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

\+ O.M.P.(I) (COMM) 364/2021

KUBER ENTERPRISES ..... Petitioner
Through Mr. Monish Panda, Mr. Mrinal Bharat Ram and Ms. Priyamwada Sinha, Advs.

versus

DOOSAN POWER SYSTEMS INDIA PVT LTD & ANR. ..... Respondents
Through Mr. Tushar Sahu, Adv. Respondent No. 2

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CORAM:
HON'BLE MR. JUSTICE C.HARI SHANKAR

J U D G M E N T (Oral)

% 12.11.2021
(Video conferencing)

1. These petitions under Section 9 of the Arbitration and Conciliation Act, 1996 ("1996 Act", in short), seek pre-arbitral interim

reliefs.

2. The facts in the two petitions, though they pertain to different contracts and different bank guarantees, are more or less identical. Arguments were principally advanced by Mr. Monish Panda, learned Counsel for the petitioner by reference to OMP (I) (Comm) 365/2021.

3. As such, the recital hereinafter would be relatable to OMP (I) (Comm) 365/2021. However, reasoning and the findings would *mutatis mutandis* apply to OMP (I) (Comm) 364/2021.

4. Given the narrow confines of the controversy, it is not necessary to make any detailed allusion to facts. A bare recital would, therefore, suffice.

5. Respondent 1 was contracted by M/s. Jawaharpur Vidyut Utpadan Nigam Ltd as an EPC contractor, for construction of a thermal power project in Uttar Pradesh. Respondent 1 further subcontracted a part of the work to the petitioner, *vide* two Subcontract Agreements dated 27th December, 2017 and 16th November, 2018. Under these subcontracts, the petitioner was required to undertake the work of civil construction of Coal Handling System and the erection of Electrostatic Precipitators and Flue Gas Desulphurization Plants, as part of the larger Thermal Power Project in respect of which Respondent 1 had entered into the contract with M/s. Jawaharpur Vidyut Utpadan Nigam Ltd. The substantial completion date of the work, as per the contract, was 12th July, 2020

and 22nd December, 2021.

6. Clause 9.1 of the General Conditions of Contract (GCC), as amended by the Special Conditions of Contract (SCC), representing the contractual relationship between the petitioner and Respondent 1, read thus:

> "**9.1 Performance bond**
>
> a) The Subcontractor shall submit to the Contractor, as a guarantee of the faithful performance of the obligations under this Subcontract and a guarantee of the quality of Works and materials provided by the Subcontractor, an unconditional Performance Bond acceptable to the Contractor in the following manner
>
> - Performance Bank Guarantee equivalent to Two point Five percent (2.5%) of Contract Value.
>
> - In lieu of Performance Bank Guarantee equivalent to Two point Five percent (2.5%) of Contract Value, Signed Cheque without date equivalent to Two point Five percent (2.5%) of Contract Value and Five Percent payment hold from progressive payment.
>
> - Contractor shall return the cheque and hold amount once Subcontractor submits Performance Bank Guarantee equivalent to Two point Five percent (2.5%) of Contract Value.
>
> The Performance Bond shall expire after expiry date of Warranty Period as defined in Clause 12 [WARRANTY] in this Subcontract. Such guarantee shall be binding notwithstanding any variations; alterations or extensions of time that may be given or be agreed upon. No interest shall be paid for this bond.

b) The Performance Bond shall be provided by a first class bank of the Country at Contractor's discretion in the form attached hereto acceptable to the Contractor."

7. As is seen, Clause 9.1(a) refers to the warranty period as defined in Clause 12 of the GCC. Clause 12 of the GCC, with its sub clauses 12.1 and 12.2, read thus:

"**12 WARRANTY**

12.1 Warranty Period

a) The warranty period for the Works for the warranties shall commence at the Substantial Completion Date (SCD) for a period of twenty four (24) months thereafter.

b) The Warranty Period with respect to any Work that is repaired, replaced, modified or otherwise altered shall be extended for a further period of twenty four (24) months from the date of completion of such repair, replacement, modification or alteration [the "Warranty Period", which shall include any extensions to the warranty period of the above paragraph a) under this paragraph b)]…."

"12.2 Repair of Defects

a) The Contractor shall promptly notify the Subcontractor in writing of the discovery of any defects or deficiencies in the Work.

b) In the event of any defects of deficiencies, the Subcontractor shall, at the Subcontractor's own cost and expense and in the shortest possible time, but in any event within three (3) days following occurrence of such defects or deficiencies that jeopardize the performance of the Plant or any Section thereof, or thirty (30) days for other defects or deficiencies following the Subcontractor's receipt of notice of

defect or deficiency or the Subcontractor's otherwise obtaining knowledge of defect or deficiency:

> (a) initiate the performance of, and thereafter diligently pursue the completion of, any necessary services to correct any defects or deficiencies;
>
> (b) initiate and thereafter diligently pursue the completion, repair, replacement, reworking and retesting (as appropriate) of defective materials;
>
> (c) provide to the Contractor the relevant data and records regarding the defect or deficiency.

c) If the Subcontractor fails to initiate the repair work required hereunder within the above time periods or to diligently pursue such repair work, the Contractor may undertake such repairs at the Subcontractor's expense, and such work by the Subcontractor or others on behalf of the Contractor, shall not void the Subcontractor's warranty hereunder."

