(2007) 07 DEL CK 0093

Delhi High Court

Case No: OMP. Nos.: 239 of 2007 and 248 of 2007

CWHEC-HCIL (JV)		APPELLANT
	Vs	
Calcutta Haldia Port Road Co. Ltd. and Others		RESPONDENT

Date of Decision: July 27, 2007

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 34, 9

Citation: (2008) 1 ILR Delhi 353

Hon'ble Judges: G.S. Sistani, J

Bench: Single Bench

Advocate: A.S. Chandhiok, with Mr. D. Moitra, for the Appellant; Rajiv Nayyar with Mr. Manu Nair and Mr. Mark D''Souza, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

G.S. Sistani, J.

The petitioner has filed the present petition being O.M.P. No. 239 of 2007 u/s 9 of the Arbitration and Conciliation Act, 1996, seeking, inter alia, an injunction restraining the respondents from invoking and encashing bank guarantees furnished by the petitioner in respect of performance of contract. During the pendency of the present petition, another petition being O.M.P. No. 248/2007 was filed seeking invocation of bank guarantees for mobilisation of advances and retention money. As both the petitions were argued together, therefore, they are being decided by a common order. The brief facts, as set out by the petitioner, are that the petitioner is a joint venture of M/s. China National Water Resources & Hydro-Power Engineering Corporation, presently known as Sino-Hydro Corporation and Ms. Harish Chandra (India) Ltd. The respondents had invited a tender for the project of four laning of Km.0/500 to Km.52/700 of Kolaghat - Haldia Section of

NH-41 in the State of West Bengal - Package WB (Haldia). While respondent no. 1 is a subsidiary created by the National Highways Authority of India for the said project respondent nos. 2 and 3 are the officer-in-charge the engineer concerned with the said project. The petitioner was one of the contractors who applied for the said tender, became successful in its bid, and accordingly, the works were awarded in favour of the petitioner. The date of opening the tender was 16.08.2001 and the letter of acceptance was received on or about 22.11.2001. The contract was entered into after a gap of 8 months. The date of completion of the project was 10.09.2002 and the time of completion was 30 months. The initial contract price was fixed at Rs. 219,98,91,379/-. The performance guarantee was fixed at Rs. 22.0 crores which was provided by the petitioner on 07.12.2001. The present petition has been filed seeking, inter alia, stay on the invocation of the aforesaid bank guarantee.

2. It has been submitted by learned counsel for the petitioner that although the bank guarantee was submitted way back on 07.12.2001 the petitioner was made to wait for more than 8 months for signing the agreement. Learned counsel further submits that there was a gap of more than 8 months, which period was more than sufficient for the respondents to clear the site from encroachment, which the respondents failed to do. On applying for extension on 14.05.2004 for completion of the project, respondent no. 3 vide letter dated 18.03.2005 granted the extension to the petitioner till 09.07.2005. The respondents further granted extension vide letter dated 16.11.2005 till 01.12.2005. Learned counsel lays stress on the fact that these extensions were granted without any levy or compensation whatsoever and consequently this would show that the delay in the completion of the project was wholly attributable to the respondents. Learned counsel for the petitioner also submits that vide letter dated 18.11.2005, the petitioner was forced to seek extension of time till 31.12.2007, as the petitioner had expected the work to be completed by that date. In reply to the letter dated 18.11.2005, respondent no. 3 granted only interim extension of 45 days from 02.12.2005 upto 15.01.2006. According to the petitioner there were various hindrances which were solely attributable to the respondents, and therefore, the petitioner vide letter dated 19.06.2006 requested for further extension of time for a period of 90 days. The respondent no. 3 vide letter dated 27.06.2006 granted extension from 15.01.2006 to 19.08.2006. Learned counsel for the petitioner also submits that even at that stage, the respondents granted extension and did not levy any compensation on the petitioner, as the delay and default was solely attributable to the respondents. The petitioner has drawn the attention of the Court to Annexure-J appended to the petition, enlisting the hindrances and problems which were created by the respondents in the completion of the project. Vide letter dated 18.07.2006, the petitioner requested for another extension of time on the ground that the delay was not attributable to it. Further extension was sought by the petitioner for a period of 27 months, as they expected completion of the project by 30.03.2008. The grievance of the petitioner is that the respondent no. 3, who is the Consulting Engineer

Services (I) Pvt. Ltd., the duly appointed engineer for the project, sat over the extension letter and did not reply for a period of seven months, and thereafter only granted extension till 09.01.2007. The petitioner vide letter dated 16.02.2007 requested for another extension from 09.01.2007 to 31.12.2008. In reply to the aforesaid letter for extension, the respondent no. 3 vide letter dated 24.2.2007 did not accede to the grant of further extension beyond 09.01.2007.

