees, furnished by the petitioner during the course of execution of the work contract with the respondent, as well as a direction to the effect that the petitioner would not be required to keep these bank guarantees alive any further.*
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> *3. Issue notice to the respondent, returnable on 27th May, 2020. Counter-affidavit by way of response to the OMP, if any, be filed within two weeks with advance copy to the petitioner who may file rejoinder thereto, if so advised, within one week thereafter.*
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> *4. Notice is accepted by Mr. K Sasiprabhu, learned Counsel on behalf of Respondent.*
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> *5. Though the matter was heard at considerable length, learned Senior counsel for the parties, on instructions, submit that they are agreeable to an ad interim arrangement, whereby and whereunder the petitioner*

would keep the Performance Bank Guarantees at serial nos. 1, 2, 3 and 4 in the tabular statement contained in the prayer clause in the OMP alive, till the next date of hearing, and the respondent would not take take any further steps, towards invocation of the said Bank Guarantees, till the next date of hearing, be passed. Learned Senior Counsel is agreeable, on these terms, to the invocation of the said Bank Guarantees remaining in abeyance, till the next date of hearing. Charges, for keeping the said Bank Guarantees alive till the date next of hearing, would continue as per the terms set out in the order dated 13th March, 2020 of the learned Single Judge in O.M.P. (I) (Comm) 73/2020.

6. The said submissions are noted, and the parties shall remain bound thereby."

Submissions:

19. Mr. Ritin Rai, learned Senior Counsel for the petitioners would submit that, the return of the bank guarantees sought for by the petitioners in this petition are those, which the petitioners provided to the respondent during the performance of the two contracts for the construction of PE unit and PP unit at a Petrochemical complex at Dehaj. The petitioners admittedly performed the contracts as far back as in 2017, and the respondent issued two separate Commissioning Certificates dated February 15, 2017 and April 14, 2017. It is a conceded case of the respondent as well that the plants were commissioned in 2017 and have achieved 100% capacity utilization. That apart, an arbitral Award directing the respondent to pay a sum of Rs. 201 Crores to the petitioners has already been passed. That apart, all the counter claims of the respondent as regards the performance of the contract have been rejected and the respondent has no live and subsisting claim.

20. According to Mr. Rai, the short issue that arises for consideration, in this petition is, whether the respondent who has lost the arbitral proceedings and had all its counter claims in relation to the performance of the contract rejected by the Arbitral Tribunal, can seek extension of the bank guarantees furnished by the petitioners for the performance of the contracts pending adjudication of the respondent's petition under Section 34 of the Act challenging the Award.

21. According to Mr. Rai, this issue is no longer res-integra and has been settled by this Court, inasmuch as a losing party in an arbitration cannot seek an extension of the contractual Bank Guarantees or invoke them once it has suffered an Award. Such an extension or pay demand is not only barred under Section 9 of the Act but also under Section 34 read with Section 36 of the Act. In this regard, he had relied upon the judgments of this Court in the case of ***Nussli Switzerland Ltd. vs. Organizing Committee FAO(OS) 121/2014*** and Bombay High Court in ***Dirk India Private Limited vs. MSEGC (2013) 7 Bom. CR 493.*** For the same proposition, he relied upon a judgment wherein ***Nussli (supra)*** was followed that is ***Singhania Horizons vs. HRC Engineers Estates (P) Ltd. 2016 (1) HCC (Delhi) 59.***

22. It was the submission of Mr. Rai, when a losing party cannot seek an order in Section 9 petition, it cannot seek such an order in Section 34 petition. [Ref. ***ONGC vs. Consortium of SimeDarby Engineering Sdn. Bhd. And another 2018 SCC OnLine Bom 6034***]. Mr. Rai stated under similar circumstances, this Court, during the pendency of petitions under Section 34 of the Act directed the return of bank guarantees in a petition filed under Section 9 of the Act in the case of ***Mukti Credits Pvt. Ltd. vs. Indra Prastha Power Generation Co. Ltd., OMP(I) (COMM) 113/2019.*** He also stated that the respondent demanded, the bank guarantees be extended only on the

ground of purported challenge to the final Award. According to him, the respondent in its e-mail dated March 07, 2020 did not aver that the extension is being sought in respect of an additional claim the respondent had against the petitioners. It is only later on, on April 10, 2020, the respondent has taken a stand that the bank guarantees are required to be extended as the petitioners failed to perform its obligation under the contracts. That apart, the subsequent invocation of the bank guarantees is egregious case of fraudulent invocation.

23. That apart, it was his submission that the Court vide order dated March 13, 2020, had directed the petitioners to extend the bank guarantees by a period of only one month, within which time, the respondent was to satisfy the condition of securing 'appropriate order' in its Section 34 petition, which they failed to secure. He stated, no positive direction for extension of bank guarantees could have been sought in a petition under Section 34 of the Act. In fact, it was his submission that the stay application does not refer at all to the subject bank guarantees. He qualifies his submission by stating that a petition under Section 34 of the Act is only for setting aside an arbitral Award on the limited grounds provided under Section 34 of the Act. Therefore, at the highest, even accepting the respondent's position for the sake of argument, the final Award may be set aside, even then the respondent's counter claims cannot be allowed in Section 34 petition. Therefore, according to Mr. Rai, the mere pendency of Section 34 proceedings cannot afford a ground for a party to assert that it has a dispute regarding contractual performance.

24. So, it was his submission, the respondent interpreting the order dated March 23, 2020, which only stays the operation of the impugned Award as an 'appropriate order' would amount to the respondent getting indirectly what it cannot achieve directly in a petition under Section 9 or 34 of the Act.

25. It was his submission, even otherwise the order dated March 23, 2020 was not passed on merits but on the respondent's agreement to deposit the entire awarded amount with the petitioners. The order only stayed the operation of the impugned Award, which has the effect of staying the enforcement of the Award. According to Mr. Rai, it follows that, there is no positive direction to the petitioners to keep on extending the bank guarantees at their own cost. In support of his submission Mr. Rai relied on the judgment of the Supreme Court in the case of ***Shree Chamundi Mopeds Ltd. vs. Church of South India Trust Association CSI Cinod Secretariat, Madras, 1992 (3) SCC 1.***

26. Mr. Rai also stated in the absence of any live and pending claim against the petitioners, there is no ground for the respondent to seek extension of bank guarantees.