8. For the sake of completion of facts, it may be noted that the period of 24 months stipulated in Clause 12.1(a) was reduced to 18 months, by an amendment *vide* the SCC.

9. According to the recitals in the petitions, the respondents defaulted in making payments to the petitioner, against the work executed by it. Mr. Monish Panda, learned Counsel for the petitioner, submits that the undisputed amounts due from the respondents to the petitioner are in the region of ₹ 4.98 crores, though he submits that his client has further claims against the respondents, which he would agitate in arbitration. Additionally, he submits that an amount of ₹

2.71 crores, which is in excess of the 2.5% envisaged by Clause 9.1(a) of the GCC as amended by the SCC already stands secured with the respondents.

10. As required by Clause 9.1, the petitioner submitted, to Respondent 1, an unconditional and irrevocable bank guarantee dated 13th March, 2018. The following recitals and Clauses in the Bank Guarantee merit reproduction:

> "**WHEREAS**:
>
> (A) By an agreement dated 27th. December 2017 (and referred to herein as the "Contract/Subcontract") the Company/DPSI has appointed Kuber Enterprises, a firm registered and existing under the laws of India and having its registered office at Kuber Enterprises, 184-D, Arjun Nagar, Safdarjung Enclave. New Delhi –110029] (hereinafter referred to as the "Subcontractor" which expression shall include its successors and permitted assigns) for CHS Civil Works Package of Jawaharpur Project (2x660MW).
>
> (B) The Subcontract requires the Subcontractor to deliver to DPSI a contract performance guarantee (hereinafter referred to as the "Guarantee"), to guarantee the due performance of its obligations under the Contract, for an amount equivalent to 2.5% (two point five percent) of the Contract Price.
>
> (C) The Contractor has approached us. HDFC Bank Limited, Trade Desk. UG-14. Ansal Chamber-I, Bhika Ji Cama Place New Delhi-110066 ("the Guarantor") for issuance of this Guarantee and at the Subcontractor's request and in consideration of the premises, the Guarantor has agreed to provide this Guarantee as hereinafter appearing.
>
> *****
>
> 1. *Upon receipt by us of a first written demand or demands from you (a "Demand"" or "Demands"), without further proof or conditions and without demur, reservation, contest, recourse or protest and without any enquiry of you or*

reference to the Subcontractor and without the need for you to take any legal action against or to obtain the consent of the Contractor and notwithstanding any objection by the Subcontractor pay you forthwith and in full without any deductions or set-offs or counterclaim whatsoever the sum claimed by you in such Demand, subject to the cap mentioned in paragraph 3 here in below *Any such demand in writing made by DPSI shall be conclusive and binding on us irrespective of any dispute or difference raised by the Subcontractor.*

2. You shall not be obliged to exercise any right or remedy which you may have before making a Demand under this Guarantee.

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9. This Guarantee shall enter into force on the date hereof *and shall be a continuing irrevocable obligation* and shall remain in force and effect until the 12-JUN-2019 or any extension thereof."

11. Mr. Panda submits that, consequent on the allegedly premature closure of the contract by the respondents, the petitioner communicated with the respondents, calling on the respondents to liquidate its dues to the petitioner. According to Mr. Panda, on repeated communications being thus made by the petitioner, the respondents threatened the petitioner to invoke the Bank Guarantee provided by the petitioner. He further points out that the petitioner, in its communication to the respondents, specifically alleged that the threat of invoking the Bank Guarantee, as held out by the respondents to the petitioner, was merely in the nature of a "pressure tactic", to pressurize the petitioner into giving up its claim against the respondents. He seeks to point out that, in their response, the respondents did not specifically deny this allegation.

12. While acknowledging that injunction, against the invocation of an unconditional Bank Guarantee, can be granted only if there exists egregious fraud, special equities or irretrievable injustice, Mr. Panda submits that in the present case, special equities do exist, as would justify injuncting the respondents from invoking the Bank Guarantee provided by the petitioner. Further, he submits, the invocation of Bank Guarantee is in the teeth of Clause 9.1(a) read with Clause 12.2 of the GCC, the protocol stipulated in which would bind the respondent, once it chose to close the contract. This protocol, submits Mr Panda, requires an advance notification, by the respondents, to the petitioner, in writing, of the defects and deficiencies in the work performed by the petitioner. The respondents not having done so, he submits that they cannot be permitted to invoke the bank guarantee.

13. Mr Panda pleads the existence of special equities, justifying the stay of invocation of the Bank Guarantee by the respondents, on the premise that the respondents owe, to the petitioner, an undisputed amount of ₹ 4.98 crores, apart from which an amount of ₹ 2.71 crores of the petitioner is presently lying with the respondents. The respondents are, therefore, he submits, sufficiently secured against any claims they may have against the petitioner and, therefore, any invocation of the Bank Guarantee by the respondents against the petitioner would be inequitable at this stage. He also points out that the respondents were seeking to invoke the Bank Guarantees provided by the petitioner in both the contracts executed with the respondents and that it could hardly be believed that the petitioner was remiss in

discharging its obligations under both the contracts. This, he submits, is an additional fact, which indicates that the respondents were invoking the bank guarantee not for genuine and bonafide reasons, but merely to pressurize the petitioner into giving up its claims against the respondents.