3. It is the grievance of the petitioner that the respondents failed to take into consideration the hindrances mentioned by the petitioner in its various letters. Vide letter dated 14.04.2007, respondent no. 3 has now levied liquidated damages on the petitioner. Learned counsel submits that extension was refused without assigning any reason and reflects the high-handedness and arbitrariness on the part of the respondents. However, it may be relevant to note that on 26.2.2007, the respondents had written to the branch manager, Corporation Bank that since contractor/petitioner, herein, have failed to perform their obligations in the contract, it has been decided to invoke the bank guarantee.

4. In light of the above facts, it is strongly argued by learned counsel for the petitioner that the complete facts suggest that the respondents alone have been responsible for the hindrances and for the non-completion of the work on time and in view of the fact they have invoked the bank guarantees on the ground of delay which is otherwise attributable thereby committing a fraud. The invocation of the bank guarantees should be stayed. Learned counsel has also drawn the attention of the Court to a letter dated 20.4.2007 wherein the petitioner had brought to the notice of the respondents that on account of slow progress and on account of the reasons not attributable to the petitioner, the delay has resulted in a loss of Rs. 54,20,46,648/- and called upon the respondents to pay the aforesaid amount. During the course of arguments it has also been pointed out that the petitioner has filed a statement of claim, seeking recovery of more than Rs. 100 crores from the respondents which dispute is pending disposal before the arbitral tribunal. It may be relevant to note that the petitioner, in OMP No. 248/2007, has brought to the notice of this court that the arbitral tribunal, before whom the disputes between the petitioner and the respondents are pending disposal, has published an award on 27.04.2007 in favour of the petitioner, which works out to about Rs. 25 crores including escalation and interest.

5. Learned counsel for the respondents has vehemently opposed this petition on the ground that none of the conditions have been brought to the notice of the Court which would entitle the petitioner for grant of stay on encashment of the bank guarantees. In his defence, learned counsel for the respondents has proffered the following grounds justifying invocation of the bank guarantees: Firstly, the petitioner has malafidely suppressed certain material documents indicating the losses suffered by the respondents on account of having to re-assign the works consequent to the termination of the material contract. Secondly, no fraud is being

perpetrated by the respondents on invoking the bank guarantees. Thirdly, no injunction can be granted against the termination of determinable contract.

6. I shall advert in detail to the submissions of the petitioner and the respondents later. At this stage, it may be relevant to revisit the principles upon which bank guarantees can be invoked or restrained. These principles have been formulated, reiterated and applied by the courts of law in India in a plethora of cases. However, for the sake of prolixity, I do not think it is necessary to refer to all of them. Suffice for us to refer to U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd., , and BSES Ltd. (Now Reliance Energy Ltd.) Vs. Fenner India Ltd. and Another, as the gist of the entire law on invocation of bank guarantees has been succinctly elucidated and summed up in the said decisions of the Apex Court. While UP Cooperative Federation Ltd. (supra) lays down the general rule for invocation of bank guarantees, BSES (now Reliance India Ltd.) (supra) supplements the said case by carving out exceptions to the general rule.

7. In U.P. Cooperative Federation Ltd. (supra), the Apex Court has ruled that a bank guarantee must be honoured in accordance with its terms as the bank, which gives the guarantee, is not concerned with the relations between the supplier and the customer. Neither is the bank concerned with the question whether any of them have failed in their contractual obligations or not. In other words, the bank must pay according to the tenor of its guarantee, on demand, without proof or condition. The following observations of the Court are notable: "....Upon bank guarantees revolves many of the internal trade and transactions in a country..... In order to restrain the operation either of irrevocable letter of credit or of confirmed letter of credit or of bank guarantee, there should be serious dispute and there should be good prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Otherwise, the very purpose of bank guarantees would be negatived and the fabric of trading operation will get jeopardised. " (per Mukharji, Sabyasachi, J).

8. In BSES Ltd. (Now Reliance Energy Ltd.) Vs. Fenner India Ltd. and Another, , the Apex Court, while endorsing the rule laid down in U.P. Cooperative Federation Ltd. (supra) appertaining to the extent of Courts'' intervention in restraining invocation of bank guarantees, has carved out the following exceptions. Firstly, 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 Court can restrain the enforcement of the bank guarantee by grant of interim injunction. Secondly, 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. In BSES (now Reliance Energy Ltd.) v. Fenner India Ltd. (supra), appellant invoked bank guarantee submitted by respondent in respect of contract entered between the parties. An application was filed by respondent for grant of interim injunction for restraining the appellant from invocation of the bank guarantee. The question that came up for consideration

before the court was whether the bank guarantees could be honoured by the bank concerned. The Apex Court, inter alia, observed "..... [A] bank guarantee must be honoured in accordance with its terms, as the bank, is not concerned with the relations between the supplier and the customer. Neither is the bank concerned with the question whether-any of them have failed in their contractual obligations or not. In other words, the bank must pay according to the tenor of its guarantee, on demand, without proof or condition. " (per Sri Krishna, B.N., J). The learned Judge further ruled that as per the terms of the bank guarantee itself, appellant was the best judge to decide as and when and for what reason the bank guarantees should be encashed. In the said case, as there was no situation of irretrievable injustice if the bank guarantees were invoked, the application of injunction for restraining the appellant from invoking the bank guarantee was accordingly dismissed.