27. That apart, he stated that the respondent wrongly contends that it has certain unadjudicated claims regarding PGTR. According to him, claims regarding PGTR have been expressly dealt by the Arbitral Tribunal in paragraphs 336 to 339 of the Award and have been rejected. Further, the respondent did not make any claims in relation to any defects in PP unit. Further, with regard to two advance bank guarantees, despite having recovered the entire mobilization advance and made no claim before the Arbitral Tribunal, their invocation is clearly fraudulent. In fact, this plea of the petitioners in paragraphs 27 to 29 of the petition has not been denied. Thus, he seeks the grant of prayers in the petition.

28. On the other hand, Mr. Nakul Dewan, learned Sr. Counsel appearing for the respondent submits that the five bank guarantees of which return is sought, are unconditional and irrevocable and out of which four have already been invoked by the respondent. According to him, contrary to the

submissions advanced by Mr. Rai, this case does not raise any important principles related to arbitration jurisprudence in India. According to him the issue is whether the petitioners have been able to demonstrate that bank guarantees should be injuncted by this Court by meeting the twin test for grant of an injunction restraining the invocation of bank guarantees. These two tests are *egregious fraud* and *irretrievable harm* on which principles there are catena of cases and which tests the petitioners have failed to meet. He justifies the invocation of the bank guarantees on the ground that the respondent has protectable interest related to performance of the contract. It was also the submission of Mr. Dewan that the petitioners cannot get the relief of return of the bank guarantees in a petition under the Section 9 of the Act as similar prayer of the petitioners was not granted by the Arbitral Tribunal and also such a relief being final in nature cannot be granted.

29. He in the alternative submitted that this Court on March 13, 2020 and on April 15, 2020 required the petitioners to extend the bank guarantees and the respondent was required to deposit the extension charges before this court. The said orders be extended till a decision is arrived at, in a petition filed by the respondent under Section 34 of the Act and in that regard, he sought an early disposal of the said petition.

30. On merits, it was his submission that two contracts between the parties is out of a USD 4.2 billion mega grassroot petrochemical project in Asia both dated September 2, 2011 for construction of Polyethylene Unit (the PE Unit) and a Propylene Unit (PP Unit) respectively. The contracts contained identical terms and obligations and were for a cumulative value of about INR 2500 Crores. Out of that the petitioners have already been paid a sum of INR 1622 Crores for PE Contract and INR 835 Crores for PP Contract approx.

31. The schedule completion date under the contract was October, 2013. However, on that date only barely 40% of the work was completed and the Project was still at the stage of construction. He stated as on date all the contracts are still valid and subsisting and the petitioners have not been discharged from their obligations under the contracts. In this regard he states the following:

1. Claims based on delays caused by the respondent were filed by the petitioners.
2. Counter-claims for (a) delays by way of liquated damages (aggregating to 5% of the contract price) and (b) defects were filed by the respondents against the petitioners.
3. The majority award held that the petitioners were entitled to their claim for delays inter alia on (a) the basis of a concept of sustained pre-commissioning which was not a concept found under the contract and (b) on an interpretation of a contractual provision which was not argued by either party. The minority award held that on plain reading of the contracts, the respondent was not liable for delays and the concept sustained pre-commissioning which was alien to the contract could not be imported to foist a contractual liability on the respondent.
4. The majority award rejected the counter-claims completely, which was not entirely agreed to in the minority award.

32. Mr. Dewan stated that in the event this Court set asides the Award in the Section 34 Petition, the respondent would be automatically entitled to invoke the subject bank guarantees for any of the breaches / non-performance and there is no requirement for an order or decree of a Court / Tribunal. At the very least the respondent would be entitled to invoke the subject bank

guarantee to recover its liquidated damages in respect of which it is settled law that there is no requirement of an order of a Court or Tribunal for a party to invoke a performance guarantee to recover liquidated damages. He stated that the bank guarantees were furnished by the petitioners in favour of the respondent in accordance with clauses 3.3 and 3.8 of the GCC and the same are required to be kept valid until the schedule completion date for the works of the contract. In this regard, he has drawn my attention to the definition of 'works' and 'scope of works' in the contracts. Further, he by drawing my attention to clause 10.14 of the GCC which stated that the petitioners are required to achieve PGTR. He stated that even if the petitioners are entitled to a claim of deemed PGTR in terms of the Award, the respondents' claims for monies to conduct the PGTR were not granted. The petitioners are nonetheless required to assist the respondent with completion of the PGTR at their costs in a contract which continues to subsist.

33. According to him, in so far as PE Unit is concerned, the PGTR has not been achieved till date which fact has been acknowledged in the Award. He qualifies his submission by stating as under:

1. The petitioners asserted before the Tribunal that they were entitled to a milestone payment of deemed PGTR.
2. The respondent asserted before the Tribunal that it ought to be allowed to complete PGTR on its own and claimed a sum of INR 111.70 million and JPY 38.14 million towards additional cost to achieve PGTR.
3. The Tribunal allowed the claim of PGTR and disallowed the respondents claim of additional costs to achieve PGTR. In this regard he has drawn my attention to Paras 336 and 337 of the

Award. He also drawn my attention to the conclusion arrived at by the minority.

34. Mr. Dewan stated that in view of the findings of the Arbitral Tribunal and in a contract which continues to subsist between the parties, the only manner by which PGTR can now be achieved would be in terms of clause 14.10 (b), which is with the assistance of the petitioners and through costs payable by them. That apart, he stated that there are other aspects of the contracts which have not been completed which is a fact that even the Tribunal recognized that the petitioners had failed to prove in the arbitration. He supports his submission by drawing my attention to Para 32 of the counter-affidavit wherein the respondent has stated that the petitioners have abandoned the contract.

35. Mr. Dewan further stated that initially on invocation of the bank guarantees, the petitioners filed OMP (I) (COMM) 73/2020 before this Court. This Court by its order dated March 13, 2020, had disposed of the petition whereby it directed that the bank guarantees be extended for a period of one month within which time, the respondent was to get its Section 34 petition listed and secure appropriate orders.