14. The last submission of Mr. Panda, to justify the prayer for injunction against invocation of the Bank Guarantee, is that the petitioner is in dire financial straits. He also draws attention to the financial defects being faced by his client and submits that if the Bank Guarantee is permitted to be invoked, his client would be "deoxygenated" and that several of its employees would be laid off. In the submission of Mr Panda, the parent company of Respondent 1 is presently facing severe financial constrains, and that Respondent 1 is dependent on the parent company. In these circumstances, he submits, an additional ground for a restraint against the respondents from invoking the Bank Guarantee is that the Bank Guarantee would act as a security, in the event of an award in the arbitral proceedings favourable to the petitioner. Otherwise, he submits, if the respondents are allowed to invoke the Bank Guarantee, there would be no security which would serve to ensure that, were the petitioner to succeed in arbitration, the award could be enforced, given the precarious financial condition of the respondents.

15. For this reason, Mr Panda presses his second prayer, in these petitions, for directing the respondents to secure the claims of the petitioner by making a deposit in this Court.

16. Having heard Mr. Panda at considerable length, I am of the opinion that these petitions are completely misconceived. They seek to re-agitate issues which, in one judicial decision after another, stand settled, in law, against the petitioner.

17. Re. prayer for stay of invocation of bank guarantee:

17.1 Admittedly, the Bank Guarantee provided by the petitioner to the respondents is unconditional. Stay of invocation of an unconditional bank guarantee can be granted only in exceptional circumstances. This Court in ***SES Energy Services India Ltd. v. Vedanta Limited***[1] has noted these exceptions and observed thus:-

> "9. In cases where the bank guarantee is unconditional, the law recognizes only three circumstances in which Courts could injunct invocation or encashment of the bank guarantee. These three circumstances, essentially, dovetail into two, with the pronouncement of Courts in that regard. The three circumstances, in which the Courts may interfere, and may injunct the invocation of unconditional bank guarantees, is where there is egregious fraud, special equity exists, or where irretrievable injustice or prejudice is likely to result, if the bank guarantee is invoked or encashed. The latter two circumstances have been treated, by the Supreme Court, as well as by the Division Bench of this Court in ***CRSC Design***[2] to be interconnected, in that special equities would be set to exist if the invocation of the bank guarantee would result in irretrievable injustice to the opposite party. The following passage, from ***BSES Ltd. v. Fenner India Ltd***.[3] , neatly encapsulates this position:
>
> > "10. There are, however, two exceptions to this rule. The first is when there is a clear fraud of which the bank has notice and a fraud of the beneficiary from which it seeks to benefit. The

[1] **2021 SCC OnLine Del 4196**
[2] **CRSC Research and Design Institute Group Co Ltd v. Dedicated Freight Corridor Corporation of India Ltd 2020 SCC OnLine Del 1526**
[3] **(2006) 2 SCC 728**

> *fraud must be of an egregious nature as to vitiate the entire underlying transaction*. The second exception to the general rule of non-intervention *is when there are 'special equities' in favour of injunction, such as when 'irretrievable injury' or 'irretrievable injustice' would occur if such an injunction were not granted*. The general rule and its exceptions has been reiterated in so many judgments of this Court, that ***in U.P. State Sugar Corpn. v. Sumac International Ltd., (1997) 1 SCC 568*** that this Court, correctly declared that the law was 'settled'." "
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> (Italics and underscoring in original)

Additionally, in para 72 of the report in ***Svenska Handlesbaken v. Indian Charge Chrome***[4]***,*** a bench of three Hon'ble Judges of the Supreme Court has held that mere irretrievable injustice, in the absence of established fraud, does not make out a case for injuncting invocation of an unconditional bank guarantee. Having said that, a bench of two Hon'ble Judges, in ***Hindustan Steelworks Construction Co. Ltd v. Tarapore & Co.***[5] held, after noticing and interpreting ***Svenska Handlesbaken***[4], that, in ***Svenska Handlesbaken***[4], the Court was "not called upon to decide whether apart from the case of fraud there can be any other exceptional case wherein the Court can interfere in the matter of encashment of a bank guarantee". As such, it was held, "not much importance" could be attached "to the use of the word 'and' in the observation that 'it cannot be interfered with unless there is fraud *and* irretrievable injustice involved in the case". ***Vinitec Electronics Private Limited v. HCL Infosystems Limited***[6] and ***BSES Ltd.***[3] hold that special equities, if pleaded as ground for stay of invocation of bank guarantee, should be in the nature of irretrievable

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[4] **(1994) 1 SCC 502**
[5] **(1996) 5 SCC 34**
[6] **MANU/SC/8095/2007**

injustice.

17.2 While, therefore, there appears to be some fluidity in judicial thinking on the issue of whether the "fraud" element would permeate the other two considerations of "special equities" and "irretrievable injustice", there does appear to be consensus on the position, in law, that fraud, if pleaded, has to be egregious in nature, and that special equities, if pleaded, have to be in the nature of irretrievable injustice. To that extent, therefore, these considerations, to one extent or another, juxtapose.