9. In light of the aforesaid discussion, the following principles governing the invocation of bank guarantees are culled out:-

(i) A bank guarantee is an independent and distinct contract between the bank and the beneficiary.

(ii) In the case of unconditional bank guarantees, the bank undertakes to give money to the beneficiary on demand, without demur or protest.

(iii) Further, in unconditional bank guarantees, the nature of the obligation of the bank is absolute and not dependent upon any dispute or proceeding between the beneficiary of the bank guarantee and the party at whose instance the bank guarantee.

(iv) As bank guarantees are fundamental to trade and commerce, both at the domestic and international level, the general rule is that courts of law should be slow and cautious in granting injunction to restrain their realization. For instance, courts should refrain from probing into the disputes between the parties or from embarking on questions as to whether the beneficiary is trying to take undue enrichment, etc.

(v) However, there are four exceptions to the aforesaid general rule, that is, the court may grant injunction restraining the invocation of bank guarantee, if :

(a) there is a fraud of an egregious nature in connection with the bank guarantee which would vitiate the very foundation of such guarantee and the beneficiary seeks to take advantage of such fraud.

(b) the applicant, in the facts and circumstances of the case, clearly establishes a case of irretrievable injustice or irreparable damage.

(c) the applicant is able to establish exceptional or special equities of the kind which would outrage the conscience of the court.

(d) the bank guarantee is not invoked strictly in its terms and by the person empowered to invoke under the terms of the guarantee.

10. It may be relevant to note that while the aforesaid principles are not in dispute, it is the application thereof in the present case which has precisely become the bone of contention between the petitioner and the respondents. I shall, therefore, delve at length on the submission of both the parties.

11. Mr. A.S. Chandhiok. learned Senior Counsel appearing for the petitioner, has submitted that all exceptions to the general rule viz. fraud, special equities, irretrievable injustice, etc. which would entitle the petitioner to a stay on the invocation of bank guarantees for performance (subject matter of OMP No. 239/2007), mobilization of advances and retention money (subject matter of OMP No. 248/2007) are clearly applicable to the present case. For the sake of clarity, I shall consider these exceptions under separate heads.

Re: Fraud

12. Under Clause 34.1 of the Instructions to Bidders and Clauses 52.1 of the Conditions of Contract, the petitioner was require to furnish respondents a Performance Bank Guarantee for an amount equivalent to 10% of the Contract Price, in order to secure the respondents against losses arising out of poor performance of the works stipulated under the contract. Learned Counsel for the petitioner submits that there is an established fraud on the part of the respondents in that the respondents initially extended the performance of the contract till the taking over, but later, in derogation of clauses 55.1 and 56.1 of the Conditions of Contract, have terminated the contract and invoked the bank guarantees. Learned counsel further submits that the invocation of the bank guarantee for recovery of liquidated damages is fraudulent because the bank guarantee is apparently for performance, and not for liquidated damages. It is further submitted that the guarantee was only for the fluctuating amount of the payment outstanding under the contract, and therefore, the invocation of the bank guarantee for the entire amount of Rs. 22.0 crores without first determining the outstanding amounts payable under the contract is fraudulent.

13. Mr. Rajiv Nayyar, learned Counsel for the respondents has countered the aforesaid contention of the petitioner by stating that due to the admittedly poor rate of progress in performing the contract work, the respondents were suffering losses on account of delay, as well as on account of having to reassign the work consequent upon termination of the contract. Learned counsel submits that compensation or damages payable in respect of these losses have been liquidated by the parties in Clause 49 of the Conditions of Contract read with Sr. No. 30 and 31 of the Contract Data, and Clause 60.1 of the Conditions of Contract read with Sr. No. 42 (a) of the Contract Data. Thus the performance bank guarantee can be invoked to recoup the liquidated damages for the losses arising out of the poor rate of

progress in performing the contract works, and the consequent termination thereof Learned counsel further submits that any contrary interpretation would be absurd, since it would result in the performance bank guarantee being not liable to be invoked under any circumstances.

14. Under Clause 51 of the Conditions of Contract, the respondent No. 1 was required to make advance sums of money against unconditional bank guarantees to the Petitioner to cover its Equipment, Plant and mobilisation expenses. Learned counsel for the petitioner submits that pursuant to the conditions of the contract, the petitioner has mobilised all required machinery and resources and equipments worth Rs. 40.0 crore and materials worth Rs. 14.0 crore are admittedly lying at site. Thus, there is no cause for invocation of bank guarantee for mobilization of advances.