36. According to him, pursuant thereto the respondent got its Section 34 petition listed and this Court by way of its order dated March 23, 2020 stayed the operation of the Award. Therefore, the disputes between the petitioners and the respondent continued to subsist and the respondent continues to have protectable interests at this juncture.

37. It was his submission that as the respondent has secured appropriate orders in its Section 34 petition, and the validity of this bank guarantees was expiring, the respondent rightly addressed the communications on April 5, 2020 and April 7, 2020, calling the petitioners to extend the bank guarantees.

In fact, he further stated that the respondent again vide its communication dated April 10, 2020 by *inter alia* stating therein that the petitioners have not complied with their obligation as contemplated under the contract but not limited to accomplishment of PGTR in case of PE Contract. Notwithstanding the Award the petitioners are fully aware that under the contract, the petitioner's obligation to complete the PGTR remains. That apart the petitioners are liable for various defects in the commissioning of the PE Unit in respect of which the respondent has filed counter-claim aggregating to over INR 750 Crores in the arbitration proceedings. It is his submission that the entire issue in this petition needs to be considered in the aforesaid background.

38. On bank guarantees, Mr. Dewan, by drawing my attention to the bank guarantees itself stated those are unconditional bank guarantees. The bank guarantees are independent contracts between the respondent and the bank and the same do not make any reference to the contact between the petitioners and the respondents; to any pending arbitration, litigation or appeals and the fact they are irrevocable in nature. Therefore, it is his submission despite the pendency of the proceedings under Section 34, the respondent is entitled to invoke the bank guarantees. He by saying so challenges the stand of the petitioners that the invocation of the bank guarantees is not in accordance with the terms therein. In support of this submission that the court should not interfere with the invocation of unconditional bank guarantees unless a case of *egregious fraud* or *irretrievable harm* is made out, he relied upon the judgment of the Supreme Court in the case of ***Himadri Chemicals Industries Ltd. v. Coaltar Refining Company, 2007 8 SCC 110***. He also relied upon a recent Judgment of the Supreme Court on a similar proposition in the case of ***Standard Chartered Bank v. Heavy Engineering Cooperation Limited, 2019***

SCC Online SC 1638. Mr. Dewan would submit that the plea of Mr. Rai that the invocation of the bank guarantees is fraudulent as the respondent has gone behind the arbitral Award as well as the orders of this Court which required the respondent to get their petition listed under Section 34 and secure appropriate orders and the respondent has failed to secure such appropriate orders is concerned, he stated that such a submission is without any basis and the respondents continues to have disputes with the petitioners and for that reason the respondent is entitled to invoke the bank guarantees. According to him merely because an arbitral Award has been pronounced against the respondent does not mean that pending its challenge, the disputes cease to exist. In this regard he has relied upon the Judgment of the Supreme Court in ***K. Kishan v. Vijay Nirman Company Pvt. Ltd., 2018 (10) SCALE 256,*** wherein the Court has *inter alia* stated that the filing of petition under Section 34 of the Act against an arbitral award shows that a pre-existing dispute which culminates at the first stage of the proceedings in an award continues even after the award, at least till the final adjudicatory process under Section 34 and 37 has taken place. Therefore, the reliance placed by Mr. Rai on the judgment of the Supreme Court in ***Shree Chamundi Mopeds Ltd. (supra)*** is irrelevant. In other words, it was his submission that once dispute between the parties has culminated into an award and the subject matter of a challenge under Section 34 of the Act, there is a continuation of the dispute between the parties. Therefore, the distinction between a stay on the award and a stay on the operation of the award are really not relevant for this case. He highlights the fact that the invocation was necessitated because of failures on the petitioners to extend the validity of the bank guarantees until the culmination of the disputes between the parties. Therefore, the petitioners have failed to make out case for injunction on the ground of *irretrievable harm* or *injustice* or

special equities. He by relying upon the Judgement of this Court in the case of ***Indu Projects Ltd. v. Union of India, 2013 (139) DRJ 260,*** wherein it is held *inter alia* that overall judgments pertaining to the bank guarantees would show that Courts have interchangeably used the expression *special equities* with expression such as *irretrievable injury* or *irretrievable injustice.*

39. It was his submission that the Courts have consistently held that in order to make out a case for injunction on the ground of *irretrievable injury* or *special equities* an aggrieved party must be able to prove that it would be impossible to recover the amount paid out under the bank guarantee, if it ultimately succeeds in the disputes between the parties. In this regard he has relied upon the Judgment in the case of ***U.P. State Sugar Corporation v. SUMAC International Ltd., 1997 1 SCC 568***.

40. That apart it was his submission that the respondent is a Public Sector Undertaking and the petitioners will not be impeded in any manner from recovering the money encashed by the respondent under the bank guarantees if the petitioner ultimately succeeds.

41. He stated that the plea of Mr. Rai that if it is ultimately found that the invocation was wrong, the petitioners have to initiate separate arbitration proceedings to recover the monies paid out to the respondent under the bank guarantees and therefore the special equities are in their favour is an untenable argument. In this regard, he reiterated his submission that the bank guarantees are unconditional and irrevocable guarantees, invocation of which can only be rejected under the two exceptions which have been stated above. Further, the plea of Mr. Rai of irretrievable injury is also without evidence.

42. On the Judgment of ***Mukti Credits Pvt. Ltd.(supra)*** as relied upon by Mr. Rai, Mr. Dewan submitted that the said judgment cannot be binding precedent on this Court because apart from the fact that it is based on a report

by DIAC and (not the Arbitral Tribunal) which quantified a claim that does not consider Section 9 of the Act and the limitation of the powers set out therein (b)does not consider the law related to invocation of bank guarantees and the limitation of the exercise of powers by the Court in such matters.

43. On the judgments relied upon by Mr. Rai, he stated that the same are entirely misplaced. On ***Nussli (supra)***, he stated that the respondent has not filed a petition under Section 9 of the Act for the Judgment to be applicable and in any case in appeal against ***Nussli(supra)*** judgment, the Supreme Court directed for the extension of the bank guarantees pending adjudication of the dispute which was consistent with approach adopted by the Single Judge of this Court in the same case.