18. It is, further, a settled principle of law that the stay of invocation of a Bank Guarantee cannot be sought on the ground that the stage for invocation, as per the contract, between the parties, has not yet been reached. A bank guarantee constitutes an independent contract between the bank and the beneficiary of the guarantee. The bank is not concerned with the contract that the beneficiary of the guarantee may have with any third party, unless and until the terms of the contract or any aspect of violation of the contract is specifically incorporated into the bank guarantee as a pre-condition for its invocation. Else, where the bank guarantee is unconditional, the bank cannot be restrained from honouring the guarantee, on the ground that the aspect of default of the parent contract, which the bank guarantee seeks to secure, is disputed. The bank, in the case of an unconditional bank guarantee, is entirely unconcerned with the disputes between the parties under the

parent agreement.[7] Nor can the Court injunct the invocation of the bank guarantee on the ground that the stage for such invocation has not been reached. This opinion, expressed by me in ***CRSC Research & Design Institute v. Dedicated Freight Corridor Corporation of India Ltd.***[8], has been upheld by a Division Bench of this Court in ***CRSC Research and Design Institute***[2], after following several authoritative pronouncements of the Supreme Court in that regard. The following passages, from the said decision, may be reproduced, in this context:

> "**7.** *The settled law with respect to grant of an injunction which has the effect of restraining encashment of a bank guarantee, is (a) when in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes; (b) the Bank giving such a guarantee is bound to honour it as per its terms, irrespective of any dispute raised by its customer; (c) the very purpose of giving such a bank guarantee would otherwise be defeated; (d) the Courts should therefore be slow in granting an injunction to restrain the realization of such a bank guarantee; (e) the Courts have carved out only two exceptions i.e. (i) a fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee - if there is such a fraud of which the beneficiary seeks to take the advantage, he can be restrained from doing so; fraud has to be an established fraud which the bank knows of and the evidence must be clear, both as to the fact of fraud and as to the bank's knowledge; and, (ii) the second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned; since in most cases payment of money under such a bank guarantee would adversely effect[sic] the bank and its customers at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional*

[7] **U.P. State Sugar Corporation v Sumac International Ltd. (1997) 1 SCC 568; Ansal Engineering Projects Ltd. v. Tehri Hydro Development Corporation (1996) 5 SCC 450**
[8] **MANU/DE/1803/2020**

and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country; it must be proved to the satisfaction of the Court that there would be no possibility whatsoever of the recovery of the amount from the beneficiary, by way of restitution.

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15. *We are unable to agree with the contention of the senior counsel for the appellant that this Court, when approached for the interim measure of interference with unequivocal, absolute and unconditional BGs, is required to interpret the contract and/or form a prima facie opinion whether the beneficiary of the BGs has wrongfully invoked the BGs. Such exercise, in our view, is to be done in a substantive proceeding to be initiated by the appellant for recovery of the monies of the BGs, if averred to have been wrongly taken by the respondent No. 1 by encashment of BGs. If any interim relief is also claimed in the said substantive proceedings, the need for taking a prima facie view, will arise therein; however not while dealing with an application for the interim measure of restraining invocation/encashment of BGs. In the said proceedings, no question of taking a prima facie view arises and the enquiry is confined to, whether on the basis of the documents, a case of fraud of egregious nature in the matter of obtaining/furnishing BGs, is made out. As far as the argument of the senior counsel for the appellant, of special equities is concerned, the same is but a facet of the second exception aforesaid of irretrievable harm or injustice*. Needless to state that from the entire arguments of the senior counsel for the appellant, no case of fraud of egregious nature in the matter of making/obtaining of the BGs is made out. All that emerges is that there are disputes between the appellant and the respondent No. 1 and it is not even whispered that the respondent No. 1 built the entire charade of entering into the contract, only to obtain BGs and to profiteer from the appellant. With respect to the ground urged by the senior counsel for the appellant, of special equities, the Solicitor General has stated that the appellant is a Chinese entity and if ultimately in arbitration, which has already commenced between the parties, the monies are found due to the respondent No. 1 from the appellant, the respondent No. 1 would have no means or ways available to it for recovering the same from the appellant and/or to enforce the arbitral

award in China. On the contrary, it is contended that the respondent No. 1 is a Public Sector Undertaking and the monies, if ultimately found due to the appellant from the respondent No. 1, can always be recovered by the appellant from the respondent No. 1.

16. *Fraud, as an exception to the rule of non-interference with encashment of BGs, is not any fraud but a fraud of an egregious nature, going to the root i.e. to the foundation of the bank guarantee and an established fraud. The entire case of the appellant, we are afraid, fails to qualify so. The Single Judge has written at length on the subject and save for as aforesaid, we need not say more.*

17. *Irretrievable injustice, as an exception to the rule of non-interference with encashment of BGs, is again not a mere loss, which any person at whose instance bank guarantee is furnished, suffers on encashment thereof. It is always open to such person to sue for recovery of the amount wrongfully recovered. What has to be proved and made out to obtain an injunction against encashment, is that it will be impossible to recover the monies so wrongfully received by encashment. There is not even a whisper to this effect, neither in the pleadings nor in the arguments."*

(Emphasis supplied)

19. Mr. Panda sought to rely on the following passages from the judgment of a coordinate Single Bench of this Court in ***Larsen & Toubro Ltd v. Experion Developers Pvt. Ltd.***[9]:

"31. As far as reliance on Sub-Clause 4.2(d) is concerned, it authorizes the Employer to make a claim against the "Performance Security" where circumstances exist entitling the Employer to terminate the Agreement under Sub-Clause 15.2 of the Agreement. Sub-Clause 15.2 of the Agreement entitles the Employer to terminate the contract, *inter alia,* where the Contractor fails to proceed with the work in accordance with Clause 8 or comply with a notice issued under Sub-Clause 7.5 or Sub-Clause 7.6 within 28 days of receiving such notice without reasonable excuse.