15. Learned Counsel for the respondents has negatived the aforesaid contention of the petitioner by submitting that Clause 51.3 of the Conditions of Contract makes it clear that these mobilization advances were in the nature of loans forwarded by the respondent no. 1 to the petitioner, and had to be repaid. Learned counsel has referred to para 10, page 3 of OMP 248 of 2007 to establish that on the petitioner''s own showing, at least Rs. 10 crores is outstanding on this account to the respondent no. 1. Learned counsel accordingly submits that the invocation of the Bank Guarantee for Mobilization Advances is not fraudulent, and is in accordance with law.

16. Under Clause 48 of the Conditions of Contract, the respondent no. 1 was entitled to retain a percentage of the payment due to the petitioner under each bill to secure the petitioner''s co-operative in rectifying any defects that emerged in the works after the payment of the bill amounts. These moneys could be released to the petitioner upon the petitioner furnishing an unconditional bank guarantee in respect of these amounts. The bank guarantees would have to be kept valid until the expiry of the Defect Liability Period contractually specified in Sr. No. 4 of the Contract Data as 365 days from the date of completion of the works. Learned counsel for the petitioner submits that since the respondents admittedly have said that defect liability period is no longer a part of the contract, they should immediately return the retention money guarantees to the petitioner. The grievance of the petitioner is that an excess amount of retention money of Rs. 1.5 crores is lying with the respondents, and now, by illegally rescinding the contract, the respondents want to grab the retention money belonging to the petitioner by invoking the bank guarantee.

17. Learned counsel for the respondents has refuted the aforesaid contention of the petitioner by stating that since the contract was terminated owing to the petitioner''s fundamental breaches, the respondents will be required to call upon a new contractor to remedy the defects. It is further submitted that as per the terms of the contract itself, the bank guarantee for the retention of money was intended

to protect the respondents'' interests in such circumstances, therefore, the invocation of bank guarantee for retention money is not fraudulent, and is in accordance with law.

Re: Special Equities

18. Learned counsel for the petitioner submits that it does not owe any sums of money to the respondents, and that on the contrary, it is respondent no. 1 who owes money to the petitioner in respect of outstanding bills, and also under the arbitration award dated 27.04.2007. The said arbitral award is totally based upon engineering and technical calculations which cannot even be interfered u/s 34 of the Arbitration & Conciliation Act, 1996 on the pretext that it offends public policy. Learned counsel further submits that as regards mobilization of advances, equipments worth Rs. 40.0 crores and materials worth Rs. 14 crores are lying at the site of construction. The grievance of the petitioner is that the said equipments and materials lying at site, having been procured specifically only for the construction work under the contract, are otherwise of no use to the petitioner. It is therefore submitted that special equities operate in its favour to justify the grant of an injunction on the invocation and payment upon the bank guarantee.

Re: Irretrievable Injury.

19. Learned counsel for the petitioner submits that if the bank guarantees are permitted to be invoked, the petitioner would suffer irreparable injury because the constituent members of the JV (the petitioner herein) have mortgaged their valuable movable and immovable properties to furnish the bank guarantees to the respondents.

20. Learned senior counsel for the respondents has opposed the plea of the petitioner qua special equities and irretrievable injury. According to learned senior counsel, it is the petitioner who owes the respondents huge sums of money in respect of outstanding bills, etc. To make his averments more objective, learned senior counsel has ably adduced in paragraph 5(b)(i) of his written submissions, the exact amounts which the petitioner owes to the respondents and the basis on which he has arrived at the said amounts. For felicity of reference, the said paragraph 5(b)(i) of the written submissions of the respondents is extracted as under:-

ii. THE PETITIONER OWES AMOUNTS TO THE RESPONDENT NO. 1.

(A) The amounts claimed by the petitioner as outstanding from the respondent no. 1, are strongly controverted and denied. It is submitted that in fact the petitioner owes the respondents large sums of money as liquidated damages on account of delay, as well as on account of having to reassign the works consequent upon termination of the contract. Moreover, certain amounts have been paid to the petitioner as mobilization advances, and these are also liable to be returned to the respondent no. 1.

(B) In terms of Clause 49.3 of the Conditions of Contract (page 60 of the Contract Compilation) read with Sr. No. 30 of the Contract data (page 97 of the Contract Compilation), liquidated damages of 1/2000th of the Initial Contract Price is payable for each day for which the completion of the project works is delayed after the completion dated. This amounts to Rs. 11 lakhs per day. The extended date of completion expired on 14.2.2007, and the Contract was terminated on 26.4.2007. Thus, liquidated damages amounting to Rs. 7.81 crores are payable for the 71 days for which the project was delayed beyond the extended date of completion until the date of termination.

(C) In terms of Clause 60.1 of the Conditions of Contract (page 62 of the Contract Compilation) read with sr. No. 42(a) of the Contract Data (page 99 of the Contract Compilation), liquidated damages qualified at 20% of the value of the work not completed, have to be paid as compensation for losses suffered on account of having to reassign the works consequent upon termination of the contract. It is the petitioner''s own case that the expenses that would have to be incurred for reassigning the works consequent upon termination of the contract would amount to Rs. 200 crores. Thus the respondent no. 1 is entitled to 20% of this sum, which amounts to Rs. 40 crores. As per the answering respondent''s calculations this amount is about Rs. 34 crores, and therefore the answering respondents claims entitlement to only Rs. 34 crores under this head.

