**(2007) 09 DEL CK 0144**

**Delhi High Court**

**Case No:** OMP No. 33 of 2007

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|---|---|---|
| United Engineers (Malaysia) - Essar Projects Ltd. (JV) | | APPELLANT |
| | Vs | |
| National Highways Authority of India | | RESPONDENT |

**Date of Decision:** Sept. 28, 2007

**Acts Referred:**

- Arbitration and Conciliation Act, 1996 - Section 9
- Contract Act, 1872 - Section 126

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

**Bench:** Single Bench

**Advocate:** Neeraj K. Kaul and Rajiv Nayyar, Mahesh Aggarwal, Rishi Aggarwal, Amit K. Singh, Biju K. Nair and Shikha, for the Appellant; Sandeep Sethi and A.S. Chandhiok, Vikas Goel, Mahesh Chibber and Vashodhara Anand, for the Respondent

**Final Decision:** Dismissed

**Judgement**

G.S. Sistani, J.

The petitioner has filed the present petitions being O.M.P. Nos. 32/2007 and 33/2007 u/s 9 of the Arbitration and Conciliation Act, 1996, seeking, inter alia, an injuction for restraining the respondent from invoking and encashing bank guarantees furnished by the petitioner in respect of performance of contract, retention money, mobilisation of advance, etc. As the facts in both the petitions are similar, they were argued together, and accordingly, are being disposed of by this common judgment.

2. Some incontrovertible facts, set in the background of the present petitions, are outlined as under:

2.1 The petitioner is a joint-venture of M/s. United Engineers (Malaysia) and M/s. Essar Projects Ltd. The respondent is the National Highways Authority of India.

2.2 On 16.1.2002, the parties entered into a contract for the construction of two sections of the National Highway No. 4 (NH-4). These sections, namely, the Chitradurga-Harihar Section (Km 207 to Km 284) of NH-4 and the Harihar-Haveri Section (Km 284 to Km 340) of NH-4, form part of the Western Transport Corridor of the National Highway (Golden Quadrilateral) in the State of Karnataka, and have been referred to as "Package -4" and "Package-5" respectively in all correspondence between the parties.

2.3 In respect of Package 4, which is the subject-matter of O.M.P. No. 33/2007, the petitioner was required to construct the highway admeasuring a length of 77 Km. (4 lane) of the Main Carriage Way + Service/side road with road fixtures, jewellery items, etc., at a total Contract Price of Rs. 264,87,23,756/-. To secure the execution of Package 4, a total amount of Rs. 79,46,455,891.56/- was submitted by the petitioner to the respondent in the form of bank guarantees. The exact amount furnished by each of the constituents of the petitioner-JV under specific categories of bank guarantees, as provided by the petitioner on page 3 of the paper book in O.M.P. No. 33/2007, is presented in a tabular form as under:

2.4 In respect of Package 5, which is the subject-matter of O.M.P. No. 32/2007, the petitioner was required to construct the highway admeasuring a length of 56 Km (4 lane) of the Main Carriage Way + Service/side road with road fixtures, jewellery items, etc. at a total Contract Price of Rs. 200,91,94,490/-. To secure the execution of Package-5, a total amount of Rs. 59,87,39,959/- crores was submitted by the petitioner to the respondent in the form of bank guarantee. The exact amount furnished by each of the constituents of the petitioner-JV under specific categories of bank guarantees, as provided by the petitioner on page 3 of the paper book in O.M.P. No. 32/2007, is presented in a tabular form as under:

| S. No. | Category | Essar | UEM | Tota |
|---|---|---|---|---|
| 1 | Performance BG | Rs. 9,84,50,530/- | Rs. 9,84,50,530/- | Rs. 19,69, |
| 2 | Retention Money BG | Rs. 10,04,59,725/- | NIL | Rs. 10,04, |
| 3 | Machinery Advance BG | Rs. 10,04,59,725/- | NIL | Rs. 10,04, |
| 4 | Mobilisation Advance | Rs. 9,84,50,530/- | Rs. 10,24,68,919/- | Rs. 20,09, |
| | | Rs. 39,78,20,510/- | Rs. 20,09,19,449/- | Rs. 59,87,3 |

2.5 The terms and conditions, both in respect of Package 4 and Package 5, were common and were documented by the parties in the form of the General Conditions of Contract (GCC) and the Conditions of Particular Application (COPA).