[9] **2019 SCC OnLine Del 9097**

> 32. Sub-Clause 8 of the Agreement deals with the "Commencement, Delays and Suspension" of work. The question of extension of time for completion has to be considered by the Engineer under Sub-Clause 8.4 read with Sub-Clause 20.1 of the Agreement. Sub-Clause 8.7 of the Agreement further provides for delay damages to be paid by the Contractor in case it fails to comply with the time for completion. Such damages are to be again made subject to Sub Clause 2.5, that is, determination of Employer's claims by the Engineer.
>
> 33. Sub-Clause 7.5 of the Agreement provides for rejection of the Plant, materials, design or workmanship, if found defective by the Engineer. While Sub-Clause 7.6 empowers the Engineer to instruct the Contractor to remove or replace any plant or material which is not in accordance with the contract or re-execute the work which is not in accordance with the contract. It is not the case of the respondent no.1 that the Engineer has made any determination of delay damages in terms of Sub-Clause 8.7 of the contract and/or the Engineer has made any determination under Sub-Clause 7.5 or 7.6 of the Agreement. On the other hand, it is the case of the petitioner (and not denied by the respondent no.1) that for the first time, the defects in the work have been alleged by the respondent no.1 only by its letter dated 28.06.2019, that is, after the invocation of the Bank Guarantees. Learned senior counsel for the respondent no.1 has not been able to refute the said submission of the petitioner. Therefore, *at least prima facie, stage of invoking Sub-Clause 4.2(d) of the Agreement has also not arisen as on the date of the invocation of the Bank Guarantees*."
>
> (Emphasis supplied)

20. A reading of paras 31 to 33 of the said decision indicate that the learned Single Judge, in that case, proceeded on the ground that "at least *prima facie*, stage of invoking sub-clause 4.2(d) of the Agreement [had] also not arisen as on the date of the invocation of the Bank Guarantees."

21. The aforesaid case had also been relied upon by the learned Counsel for the petitioner before me in ***CRSC Research & Design Institute Co. Ltd.***[8], which was upheld in appeal. In the said judgment, too, I had expressed my inability to subscribe to the aforesaid view, for which purpose I had relied on para 22 of the report of judgment of Supreme Court in ***Mahatma Gandhi Sahakra Sakkare Karkhane v National Heavy Engg. Coop. Ltd.***[10] which may be reproduced thus:-

> "22. In our considered opinion if the bank guarantee furnished is an unconditional and irrevocable one, it is not open to the bank to raise any objection whatsoever to pay the amounts under the guarantee. *The person in whose favour the guarantee is furnished by the bank cannot be prevented by way of an injunction in enforcing the guarantee on the pretext that the condition for enforcing the bank guarantee in terms of the agreement entered between the parties has not been fulfilled. Such a course is impermissible.* The seller cannot raise the dispute of whatsoever nature and prevent the purchaser from enforcing the bank guarantee by way of injunction except on the ground of fraud and irretrievable injury."
>
> (Emphasis supplied)

22. The view expressed in ***CRSC Research & Design Institute Co. Ltd.***[8] having been upheld by the Division Bench in ***CRSC Research & Design Institute Co. Ltd.***[2], I regret my inability to follow the decision in ***Larsen & Toubro***[9].

23. In the present case, as already noted, the Bank Guarantee was unconditional. The arguments of Mr. Panda essentially pare down to contending that the manner in which the Bank Guarantee was being sought to be invoked was not in accordance with Clause 12.2, in as much as, prior to such invocation, the respondents were required to

[10] **(2007) 6 SCC 470**

issue a notice to the petitioner, setting out the defaults committed by the petitioner. This argument, in my view, has no substance. Clause 12.2 of the Contract has not been incorporated either expressly or by reference, into the Bank Guarantee provided by the petitioner to the respondents. If, therefore, the invocation of the Bank Guarantee by the respondents is in violation of Clause 12.2, or any other clause of the contract between the petitioner and the respondents, that may provide the petitioner a ground to seek restorative relief in arbitral proceedings. Injunctive interdiction of invocation of the bank guarantee, cannot, however, in view of its unconditional character, be directed in law.

24. The submission of Mr. Panda that the respondents stand sufficiently secured, as they have, in their possession, ₹ 2.71 crores and, additionally, owe ₹ 4.98 crores to the petitioner, again cannot be a ground to restrain invocation of the Bank Guarantee by the respondents.[11] These are claims which have to be taken up and agitated in arbitral proceedings. They cannot restrain the bank from honouring its commitment to the respondents under an unconditional and irrevocable Bank Guarantee.

25. Similarly, Mr. Panda's submission regarding the financial condition in which his client is placed, and the hardship that it would have to undergo, were the Bank Guarantee to be invoked, as also its reference to the allegedly precarious financial condition of the

[11] **Hindustan Steel Works Construction Ltd. v. Tarapore & Co. and Anr.: AIR 1996 SC 2268; Consortium Of Deepak Cable India Limited & Abir Infrastructure Private Limited (Dcil-Aipl) Thr Abir v. Teestavalley Power Transmission Limited: 2014 SCC Online Del 4741;**

respondents, cannot constitute grounds to stay invocation of the Bank Guarantee. Mr. Panda sought to submit that the Bank Guarantee, if allowed to remain in place, would secure the dues of the petitioner against the respondents which, otherwise, may be frustrated, given the financial condition of the respondents.