44. Finally, he stated that the present petition is liable to be dismissed alternatively as suggested that the orders dated April 13, 2020 and April 15, 2020 be continued till the disputes between the parties culminates with the hearing of the petition under Section 34 of the Act on a date convenient to this Court.

45. In his rejoinder submissions, Mr. Rai, contested the arguments advanced by Mr. Dewan, that the respondent is entitled to seek the extension of the Bank Guarantees for the reason, it has a fresh-claim on account of PGTR against the petitioners and Section 34 petition is pending.

46. Mr. Rai stated that all the claims that the respondent had qua petitioner's obligation to conduct PGTR were made before arbitral tribunal, which rejected them, as can be seen from the Award that the counter-claim was "*for additional costs to achieve PGTR*". He also stated that till date no new demand or claim has been made by respondent against the petitioner qua any obligations to conduct a PGTR. According to Mr. Rai, the argument is an

after thought to defend and unsustainable invocation of the Bank Guarantees. In this regard he has highlighted the following:

1. In its first mail seeking extension dated March 7,2020, the respondent referred to Section 34 petition for seeking extension of the Bank Guarantees.

2. Even subsequently, when communicating its extend or pay demand for the second time on March 05, 2020, the respondent only referred to the pendency of Section 34 petition as the basis for seeking an extension of the Bank Guarantees.

3. The reliance placed by Mr. Dewan on paragraphs 24-31 of the respondent's counter-affidavit for its new/fresh PGTR claim, do not relate to any fresh claim or refer to Clause 10.14(b) and therefore, reliance on the said clause is clearly an after-thought to somehow create a claim.

47. According to Mr. Rai, the PGTR was to be conducted within 12 months from the date of successful completion of commissioning. This according to Mr. Rai, is important because the respondent's counter-claim was filed on April, 02, 2018. In fact, according to him, no defect was raised for PP unit and the PGTR was successfully completed by the petitioner and payment for the same was made by the respondent.

48. Insofar as the reliance placed by Mr. Dewan on the judgment of the Supreme Court in the case of ***K. Kishan (supra)*** is concerned, Mr. Rai stated that the said decision is in the context of Insolvency and Bankruptcy Code, 2016 ('IBC', for short) and only deals with the concept of pre-existing dispute as defined in IBC, in respect of commencement of the insolvency process by an operation creditor.

49. He also stated that the submission of Mr. Dewan that petitioner is a foreign entity and therefore the respondent is required to be secured is a misplaced-argument. He stated, a similar argument was rejected in ***Nussli (supra).*** He also stated the plea of Mr. Dewan that the Bank Guarantees be encashed and the money thereof be deposited in the Court is also an absurd argument and need to be rejected. He reiterated the prayers in the petition.

50. Mr. Dewan also made rejoinder submissions wherein he primarily reiterated his earlier submissions in the following manner:

1. No novel issue arises in these proceedings. It is simply an issue related to injunction/return of the Bank Guarantees.

2. The test for injunction has not been made out.

3. The contractual security in favour of the respondent ought to be protected and adjudication of statutory rights given to the respondent.

4. The judgments of ***Dirk Industries (supra)*** and ***Nussli (supra)*** on which reliance is placed by Mr. Rai is totally misplaced.

51. Having heard the learned counsel for the parties and considered the record, before I deal with the submissions made by the Sr. Counsels for parties, the submissions of Mr. Rai as noted above can summed up as (i) the bank guarantees are those which were provided to the respondent during the performance of the contracts; (ii) the petitioner performed the contracts and commissioning certificates dated February 15, 2017 and April 14, 2017 have been issued and plants have achieved 100% capacity utilization; (iii) the petitioners' claims have been allowed by the Arbitral Tribunal and the counter-claims of the respondent rejected; (iv) a losing party in an arbitration cannot seek extension of the bank guarantees or invoke them once it has suffered an Award; (v) the respondent demanded the extension of validity of bank guarantees on the ground it has challenged the final Award; (vi) for the

first time, on April 10, 2020, the respondent has taken a stand that bank guarantees are required to be extended as petitioner failed to perform the contracts, which is an incorrect stand; (vii) by order dated March 13, 2020, this court directed the petitioner to extend the bank guarantees for one month within which time, the respondent was to seek appropriate orders in its Section 34 petition which the respondent failed to secure; (viii) no direction for extension of bank guarantees was given in Section 34 petition; (ix) the stay application in the petition under Section 34 of the Act does not refer at all to the bank guarantees; (x) mere pendency of Section 34 proceedings does not mean dispute regarding contractual performance exist between the parties; (xi) there is no live or pending claim against the petitioners to seek extension of bank guarantees; (xii) there were no claims regarding defects in PP Unit. Further, the claim of the respondent regarding PGTR expressly dealt with by the Tribunal in paragraphs 336 to 339 of the Award and rejected the same; (xiii) with regard to two bank guarantees, despite having recovered the entire mobilization advanced and the counter-claims before Arbitral Tribunal having been rejected, the invocation is fraudulent; and (xiv) the petitioners have to initiate separate arbitration proceedings to recover the monies paid out to the respondent under the bank guarantees and therefore the *special equities* are in their favour.

52. On the other hand, the submissions made by Mr. Nakul Dewan can be summed up as follows (i) the bank guarantees are unconditional and irrevocable, out of which four have already been invoked; (ii) this case needs to be seen and decided on the principles governing grant of injunction, restraining the invocation of the bank guarantees on the twin test of *egregious fraud* or *irretrievable harm*, which are not satisfied; (iii) the invocation of bank guarantees is justified as the respondent has protectable interest related

to the performance of the contract; (iv) the petitioners cannot get the relief of return of bank guarantees as similar prayer was rejected by the Arbitral Tribunal, more so in a petition under Section 9 of the Ac; (v) alternatively, this Court extend the orders dated March 13, 2020 and April 15, 2020 which requires the petitioners to extend the validity of the bank guarantees and the respondent shall deposit the charges in the Court till the decision of Section 34 Petition; (vi) as of today, all the contracts are still valid and subsisting and the petitioners have not been able to discharge their obligations under the contracts; (vii) merely because an arbitral Award has been pronounced against the respondent does not mean that pending its challenge, the disputes cease to exist; and (viii) if the Court set asides the Award in the Section 34 Petition, the respondent would automatically be entitled to invoke bank guarantees for any breaches / non-performance and recover its liquidated damages in respect of which it is settled law that there is no requirement of an order of Court / Tribunal.