(D) As per the petitioner''s own showing, at least Rs. 10 crores is outstanding as mobilization advances to the respondent no. 1 (Para 10, page 3 of the OMP 248 of 2007).

(E) Thus the answering respondent is owned approximately Rs. 51.81 crores by the petitioner, as against bank guarantees of Rs. Only Rs. 38.5 crores furnished to it. It is therefore denied that there are any special equities in favour of the petitioner meriting a stay on the invocation of the bank guarantees.

(F) The arbitration award pronounced in favour of the petitioner is in relation to a separate dispute, and it was pronounced during the course of arguments in the present petitions. This amounts claimed by the petitioner to be payable under the award are disputed. Moreover, it is submitted that this award is subject to challenge u/s 34 of the Arbitration & Conciliation Act, 1997, and the same has not attained finality.

(G) The petitioner''s claim that equipment worth Rs. 50 crores has been seized by the answering respondent is strongly controverted. The said equipments are being held as per Clause 61.1 of the Conditions of Contract (page 62 of the Contract Compilation). Further, the cost of the various equipments on their purchase in 202 is as stated by the petitioner itself in the certificate of the charted Accountants filed by the petitioner on page 28 of its Additional Documents filed in OMP 248 of 2007 on 4.5.2007. Column 3 in the table in the said certificate sets out the cost of the various

equipments, and these amounts add up to approximately Rs. 23 crores. To arrive at the present value of these equipments, the procurement cost has to be adjusted for depreciation as well. Moreover, it is manifest from the opening paragraph of the same certificate that these equipments are all hypothecated to ICICI Bank, and therefore of limited value to the answering respondents. It is therefore submitted that the fact that the said equipment is being held by the respondent no. 1 creates no equities in favour of the petitioner.

21. It is thus the case of the respondents that as the petitioner owes approximately Rs. 51.81 crores to the respondents, as against bank guarantees of only Rs. 38.5 crores, no special equities exists in favour of the petitioner so as to grant any injunction on the invocation of bank guarantees.

22. It is also the case of the respondents that the petitioner being an instrumentality of the state, there is no danger of the petitioner being unable to recover any amounts it claims should the same be awarded to it in the arbitral proceedings. Thus, no irretrievable injury would be occasioned if no interim relief is granted to the petitioner in the present case.

23. It is trite that the invocation of bank guarantees in the present case was an inevitable fallout of the respondents'' termination of the contract between him and the petitioner for the construction of the Calcutta-Haldia Port Road. Whilst challenging the invocation of the bank guarantees, learned senior counsel for the petitioner has strenuously argued that not only was the said invocation bad in law, the termination of the contract by the respondents with the ulterior motive to invoke the bank guarantees was, per se, fraudulent. Refuting the said averment of the petitioner, learned senior counsel for the respondents has made good the grounds which constrained the respondents to terminate their contract with the petitioner. According to the learned senior counsel, the three grounds which impelled the respondents to terminate the contract are:

(i) Firstly, extremely poor rate of progress;

(ii) Secondly, fraudulent mis-representation of lead partners; and

(iii) Thirdly, non-deployment of lead partner.

24. The aforesaid grounds, as adduced by learned counsel for the respondents and the counter-submissions on behalf of the petitioner, are elucidated in the following paragraphs.

25. Clause 59.2(e) of the Conditions of Contract provides for termination of the contract for fundamental breach provided if the Engineer gives notice that the failure to a correct a particular defect is a fundamental breach of the Contract, and the Contractor fails to correct the defect within a reasonable period of time determined by the Engineer. It is the case of the respondents that despite repeated communications dated 19.07.2006, 30.08.2006, 12.10.2006, all of which have been

suppressed by the petitioner, the petitioner has failed to explain its continued poor progress in completion of the contract. Subsequently, the respondents issued yet another show cause notice dated 15.02.2007 in view of the petitioner''s failure to improve its rate of progress. Furthermore, the petitioner has itself filed letters dated 17.04.2007 and 28.02.2007 wherein it has admitted the factum of termination of the contract owing to consistent delay in completion of the Calcutta-Haldia Port Road project. It is thus the case of the respondents that as all the requirements for terminating the Contract for fundamental breach under Clause 59.2(e) of the Conditions of Contract were met, the Contract was validly terminated vide letter dated 26.4.2007.

26. Learned senior counsel for the petitioner has vehemently opposed the aforesaid averments of the respondents. He submits that the respondents'' termination of the contract under Clause 59.2(e) is wholly fallacious inasmuch as the petitioner has duly responded vide letter dated 28.02.2007 to the respondents'' show-cause notice dated 15.02.2007. Learned counsel submits in its letter dated 28.02.2007, the petitioner has established beyond doubt that the delay in the completion of the project was solely attributable to the respondents.