26. There is another factor, which deserves to be taken into account. This is not the first occasion when, in the context of the present contract, the petitioner is approaching this Court with a prayer for stay of invocation of the bank guarantee. Earlier, the petitioner had approached this Court by means of OMP (I) (Comm) 158/2021. In that case, too, the prayer, which has been agitated in the present case, was specifically urged, as is noted in para 3 of the judgment of this Court, which reads thus:

> "3. Mr Nath, learned counsel appearing for the petitioner has, essentially, stressed on two reliefs. First, that this Court should restrain the invocation of the bank guarantee in question (Performance Bank Guarantee No. 003GT02180720033 of Rs.1,18,75,000 – hereinafter 'the Bank Guarantee'); and second, that the respondent be directed not to encash the cheque furnished by the petitioner (Cheque bearing No. 000209 amounting to Rs.1,18,75,000/-) till further orders."

27. Paras 11 to 22 of the said decision merit reproduction, thus:

> "11. This Court has examined the averments made in the present petition and there is no ground alleging any fraud on the part of the respondent. Mr Nath, learned counsel appearing for the petitioner, submits that the petitioner is not seeking an order restraining invocation of the Bank Guarantee on the ground of any alleged fraud. He states that the petitioner rests its case only on the ground of special equities. He submits that the petitioner had invoked clause 25 of the Agreement and sought an amicable resolution of the disputes. However, the respondent has not joined the said resolution

process and this, itself, is a ground of special equities in favour of the petitioner. He submits that since the petitioner has invoked the disputes resolution clause and the respondent has not offered an amicable resolution of the disputes, the same would provide the petitioner sufficient grounds for seeking interdiction of the Bank Guarantee. He also relied on an order dated 31.12.2020 passed by this Court in ***O.M.P. (I) (COMM) 442/2020*** captioned ***ISGEC Heavy Engineering Ltd. v. Indian Oil Corporation Ltd. & Anr.***. He also relies on the decision of a Division Bench of this Court in ***Hindustan Construction Co. Ltd. v. National Hydro Electric Power Corporation Ltd. : 2020 SCC OnLine (Del) 1214***, which was referred by a Coordinate Bench of this Court in ***ISGEC Heavy Engineering Ltd. v. Indian Oil Corporation Ltd. & Anr*** (*supra*).

12. The contentions advanced on behalf of the petitioner are unmerited. The proposition that the reluctance of any party to join a dispute resolution process as claimed by the party under a contract, itself, gives a ground of special equities for interdicting the bank guarantee is fundamentally flawed.

13. The grounds on which a bank guarantee can be interdicted are extremely limited. In ***Svenska Handelsbanken v. M/s. Indian Charge Chrome and Others: (1994) 1 SCC 502***, the Supreme Court had held as under:-

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

14. In ***Consortium Of Deepak Cable India Limited &***

Abir Infrastructure Private Limited (Dcil-Aipl) Thr Abir v. Teestavalley Power Transmission Limited[11], the Division Bench of this Court had held as under:

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

injunction pertaining to a bank guarantee. Plea of lack of good faith and/or enforcing the guarantee with an oblique purpose or that the bank guarantee is being invoked as a bargaining chip, a deterrent or in an abusive manner are all irrelevant and hence have to be ignored. There are only two well recognized exceptions to the rule against permitting payment under a bank guarantee. The same are:-

A. A fraud of egregious nature;

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

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

148. Contractual disputes cannot be projected by attempting to urge that the beneficiary under the bank guarantee is in default. Issues of fraud require pleadings to bring out a case of a fraud of an egregious nature and we do not find any brought out in the pleadings. The irretrievable injury or irretrievable injustice or special equity would mean a situation where the party at whose behest the bank guarantee is issued is rendered remediless…."

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

"10. There are, however, two exceptions to this rule. The first is when there is a clear fraud of which the bank has notice and a fraud of the beneficiary from which it seeks to benefit. The fraud must be of an egregious nature as to vitiate the entire underlying transaction. The second exception to the general rule of non-intervention is when there are 'special equities' in favour of injunction, such as when 'irretrievable

injury' or 'irretrievable injustice' would occur if such an injunction were not granted. The general rule and its exceptions has been reiterated in so many judgments of this Court, that in ***U.P. State Sugar Corpn. v. Sumac International Ltd., (1997) 1 SCC 568*** this Court, correctly declared that the law was 'settled'."

16. In ***Hindustan Steel Works Construction Ltd. v. Tarapore & Co. and Anr.: AIR 1996 SC 2268,*** the Supreme Court had held as under:

> "We are, therefore, of the opinion that the correct position of law is that commitment of banks must be honoured free from interference by the courts and it is only in exceptional cases, that is to say, in case of fraud or in a case where irretrievable injustice would be done if bank guarantee is allowed to be encashed, the court should interfere. In this case fraud has not been pleaded and the relief for injunction was sought by the contractor/Respondent 1 on the ground that special equities or the special circumstances of the case required it. *The special circumstances and/or special equities which have been pleaded in this case are that there is a serious dispute on the question as to who has committed breach of the contract, that the contractor has a counterclaim against the appellant, that the disputes between the parties have been referred to the arbitrators and that no amount can be said to be due and payable by the contractor to the appellant till the arbitrators declare their award. In our opinion, these factors are not sufficient to make this case an exceptional case justifying interference by restraining the appellant from enforcing the bank guarantees.* The High Court was, therefore, not right in restraining the appellant from enforcing the bank guarantees."