53. Having noted the broad submissions made by the Senior Counsels it is a fact that as per the contracts, the petitioners had in terms of Clauses 3.3 and 3.8 of the GCC, had furnished performance bank guarantees, guaranteeing the execution and performance of the contract and advanced bank guarantees to secure the mobilization advance paid by the respondents to the petitioners. Out of the five bank guarantees, two are advanced bank guarantees and three are performance bank guarantees. It is a conceded case of the parties that the scheduled date of completion of commissioning of both the Units was on or before October 2, 2013. But in fact, the units were commissioned on April 14, 2017 and February 12, 2017 respectively. Disputes arose between the parties which went to arbitration. The primary claim of the petitioner was for damages on account of delay on the part of the respondent in completing and

commissioning of the project. The respondent had also filed counter-claims seeking liquidated damages for the delay in commissioning both the units attributable to the petitioners and also for losses and damages incurred by respondent on account of defects and damages discovered in the PE Unit and claim on PGTR. The Arbitral Tribunal speaking through majority allowed the claims of the petitioners and rejected the counter-claims. The respondent has challenged the Award in a Section 34 petition which is pending consideration of this court. When the said petition was listed on March 23, 2020, this Court on the submission made by Mr. Dewan, directed that the awarded amount shall be paid by the respondent to the petitioners on the petitioners furnishing bank guarantee for the awarded amount stayed the operation of the Award.

54. So, it follows that the Award of the Arbitral Tribunal enures to the benefit of the petitioners being a successful party. It is the successful party who can seek its enforcement under Section 36 of the Act and also secure the Award under section 9 of the Act and not the respondent being the losing party. This position of law is well settled by the judgment of the Bombay High Court as upheld by the Supreme Court in case of ***Dirk (Supra)*** wherein in paragraphs 13 & 14, the Court has held as under:

> *"13. The Court which exercises jurisdiction under Section 34 is not a court of first appeal under the provisions of the Code of Civil Procedure. An appellate court to which recourse is taken against a decree of the trial Court has powers which are co-extensive with those of the trial Court. A party which has failed in its claim before a trial Judge can in appeal seek a judgment of reversal and in consequence, the passing of a decree in terms of the claim in the suit. The court to which an arbitration petition challenging the award under Section 34 lies does not pass an order decreeing the claim. Where an arbitral claim has been rejected by the arbitral tribunal, the court under Section 34 may*

either dismiss the objection to the arbitral award or in the exercise of its jurisdiction set aside the arbitral award. The setting aside of an arbitral award rejecting a claim does not result in the claim which was rejected by the Arbitrator being decreed as a result of the judgment of the court in a petition under Section 34. To hold that a petition under Section 9 would be maintainable after the passing of an arbitral award at the behest of DIPL whose claim has been rejected would result in a perversion of the object and purpose underlying Section 9 of the Arbitration and Conciliation Act, 1996. DIPL's application under Section 9, if allowed, would result in the grant of interim specific performance of a contract in the teeth of the findings recorded in the arbitral award. The interference by the Court at this stage to grant what in essence is a plea for a mandatory order for interim specific performance will negate the sanctity and efficacy of arbitration as a form of alternate disputes redressal. What such a litigating party cannot possibly obtain even upon completion of the proceedings under Section 34, it cannot possibly secure in a petition under Section 9 after the award. The object and purpose of Section 9 is to provide an interim measure that would protect the subject-matter of the arbitral proceedings whether before or during the continuance of the arbitral proceedings and even thereafter upon conclusion of the proceedings until the award is enforced. Once the award has been made and a claim has been rejected as in the present case, even a successful challenge to the award under Section 34 does not result an order decreeing the claim. In this view of the matter, there could be no occasion to take recourse to Section 9. Enforcement for the purpose of Section 36 as a decree of the Court is at the behest of a person who seeks to enforce the award. (Emphasis supplied)

55. The judgment of ***Dirk (Supra)*** is followed by this Court in ***Nussli Switzerland (Supra)*** wherein the Division Bench agreed with the reasoning of the Court in ***Dirk (Supra).***

56. In fact, I in the case of ***Singhania Horizons (supra),*** has also followed judgments in ***Dirk (supra)*** and ***Nussli Switzerland (supra)*** to hold that a losing party cannot file a petition under Section 9 of the Act. It is the submission of Mr. Dewan that the ***Nussli Switzerland (Supra)*** is pending consideration before the Supreme Court in SLP(C) No. 026876 - 026876/2014. He has placed before me the order dated September 26, 2014 in the said special leave petition wherein the Supreme Court has directed the extension of the Bank guarantees till further orders. Mr. Dewan, however, concedes to the fact that the Supreme Court has not stayed the judgment of the Division Bench in ***Nussli Switzerland (Supra)***.

57. It appears that the respondent being a losing party, in order to overcome the Judgment in ***Dirk (Supra)***, as it could not have approached the Court in Section 9 and sought an order against the petitioners that they shall keep the bank guarantees alive till Section 34 petition is decided, proceeded to invoke the bank guarantees. Mr. Rai is right to contend that the respondent by invoking the bank guarantees, did what they could not have done directly. Mr. Rai is also right in stating that when this Court vide order dated March 13, 2020 disposed of OMP (I) (COMM) 73/2020 directing the petitioners to extend the bank guarantees by a period of one month to enable the respondent to get its petition under Section 34 listed and secure appropriate orders, which the respondent failed to secure at least with regard to securing bank guarantees, they are precluded from invoking the same.