27. The aforesaid submission of the petitioner that the delay is squarely attributable to the respondents is not convincing. To make things clear, I''ve extensively perused all the aforementioned correspondences between the petitioner and the respondents. Pertinent to note is the respondents'' letter dated 19.07.2006 to the petitioner, whereby the respondents have chronicled the entire chain of complaints starting from 2004, regarding the petitioner''s poor rate of performance. Relevant portions of the letter dated 19.07.2006 are reproduced as under:-

The JV was issued with warnings on the poor rate of progress and its failure. To improve the performance. In this connection, your attention is invited to the project Director, PIV, NHAI letter PIV/ Haldia/PC-1002/214/04-05 dated 14.10.2004, PIU/Haldia/PC-1002/236/ 2004-05 dated 29.10.2004 and PIU/Haldia/PC-1002/174/05-069 dated 29.9.2005. Early warnings were also issued by the Engineer under his letter 2002060/RH/394 dated 22.12.2004 and under letter 200 2060/RH/ 95 dated 30.5.2006, bringing out the failure to achieve the targets and for not fulfilling the commitments made by the JV to meet the obligation under the contract. The JV was also informed that in the event of its failure to remedy the situation, we will be left with no alternative but to initiate action pursuant to the conditions of cont.

28. The respondents have also taken me through the letter dated 24.04.2007 wherein the respondents had refused the extension of time to the petitioner on the ground of failure to improve its rate of progress. Learned senior counsel for the respondents submits that as on 14.02.2007, the date until which extension had been granted for the completion of the contractual work without levy of damages, only 41.8% of the work had been completed by the petitioner. In fact, at the rate of

progress of the petitioner, the contract work would take an additional 6 years after 14.2.2007 to complete the work. The respondents, therefore, were not convinced that the petitioner would be able to complete the work even at the revised dates of completion that the petitioner had indicated as its targets. Learned senior counsel has also clarified that the extension granted in the date of completion until 14.2.2007 was in the nature of a condonation of levy of liquidated damages for delay. It did not amount to a waiver of the rights arising out of all contractual non-compliances and breaches, fundamental or otherwise, occurring prior to the grant of the extension.

29. The respondents have terminated the contract also on the ground of fraudulent misrepresentation of lead partners as well as non-deployment of key personnel. These two grounds are clearly stipulated in Clauses 59.2 of the contract. According to learned senior counsel for the respondents, the petitioner had named several highly qualified and experienced persons as their key personnel in their bid and upon considering, inter alia, the qualifications of these key personnel, the answering respondents awarded the contract to the petitioner. It is thus the case of the respondents that inasmuch as the lead partner has not participated in performing the contract, and despite being called upon to do so by the respondents in each of the suppressed documents as well as the show cause notice dated 15.2.2007, the petitioner has not come forward to provide any proof of the participation of the lead partner, the petitioner has clearly committed a fundamental breach of the contract under Clause 59.2 of the contract thereby entitling the respondents to terminate the contract.

30. Learned senior counsel for the petitioner has negatived the aforesaid contention of the respondents by submitting that the Chinese employees had been deployed in the initial stages of contract, but owing to health reasons, language problems and non-availability of visas due to security reasons, they could not continue. This submission of the learned counsel does not appear convincing to me. The petitioner has clearly committed a breach of Clause 59.2 of the Contract inasmuch as the reasons adduced for non-deployment of key personnel could have been clearly foreseen by the petitioner whilst tendering its bid for the contract. As the petitioner was aware that he would not be able to sustain the strength of its Chinese partner in the long run, the petitioner should have refrained from tendering its bid.

31. Learned senior counsel from both sides have also cited various judicial pronouncements to substantiate their respective arguments. Before embarking on to the decision of the present case, it is incumbent upon this Court to delve on these judicial pronouncements and examine to what extent they buttress the respective submissions of the petitioner and the respondents.

32. As regards the plea of fraud, learned counsel for the respondents has vociferously opposed the same by submitting that merely by saying a fraud has been committed is not enough. To substantiate his point, learned counsel has

placed on record the decision in Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works (P) Ltd., and another, and Intertoll ICS Cecons O and M Company P. Ltd. Vs. National Highways Authority of India, , wherein Courts have consistently maintained that no injunction can be granted to restrain the invocation of an unconditional bank guarantee unless fraud in connection with the said bank guarantee that vitiates the very foundation of the bank guarantee is of an egregious nature and an established fraud.