17. *It is well settled that a bank guarantee can be interdicted only in exceptional circumstances. Mere contractual disputes cannot be asserted to give rise to special equities. The expression 'special equities' is not nebulous. It means peculiar or special circumstances which result in irretrievable injustice. These special equities or special*

circumstances must be pleaded.

18. Bank guarantees cannot be interdicted on account of disputes between the parties and therefore, any allegation that the respondent has been reluctant to join the proceedings for an amicable resolution of the disputes in terms of the Contract is not per se a ground for interdicting an unconditional bank guarantee.

19. In ***Hindustan Construction Co. Ltd. v. National Hydro Electric Power Corporation Ltd.*** (*supra*), the division bench of this Court had held that a bank guarantee cannot be interdicted on account of contractual disputes. The relevant extract of the said decision is set out below:-

> "9. The law relating to grant of injunctions to restrain the invocation/encashment of unconditional BGs is well settled. BGs are distinct agreements between the banks and its customers and are independent of the main contract between the customer and the beneficiary and therefore, disputes between the latter two will have no bearing on the obligation of the bank giving such a guarantee to honour its invocation by the beneficiary in terms of the bank guarantee, more so when it is unconditional. The courts are slow to restrain the realization of a BG, but have, however, carved out two exceptions to the rule, one being fraud and the other being special equities in the form of irretrievable harm or injustice being caused if encashment is allowed. [See: ***UP State Sugar Corporation* v. *Sumac International Ltd.*** **(1997) 1 SCC 568;** ***Standard Chartered Bank* v. *Heavy Engineering Corporation Ltd.*** **2019 SCC OnLine SC 1638**].
>
> 10. Fraud, calling for the intervention of the court, has to be of an egregious nature. There must be fraud established and mere allegations will not suffice. Fraud in connection with a BG should vitiate its very foundation. It is when the beneficiary seeks to benefit thereby, that the courts will restrain encashment. Fraud must be that of the beneficiary and none else. Injunction can be granted also where the bank itself is proved to have knowledge that the demand for

payment of the BG is fraudulent. [SEE : ***U.P. Coop. Federation Ltd.* v. *Singh Consultants and Engineers (P) Ltd.* (1988) 1 SCC 174; *Svenska Handelsbanken* v. *Indian Charge Chrome* (1994) 1 SCC 502**].

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21. The law relating to encashment of BGs under the second exception has attained wider dimensions over a period of time. The courts were initially very circumspect and required existence of fraud before it prevented encashment of unconditional BGs. Then it looked into the question of who was in breach of the contract to determine the relief to be granted under special equities. Through various judicial pronouncements the scope of what constitutes special equities was expanded to include cases of irretrievable injury, extraordinary special equities including the impossibility of the guarantor being reimbursed at a later stage if found entitled to the money and the invocation of the BG being not in terms of the BG itself. In the absence of any straight-jacket formula, the courts are required to examine each case to find out whether it falls within these heads."

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

> "..the existence of any dispute between the parties to the contract is not a ground for issuing an injunction to restrain enforcement of bank guarantees"

21. The order dated 31.12.2020 passed by this Court in ***O.M.P. (I) (COMM) 442/2020*** captioned ***ISGEC Heavy Engineering Ltd. v. Indian Oil Corporation Ltd. & Anr***, is an ad-interim order and is not an authority for the proposition that in all cases where the beneficiary of a bank guarantee is reluctant to amicably resolve the disputes, the bank guarantee in its favour is liable to be injuncted.

22. In the present case, this Court finds no valid grounds for interdicting the invocation of the Bank Guarantee. The petitioner's prayer in this regard is, accordingly, rejected."

(Italics and underscoring supplied)

28. At the very outset of the proceedings, I had drawn the attention of Mr. Panda to the above decision and questioned him regarding the justification for re-approaching this Court with the very same prayer, which has earlier been rejected by a coordinate Bench of this Court. His response was that the said order had been passed prior to the closure of the contract by the respondent and that, therefore, special equities now existed, justifying stay of invocation of the bank guarantee, which may not have existed at that point of time.

29. The passages from the judgment of this Court in OMP (I) (Comm) 158/2021, reproduced hereinabove, clearly indicate that the closure of the contract by the respondent cannot alter the legal position, as expressed by this Court in the said decision. In clear and categorical terms, this Court has held, in the said decision, *inter alia*, that a bank guarantee can be interdicted only in exceptional circumstances and that mere contractual disputes cannot be asserted to give rise to special equities. To make the matter clearer, in the very next paragraph, it is reiterated that the bank guarantees cannot be interdicted on account of disputes between the parties.

30. All submissions advanced by Mr. Panda only, at best, relate to make out a dispute between the petitioner and the respondents. These cannot be pleaded all over again, to seek, afresh interdiction against invocation of a bank guarantee amounting, in fact, to a second bite at the cherry.

31. As such, the prayer for stay of invocation of the Bank Guarantee provided by the petitioner is, in my view, is completely misconceived.