58. It was the submission Mr. Dewan that (1) disputes continue to exist till such time the arbitral Award attains finality in the Supreme Court; (2) there are other obligations under the contracts which have not been completed by the petitioner for which reason the respondent can invoke the bank guarantees. On the first aspect, he has relied upon the judgment of the Supreme Court in

K. Kishan (Supra). The issue involved in the said judgment was whether IBC can be invoked against an operational debtor against whom an arbitral award has been passed which is challenged in a Section 34 petition under the Act and is pending adjudication. The Supreme Court after referring to its earlier judgment in ***Mobilox Innovations Private Limited v. Kirusa Software Private Limited, (2018) 1 SCC 353,*** held that when a *'dispute'* pre-exists or is on-going between the parties, operational creditors cannot use IBC either prematurely or for extraneous considerations or as a substitute for debt enforcement procedures. The judgment further holds that the challenge to the arbitral award means the *'dispute'* between the parties continue, in which case an application preferred by the operational creditor must be rejected. So, the judgment of the Supreme Court has been considered in the context of IBC that a *'dispute'* continues to exist between the parties when the arbitral award is under challenge. The said judgment has no applicability in the facts of this case as it does not relate to a litigation under the IBC.

59. On the second submission he drew the attention of the Court to an e-mail dated April 10, 2020 of the respondent to the petitioners and also Para 32 of the counter-affidavit. To understand the submission, it is necessary to reproduce Para 11 of the e-mail dated April 10, 2020 and Para 30 to 33 of the counter-affidavit, as under :

> *"11. The bank guarantees were created under Clause 3.3 and 3.8 of the Contracts dated 02.09.2011 ("Contracts") to secure the performance of your clients' obligations under the Contracts. You are well aware that till date, your clients have not complied with their obligations as contemplated under the contracts including but not limited to accomplishment of Performance Guarantee Test Run ("PGTR") in case PE Contract. Notwithstanding the Award, you are fully aware that under the Contract your clients' obligation to complete the PGTR remains. Furthermore, your clients are liable for various defects in the*

commissioning of the PE Unit in respect of which our client had filed a counterclaim aggregating to over INR 750 Crores in the arbitration proceedings. In view of the stay of the Impugned Award, your clients are now required to keep the Subject Bank Guarantees alive so as to secure our client's interests and claims under the Contracts. Since the validity of the bank guarantees in question are expiring by 14.04.2020 and 17.04.2020, our client has no option but to invoke them in order to prevent those guarantees from lapsing. Our client cannot afford to lose the security available. In this time of pandemic and resultant restrictions, as a matter of necessity these guarantees have to be saved from lapsing and our client will resort, in good faith ,such actions which are necessary to protect its security and also to mitigate the situation until the Hon'ble Court rule on matters pending before it."

XXX XXXX XXXX XXX

COUNTER-AFFIDAVIT

XXXXXXXX

"30. By way of its Counterclaim, OPaL contended that it is entitled to Liquidated damages for the delay in commissioning of both PE and PP Units due to the delays caused by Tecnimont and also for the losses and damages incurred by OPaL on account of the defects and damages discovered in the PE Unit. OPaL also claimed that Tecnimont was in breach of its obligations to complete the PGTR of the respective units. The Respondent craves leave to refer to the Statement of Claim, Counterclaim and other pleadings in the arbitration proceedings when produced

31. It is submitted that under the Contracts, OPaL is entitled to recover the following amounts by invoking the bank guarantees issued in its favour under the terms of the Contracts, without resorting to a fresh arbitration, in the event the Impugned Award is set aside by this Hon'ble High Court:

S. No	*Particulars*	*Amounts*
1.	*Liquidated Damages of 5 percent of the contract value for both PP Unit and PE Unit under Clause 6.3.2 of GCC of both PE and PP Contract*	*INR 491.21 million USD 5.46 million EUR 3.86 million*
2.	*Defects caused to the PE Unit and for non-achievement of PGTR of the PE Unit under Clause 6.1 and Clause 10 of the GCC of the PE Contract*	*(a) INR 2,819.82 million towards loss of incremental profits of the PE Unit* *(b) INR 4,773.42 million towards impact on DFCU and* *(c) INR 111.70 million and JPY 38.14 million for additional cost to achieve PGTR*
3.	*Interest on mobilization advance*	*INR 136.28 million*
4.	*Additional insurance premium*	*INR 183.23 million*
5.	*Change orders*	*INR 79.43 million and USD 0.46 million*

32. Further, undisputedly, Tecnimont's entire technical team abandoned OPaL's Dahej Plant during the pendency of the arbitration proceedings without any proper intimation to OPaL and without completing the entire Scope of Works including PGTR of the PE Unit and closure of punch points and others. Till date, in spite of several requests from OPaL, Tecnimont flagrantly failed and neglected to supply the complete set of mandatory spares under the Contracts. In this regard, it is pertinent to mention that Clause 11 of the Contracts provides that Tecnimont is obligated to perform the works under the Contract notwithstanding pendency of the arbitration proceedings. Clause 11 is reproduced below:

> *"11.0 Continuation of the Contract*
>
> *Notwithstanding the fact that settlement of dispute(s) (if any) under arbitration may be pending, the Contractor shall continue to be governed by and perform the work in accordance with the provisions under this Contract."*

Therefore, Tecnimont's assertion that the entire Scope of Work under the Contracts has been completed is incorrect.

33. It is submitted that if the Impugned Award is set aside, OPaL would be entitled to recover the amounts by invoking the bank guarantees without resorting to fresh arbitration. The bank guarantees are furnished as security towards OPaL's claims against Tecnimont and under the Contracts OPaL is entitled to recover the said amounts without first resorting to any dispute resolution including arbitration."

60. On a reading of the above paras as reproduced it is clear that the respondent in its counter-claims before the Arbitral Tribunal had sought:

i. Liquidated damages for the delay in commissioning of both PE and PP Units caused by the petitioners.

ii. Losses and damages incurred by the respondent on account of defects and damages discovered in PE Unit.

iii. Interest on mobilization advance.

iv. Additional Insurance Premium.

v. Charge Orders

61. During his submissions, Mr. Dewan would contend that the respondent has fresh claims regarding PGTR, by referring to para 11 of e-mail dated April 10, 2020 (reproduced above). In other words, he tries to draw a distinction between the counter-claims made before the Tribunal and the claims over and above the counter-claims to justify the invocation. Such a plea does not flow either from the e-mail dated April 10, 2020 nor from the counter-affidavit (reproduced above) filed by the respondent. The said e-mail only narrates the stand of the respondent that the petitioners have not accomplished the PGTR. It is not the case of the respondent that in its counter-claims, the respondent has not sought the sums to achieve PGTR themselves. Even otherwise, I find that the respondent in its written arguments filed in the court has stated "*the respondent asserted before the Hon'ble Tribunal that it ought to be allowed to complete to PGTR on its own and claimed a sum of INR 111.70 million and JPY 38.14 million towards additional cost to achieve PGTR*" . This statement of respondent corresponds with the final Award which reads "*for additional cost to achieve PGTR*", and the claim was rejected.