33. As regards the plea of special equities, learned counsel for the petitioner has relied upon Vakil Chand Bindal Vs. Delhi Development Authority, and Hindustan Construction Co. Ltd. Vs. State of Bihar and Others, . The said contention of the petitioner is not acceptable to me. In view of the letters dated 24.2.2007, 14.4.2007 and 19.7.2006, it is clearly established that the respondents have repeatedly put the petitioner to notice, from as early as 2004, informing the petitioner that his poor rate of performance was a matter of grave concern and that the petitioner was required to take immediate corrective action. The petitioner, thus, cannot claim any special equities on the ground that the respondents had not made any complaint as to its slow rate of progress on the project.

34. As regards the case of Vakil Chand Bindal (supra), the said case does not come to the rescue of the petitioner inasmuch as the beneficiary (DDA) the said case had not fulfilled its obligation in respect of making available the clear site and drawings of construction thereby resulting in delay in the execution of the work awarded to the contractor. On account of the laxity on the part of the DDA the court rightfully restrained the DDA from retaining or forfeiting the security money deposited with it for performance of the contract. However, the facts in Vakil Chand Bindal (supra) are clearly distinguishable from the facts in the present case inasmuch there was no laxity or inadvertence on the part of respondents as they had duly intimated and warned the petitioner that the latter''s slow rate of performance could hinder the timely completion of the project.

35. As regards Hindustan Construction Co. Ltd. (supra), the said case also does no good to the petitioner, as the court in the said case granted injunction on invocation of bank guarantee on the ground that the invocation was not by proper authority. The said case does not come to the rescue of the petitioner as the situation here is different. On a conjoint reading the bank guarantee dated 6.12.2001 and the letters dated 24.2.2007, 14.4.2007 and 19.7.2007, it is clearly established that the respondents retain the right of invoking the bank guarantee on account of slow rate of progress in completing the project.

36. The petitioner has further alleged that the respondents have illegally terminated the contract under Clause 59.2(e) of the Conditions of Contract for failure to correct a particular defect. To vindicate his argument, learned counsel for petitioner has referred to clauses 33 to 36 of the Conditions of Contract to submit that the word ''Defect'' is used only in the context of particular physical defects in the work done.

Learned counsel submits that since poor rate of progress is not a ''Defect'' under the contract, the respondents have committed a fundamental breach in terminating the contract. Learned counsel for the respondents has countered the submissions of the petitioner by submitting that the definition of the word ''defect'', as construed by the petitioner, is not warranted by the definition of the word ''defect'' in clause 1.1 of the Conditions of Contract, which defines defect as ''any part of the works not completed in accordance with the contract''. It is submitted by learned counsel for the respondents that the definition of the word ''defect'' under the said clause 1.1 is of much wider amplitude than the definition proposed by the petitioner. Moreover, clauses 33 to 36 of the Conditions of Contract are under the sub-heading of ''Quality Control'', and in that context, would necessarily refer to the quality of the physical work done.

37. Furthermore, the petitioner has placed reliance upon the case of Hind Construction Contractors by its Sole Proprietor Bhikamchand Mulchand Jain (Dead) by Lrs Vs. State of Maharashtra, to submit that a provision for the imposition of penalty and extension of time would militate against any reference that time is of essence is a construction contract, and thus, the respondents have illegally terminated the contract on the ground of delay in completion of the project. This averment of the petitioner, I am afraid, is misplaced. Learned counsel for the respondents has aptly countered this averment of the petitioner by submitting since the respondents had expressly fixed an additional time for completion of the work when granting extensions ,, the failure of the petitioner to complete the project within the extended time entitles the respondents to terminate the contract. To further buttress his point, learned counsel has relied upon Halsbury''s Laws of England (part 7, page 77), which states even when time is not essence of the contract, "the employer may by notice fix a reasonable time for the completion of the work and dismiss the contractor on a failure to complete by the date so fixed."

38. It is further the case of the respondents that no injunction can be granted restraining the termination of a determinable contract. To substantiate his point, learned counsel has relied upon Rajasthan Breweries v. Stroh Brewery Co., reported at AIR 2000 Del. 450 and Rainbow Electic Supply Co. Vs. North Delhi Power Limited, . Learned Counsel for the respondents has further justified the termination of the contract on the ground that under Clause 59.2 (3) of the Conditions of Contract, the contract could be terminated for fundamental breach if the engineer gave notice that the failure to correct a particular defect is a fundamental breach of the Contract, and the Contractor fails to correct the defect within a reasonable period of time determined by the Engineer.

39. I have heard learned counsel for both parties and given my thoughtful consideration to the matter.

40. In the ultimate analysis, I do not see any advantage which the beneficiary (respondents herein) seek to take by invocation of the bank guarantees. Even

otherwise, the bank guarantees in the present case are unconditional bank guarantees and being an independent and distinct contract between the bank and the beneficiary, both the parties are bound by the terms thereof. The invocation of the bank guarantees, thus, will have to be in accordance with the terms of the said bank guarantee, or else, the invocation itself would be unjustifiable in law. It may be relevant for this Court to take into consideration the terms of the bank guarantees in the present case. The bank guarantee dated 06.12.2001, which is a performance guarantee, is in the following terms:

BANK GUARANTEE (PERFORMANCE)

To

Calcutta Haldia Port Road Company Limited National Highways Authority of India, G-5 & 6, Sector-10, Dwarka, New Delhi-110045.