Re. prayer for furnishing of security

32. Mr. Panda also drew my attention to prayer (b) in these petitions, which seeks an *ad interim* order securing the alleged dues of the respondent to the petitioner. An interim protection, by way of a direction to provide security covering the amount in dispute in arbitration, cannot be granted in a routine fashion. There are precedents galore[12], to the effect that an order directing payment of security, whether under Section 9 or Section 17 of the 1996 Act, can be passed only if circumstances analogous to those which govern Order XXXVIII Rule 5 of the Code of Civil Procedure, 1908 (CPC) are pleaded and, *prima facie*, shown to exist. Though the language of Order XXXVIII Rule 5 cannot be bodily incorporated either into Section 9 or Section 17, the position in law, as it exists today, requires that an applicant seeking interim protection by way of security under Section 9 (1)(ii)(b), is required to show, apart from the existence of a *prima facie* case, balance of convenience and irreparable loss, that (i) the financial position of the opposite party is so precarious as would, possibly, frustrate the implementation of any arbitral award rendered

[12] **Goel Associates v Jivan Binma Rashtriya Avas Samati Ltd. 2004 SCC OnLine Del 874; CV Rao v. Strategic Port Investments KPC Ltd. (2015) 218 DLT 200 (DB); Ajay Singh & Ors. v. Kal Airways Private Limited (2018) 209 CompCas 154 (Delhi); State Bank of India v Ericsson India Pvt. Ltd. (2018) 16 SCC 617; DLF Ltd. v Leighton India Contractors Pvt. Ltd. (2021) 4 Arb LR 160**

in favour of such applicant and (ii) that the opposite party is likely to dissipate its assets with a view to frustrate the arbitral award. Vague allegations of financial difficulties are entirely insufficient to justify passing of a protective order of security under Section 9 (1)(ii)(b).

33. It has to be remembered that Section 9 is not a substitute for Section 17. Grant of relief under Section 9 requires, as its *sine qua non*, an opinion, by the Court, that, were such relief not to be granted, the arbitral proceedings may stand frustrated.[13] Section 9 cannot be used as an avenue to secure "*ad hoc* protection". Else, the Court would be pre-empting the right of the arbitral tribunal to take a *prima facie* view regarding the necessity of grant of interim protection to either of the parties before it.

34. In this context, one is also required to be mindful of the note of caution by a Division Bench of this Court in ***DLF Ltd. v Leighton India Contractor Pvt. Ltd.***[14], that findings, and even observations, of the Court, exercising jurisdiction under Section 9, invariably impact, to one extent or the other, the arbitral proceedings. The court should, therefore, save in exceptional circumstances and where the interests of justice pre-eminently so require, eschew the temptation to return any such observations or findings.

35. Viewed in this backdrop, the averments in the petition do not make out any case for a direction, to the respondents to furnish

[13] **Avantha Holdings v Vistra ITCL Limited MANU/DE/1548/2020: Indiabulls Housing Finance Ltd. v Ambience Projects & Infrastructure Pvt. Ltd. MANU/DE/0557/2021**
[14] **2021 SCC OnLine Del 3772**

security. All that is alleged is that Respondent 1 is in a fragile financial condition. The only contention advanced by Mr. Panda, during arguments, in this context, was that Respondent 1 is a subsidiary of, and financially dependent on Doosan Heavy Industries & Construction Company, Korea, (Doosan Korea) which, itself, is in dire financial straits. Apropos the financial condition of Doosan Korea, the petition alleges that, recently, it had to shut down several of its subsidiaries and fire thousands of its employees which has, "had a rippling effect", on the Indian subsidiary, Respondent 1, owing to which Respondent 1 has not been able to pay its contractors. There is no reference to the particulars of the financial condition of Doosan Korea, or of the "rippling effect", on Respondent 1. Though there is an averment that Doosan Korea has had to shut down some of its subsidiaries, Respondent 1, obviously, has not been shut down. There is no reference to any Balance Sheet or other financial document of Respondent 1, on the basis of which it can be said that Respondent 1 is financially not in a position to meet the claims of the petitioner, in the event of the petitioner succeeding in arbitration. Further, there is no allegation of dissipation, by Respondent 1 of any of its assets, whether with a view to frustrate the arbitral proceeding or for any other reason.

36. Factual assertions, which would satisfy, even *prima facie,* the pre-requisites for grant of *interim* protective relief under Section 9 (1)(ii)(b) are, therefore, completely lacking in the present case.

Critical note sounded in ***CRSC Research and Design Institute Group[2]***

37. In ***CRSC Research and Design Institute Group[2]***, the Division Bench of this Court has critically commented on parties approaching this Court under Section 9 of the 1996 Act, seeking restraint against invocation of bank guarantees, despite the extremely restricted grounds on which such prayers could be sought. This Court has opined that such attempts have to be quelled with a heavy hand and imposed, in the said case, costs of ₹ 5 lakhs on the appellant in that case. Unjustified attempts at approaching Courts at the pre-arbitral stage under Section 9 of the 1996 Act, such as the present, apart from burdening the docket of the Court, are also against the very ethos of the 1996 Act.

38. I am therefore constrained, albeit reluctantly, to dismiss these petitions with costs, in each case of ₹ 2.5 lakhs.

39. The costs would be deposited by the petitioner with the Registrar General of this Court, by way of a crossed cheque favouring the Delhi High Court Legal Services Centre (DHCLSC) within a period of four weeks from today.

C.HARI SHANKAR, J

NOVEMBER 12, 2021
r.bararia