62. Mr. Rai is justified in stating the plea of Mr. Dewan, is an afterthought as no such stand was taken by the respondent in its earlier e-mails dated March 7, 2020 and April 5, 2020.

63. It is clear that the respondent by invoking the bank guarantees intends to secure counter-claims which were rejected by the arbitral tribunal, which is clearly impermissible in view of the position of law noted above.

64. Insofar as the plea of Mr. Dewan that if the arbitral Award is set aside, the respondent can invoke the Bank Guarantees to satisfy its claims without resorting to arbitration / Court is a fallacious argument.

65. It is settled law that the claims (counter-claims in this case) so rejected are not deemed to have been allowed in favour of respondent as held by the Bombay High Court in ***Dirk (supra)*** in Para 13, the relevant part reads as under:

> *"13. The Court which exercises jurisdiction under Section 34 is not a court of first appeal under the provisions of the Code of Civil Procedure. An appellate court to which recourse is taken against a decree of the trial Court has powers which are co-extensive with those of the trial Court. A party which has failed in its claim before a trial Judge can in appeal seek a judgment of reversal and in consequence, the passing of a decree in terms of the claim in the suit. The court to which an arbitration petition challenging the award under Section 34 lies does not pass an order decreeing the claim. Where an arbitral claim has been rejected by the arbitral tribunal, the court under Section 34 may either dismiss the objection to the arbitral award or in the exercise of its jurisdiction set aside the arbitral award. The setting aside of an arbitral award rejecting a claim does not result in the claim which was rejected by the Arbitrator being decreed as a result of the judgment of the court in a petition under Section 34"*

66. The aforesaid view has been reiterated by another Division Bench of Bombay High court in the case of ***Oil and Natural Gas Corporation Ltd. v. Consortium of Sime Darby Engineering Sdn. Bhd. and Swiber Offshore Construction Pte. Ltd., 2018 SCC Online Bom 6034,*** wherein in Para 11 states as under:

> ***"11.*** *The Division Bench of this Court in Dirk India Pvt. Ltd. (supra) has held that the enforcement of an award enures*

to the benefit of the party who has secured an award in the arbitral proceedings and the party whose claim has been rejected in the course of arbitral proceedings cannot have arbitral award enforced in accordance with Section 36 of the Act. The Court to which the arbitration petition challenging the award under Section 34 of the Act lies does not pass an order decreeing the claim. Where an arbitral claim has been rejected by the arbitral tribunal, the Court under Section 34 of the Act either may dismiss the objection to the arbitral award or in exercise of its jurisdiction may set aside the arbitral award. The setting aside of the arbitral award in rejecting the claim does not result in the claim which was rejected by the arbitral tribunal being decreed as a result of the judgment of the Court in a petition under Section 34. It was held that the interference by the court to grant a mandatory order will negate the sanctity and efficacy of the arbitration as a form of alternate dispute redressal."

67. In fact, a similar view has been taken by the Division Bench of this Court in the case of ***State Trading Corporation of India Ltd. v. Toepfer International Asia PTE Ltd., 2014 (144) DRJ 220,*** wherein in paragraph 7, the Division Bench held as under:

"7. Arbitration is intended to be a faster and less expensive alternative to the courts. If this is one's motivation and expectation, then the finality of the arbitral award is very important. The remedy provided in Section 34 against an arbitral award is in no sense an appeal. The legislative intent in Section 34 was to make the result of the annulment procedure prescribed therein potentially different from that in an appeal. In appeal, the decision under review not only may be confirmed, but may also be modified. In annulment, on the other hand, the decision under review may either be invalidated in whole or in part or be left to stand if the plea for annulment is rejected. Annulment operates to negate a decision, in whole or in part, thereby depriving the portion

> *negated of legal force and returning the parties, as to that portion, to their original litigating positions. Annulment can void, while appeal can modify. Section 34 is found to provide for annulment only on the grounds affecting legitimacy of the process of decision as distinct from substantive correctness of the contents of the decision. A remedy of appeal focuses upon both legitimacy of the process of decision and the substantive correctness of the decision. Annulment, in the case of arbitration focuses not on the correctness of decision but rather more narrowly considers whether, regardless of errors in application of law or determination of facts, the decision resulted from a legitimate process."*

68. It is clear that the even if the respondent succeeds in its Section 34 petition, the setting aside of the arbitral Award in rejecting the counter-claims of the respondent does not result in the same being decreed in its favour. It would be open to the respondent to commence fresh proceedings against the petitioners ***(Ref. International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181)***.

69 It follows that, till such time there is an adjudication of the counter-claims, in favour of the respondent, no sum is due in *praesenti* nor any sum is payable to the respondent, for it to invoke the bank guarantees. This I say so in view of the Judgment of the Bombay High Court in ***Iron Hardware (India) Company a Firm v. Shyamlal Brothers, A Farm, AIR 1954 BOM 523***, wherein the Court inter alia held as under:

> *"7. Now, this principle has been accepted by the learned Judge below, but the reason why he has taken a different view is that the definition of "debt" given in this Act is an artificial definition and is not the definition which has been accepted for the purpose of the Transfer of Property Act, and what is emphasised is that debt is not merely a liability which is ascertained, but it is also a liability which is to be ascertained,*

and therefore the view is taken that unliquidated damages would constitute a debt within the meaning of this Act. In my opinion, with respect to the learned Judge, greater emphasis should be placed on the expression "any pecuniary liability" rather than on the expression "whether ascertained or to be ascertained". Before it could be said of a claim that it, is a debt, the Court must be satisfied that there is a pecuniary liability upon the person against whom the claim is made, and the question is whether in law a person who commits a breach of contract becomes pecuniarily liable to the other, party to the contract. In my opinion it would not be true to say that a person who commits a breach of the contract incurs any pecuniary liability, nor would it be true to say that the other party to the contract who complains of the breaches has any amount due to him from the other party.