Whereas M/s China National Water Resources & Hydropower Engineering Co-Harish Chandra (India) Ltd. (J.V.), 113-A, Kamla Nagar, Delhi 1-110 007 (hereinafter called "the Contractor") has undertaken in pursuance of Contract No. Package WB (Haldia) dated 22.11.2001 to execute Development of Adequate Road Connectivity to Haldia Port - Package WB (Haldia) (hereinafter called "the Contract").

And whereas it has been stipulated by you in the said Contract that the Contractor shall furnish you with a Bank Guarantee by a recognised bank for the sum specified therein as security for compliance with his obligations in accordance with the Contract.

And whereas we have agreed to give the Contractor such a Bank Guarantee;

Now therefore we hereby affirm that we are the Guarantor and responsible to you, on behalf of the Contractor upto a total of Rs. 22,00,00,000/-(Rupees twenty two crores only) such sum being payable in Indian Rupees in which the Contract price is payable, and we undertake to pay you, upon your first written demand and without cavil or argument, any sum or sums within the limits of Rs. 22,00,00,000/- (Rupees twenty two crores only) as aforesaid without your needing to prove or to show grounds of reasons for your demand for the sum specified therein.

We hereby waive the necessity of your demanding the said debt from the Contractor before presenting us with the demand.

We further agree that no change or addition to or other modification of the terms of the Contract or of the Works to be performed thereunder or any of the contract documents which may be made between you and the Contractor shall in any way release us from any liability under this guarantee and we hereby waive notice of any such change, addition or modification. This guarantee will remain valid till 06.09.2005 w.e.f. 07.12.2001.

Notwithstanding anything contained herein above:-

i. Our liability under this guarantee shall not exceed Rs. 22,00,00,000/-(Rupees twenty two crores only);

ii. this bank guarantee shall be valid upto and including 06.09.2005; and

iii. We are liable to pay the guaranteed amount or any part thereof under this Bank guarantee only and only if you serve upon us a written claim or demand on or before the expiry of this guarantee.

41. As per the terms of the aforesaid bank guarantee, the bank has clearly stated that:

(e) the bank is the guarantor and responsible to the respondents herein upto a total of Rs. 20,00,00,000/-.

(f) the bank undertakes to pay the beneficiary any sum or sums within the aforesaid limit of payment by the beneficiary.

(g) the amount would be payable ''upon first written demand'' and without cavil or argument.

(h) payment would be made without respondents needing to prove grounds or reasons for the demand.

(i) necessity of demanding the said debt from the operator, that is, the petitioner herein, is also waived by the bank.

42. The importance of bank guarantees in facilitating trade and commerce, both nationally and internationally, cannot be understated. An unconditional bank guarantee creates an irrevocable obligation on the bank to honour the bank guarantee irrespective of any dispute between the party furnishing the bank guarantee and the beneficiary thereof. This obligation of the bank manifests an act of trust and faith in order to mobilize practices pertaining to trade and commerce. The courts of law, too, should be extremely circumspective and sporadic in interfering with the invocation of bank guarantees, lest the free flow of trade and commerce is imperiled. The general rule is that the court, ordinarily, should avoid granting injunction to restrain the invocation of bank guarantee, unless it is prima facie satisfied that the act of the beneficiary/respondents is so glaring and unreasonable so as to cause irretrievable injury to the petitioner. The principle underlying the maxim judicis est in pronuntiando sequi regulam, exceptions non probat should be strictly adhered to by the Court in matters pertaining to stay on invocation of bank guarantees .That is to say, the judge in his decision ought to follow the rule, when the exception is not made apparent.

43. Recapitulating the facts of the present case, it is not disputed that the bank guarantees furnished by the petitioner are unconditional and are couched in unequivocal and unambiguous terms. Further, it has been satisfactorily established by the respondents that the delay in execution of the project, as alleged by the

petitioner, is not attributable to them. Even otherwise, at this stage, it is not appropriate for this Court to give a finding or to take evidence to arrive at a conclusion whether it is the petitioner or the respondents who caused the delay. Moreover, in light of the diktats of the Apex Court qua invocation of bank guarantees in U.P. Cooperative Federation Ltd. (Supra) and BSES (now Reliance Energy Ltd.) (Supra), the respondents cannot be asked to prove the grounds of reasons of the invocation, nor the petitioner can be permitted to urge the breach of contract. Further, I see no special equities in favour of the petitioner or any irretrievable injustice jeopardising the petitioner inasmuch as if the petitioner ultimately succeeds in arbitration, the amount realized by invoking the bank guarantees shall be refunded by the respondents. The petitions are accordingly dismissed. It is also made clear that payment made under the bank guarantee would obviously be subject to the final decision of the Arbitral Tribunal or the Court.