As already stated, the only right which he has is the right to go to a Court of law and recover damages. Now, damages are the compensation which a Court of law gives to a party for the injury which he has sustained. But, and this is most important to note, he does not get damage or compensation by reason of any existing obligation on the part of the person who has com mitted the breach. He gets compensation as a result of the fiat of the Court. Therefore, no pecuniary liability arises till the Court has determined that the party complaining of the breach is entitled to damages. Therefore, when damages are assessed, it would not be true to say that what the Court is doing is ascertaining a pecuniary liability which already existed. The Court in the first place must decide that the defendant is liable and then it proceeds to assess what that liability is. But till that determination there is no liability at all upon the defendant……"

70. A similar view had been taken by the Calcutta High Court in the case of ***Jabed Sheikh v. Taher Mallick, AIR 1941 Cal. 629***.

71. The submission made by Mr. Dewan that the invocation of the bank guarantees has to be strictly seen as per the law relating to the bank guarantees

by referring to the judgments in the case of ***Himadri Chemicals Industries Ltd. (supra)***; ***Standard Chartered Bank (supra)***; ***Indu Project Ltd. (supra) and U.P. State Sugar Corporation (supra),*** is misplaced. The said proposition is not applicable in the facts of this case and in view of my conclusion above. Even otherwise, a reading of these judgments reveal that a bank is bound to honor the bank guarantee irrespective of disputes between the party at whose instance the guarantee was issued and the beneficiary, subject to two exceptions i.e. when it is a case of *egregious fraud, irretrievable injustice* or *irretrievable harm*, the Court can grant injunction. It also emerges that every case has to be decided with reference to the facts and circumstances as existing. It is also noted that in ***Indu Projects Ltd. (supra),*** a Coordinate Bench of this Court held that the expression *irretrievable injury* or *irretrievable injustice* have been used interchangeably with expression *special equities*. However, the Apex Court in the judgment of ***Standard Chartered (Supra)*** as relied upon by Mr. Dewan, visualized the *irretrievable injustice* and *special equities* as distinct circumstances. This is so held by a Coordinate Bench of this Court in the case of ***Halliburton Offshore Services Inc v. Vedanta Ltd. and Anr., 2020 SCC Online Delhi 542***, by relying upon the Supreme Court judgment in the case of ***Standard Chartered Bank Ltd. (Supra)*** in paragraph 17, which reads as under:

> *"**17.** In my view, it is not necessary to multiply references to precedents, the law with respect to injunction of encashment, or invocation, of unconditional bank guarantees, being fairly well settled. It is significant, however, that, where the earlier understanding of the expression "special equities", as a circumstance in which invocation of bank guarantees could be inducted, was that such equities were limited to cases where irretrievable injustice resulted, the recent decision in Standard Chartered Bank Ltd,[8] seems to visualize irretrievable injustice, and special equities, as distinct*

circumstances, the existence of either of which would justify an order of injunction. Viewed any which way, there appears to be no gainsaying the proposition that, where "special equities" exist, the court is empowered, in a given set of facts and circumstances, to injunct invocation, or encashment, of a bank guarantee. Where such special circumstances do exist, no occasion arises, to revert to the general principle regarding the contractually binding nature of a bank guarantee, or the legal obligation of the bank to honour the bank guarantee, these special circumstances having, in all cases, being treated as exceptions to this general principle."

(Emphasis supplied)

72. In the case in hand, the following facts also cumulatively demonstrate *special equities* in favour of the petitioners:

i. The petitioners have an arbitral Award in its favor;

ii. The counter-claims have been dismissed;

iii. The respondent did not secure any order with regard to extension of the bank guarantees;

iv. It is the case of the petitioners that advance bank guarantees were furnished against mobilization advance given by the respondent which have since been recovered by the respondent through running account bills, the said aspect has not been denied by the respondent in Para 27 and 29 of its reply to the petition;

v. The bank guarantees given during the contract cannot be said to have been given in perpetuity even for the period, after the adjudication of claims / counter-claims, between the parties;

vi. There is no sum due in *praesenti* or sum payable to the respondent;

vii. Even if the respondent succeeds in its challenge to the Award under Section 34, it has to resort to fresh arbitration proceedings with regard to the counter-claims and;

viii. That after invocation/encashment of the bank guarantees by the respondent, the petitioners have to resort to the process of arbitration to claim the amount.

73. In fact, I also rely on a Coordinate Bench judgment of this Court in ***M/s. Mukti Credits Pvt. Ltd. (supra),*** wherein the Court has restrained the respondent therein from invoking a bank guarantee, post an arbitral award on the ground that no sum was due to the respondent and the objections of both the parties to arbitral award under Section 34 were pending. The plea of Mr. Dewan on the non-applicability of this judgment is misplaced.

74. During his submissions, Mr. Dewan had stated that the petitioner be directed by this Court to continue to extend the validity of the bank guarantees with charges for such extension to be deposited by the respondent in this Court or in the alternative, the respondent be allowed to invoke the bank guarantees and deposit the money in this Court. This submission, is clearly inequitable in view of the facts and circumstances of this present case. If such a plea is allowed every party even after losing before an Arbitral Tribunal, on the pretext that the bank guarantees cannot be injuncted or it shall deposit the amount in the Court, shall achieve what it could not achieve before the Arbitral Tribunal, through claims / counter-claims (as in the case of the respondent).

75. In view of my above discussion, the present petition is allowed. The respondent is restrained from invoking / encashing the bank guarantees as referred to in para (a) of the prayer clause. It is also directed that the respondent shall return to the petitioners the said bank guarantees.

76. The direction to return the bank guarantees by the respondent to the petitioners shall not be given effect till June 29, 2020 (including the said date). The petition is disposed of. No costs.

V. KAMESWAR RAO, J

JUNE 20, 2020*/ak/jg*