2.6 In pursuance of the aforesaid terms and conditions, the contract dated 16.1.2002 commenced on 1.3.2002 and was stipulated to complete on 31.8.2004

2.7 However, apprehending that the contract dated 16.1.2002 would not be completed on time owning to various bottlenecks viz, hindrances at the site of construction, variation in earthwork, resistance by villagers, etc., the petitioner, on 24.9.2003, sought extension of time for completion of the contract from the Engineer. The Engineer recommended extension subject to approval of the respondent.

2.8 Subsequently, on 7.2.2004, the Engineer issued a notice to the petitioner under Clause 46.1 of the General Conditions of Contract assailing him for slow progress of work in respect of completion of the contract dated 16.1.2002.

2.9 As the extension of time recommended by the Engineer for completion of the contract dated 16.1.2002 as well as his invocation of Clause 46.1 of the General Conditions of Contract were not acceptable to the petitioner, the matter was referred to the Disputes Adjudication Board (DAB) for redressal.

2.10 Upon observing that the petitioner was entitled to extension of time, the DAB vide order dated 21.7.2004 awarded twelve months extension of time up to 31.7.2005.

2.11 As various bottlenecks impeding completion of the contract dated 16.1.2002 continued to persist, the respondent further extended the contract up to 31.12.2005, but to little avail.

2.12 On 17.3.2006, a Review Meeting of the petitioner, respondent and the Engineer with the Union Minister of Road and Transport was held wherein it was mutually agreed between the parties that the petitioner would complete 60 Km of DBM and 25 Km of BC in respect of Package 4 and 50 Km of DBM and 15 Km of BC in respect of Package 5.

2.13 Pursuant to the aforesaid Review Meeting, the Engineer vide letter dated 20.7.2006 informed the respondent that the petitioner had completed 59.50 Km of DBM and 17.15 Km of BC as against the agreed 60 Km of DBM and 25 Km of BC respectively in respect of Package 4, and further, 40.55 Km of DBM and 14 Km of BC as against the agreed 50 Km of DBM and 15 Km of BC respectively in respect of Package 5.

2.14 On 10.10.2006, the respondent issued notice to the petitioner warning the latter of invoking the bank guarantees if the same were not renewed.

2.15 Apprehending invocation of the bank guarantees by the respondent the petitioner knocked the doors of this Court u/s 9 of the Arbitration and Conciliation Act, 1996, praying for appropriate relief.

2.16 Vide order dated 29.11.2006, this Court directed the respondent that in case it desired to invoke the bank guarantees issued by the petitioner, it must give at least five days notice to the petitioner setting out the reasons for the invocation.

2.17 On 11.12.2006, the Engineer issued notice to the petitioner under Clause 46.1 of the General Conditions of Contract, asking it to expedite the completion of the contract dated 16.1.2002 and threatening therein that it would recommend termination of the petitioner''s services within 28 days if the latter''s performance did not improve.

2.18 The respondent vide letter dated 24.12.2006 assailed the petitioner for its extremely slow and dismal performance in completion of the contract dated 16.1.2002 despite the respondent shaving been able to clear most obstructions at the site of construction.

2.19 The petitioner vide letter dated 28.12.2006 informed the respondent that it had terminated the contract dated 16.1.2002 and thereby had discharged itself from carrying out any work further.

2.20 On 12.1.2007, the Engineer issued notice to the petitioner under Clause 63.1 of the General Conditions of Contract, assailing it for extremely slow rate of progress in completion of the contract and recommending therein termination of its services.

2.21 As the completion of the work stipulated in the contract dated 16.1.2002 reached a stalemate, the respondent on 16.1.2007, issued notice to the petitioner expelling it from the site of construction in terms of Clause 63.1 of the General Conditions of Contract. On the same date, the respondent wrote to the petitioner, informing the latter of its intention to invoke the bank guarantees.

2.22 Hence, the present petitions.

3. Before delving at length on the rival submissions of both parties, it may be worthwhile to recall the relevant statutory provisions and judicial propositions underlying the invocation of bank guarantees and the exceptions thereof.

4. A bank guarantee is essentially a contract of guarantee whereby the bank undertakes to be answerable for payment of a sum of money in the event of non-performance by the party on whose behalf the guarantee is issued.

5. The statutory definition of a bank guarantee is embodied within the provisions of Section 126 of the Indian Contract Act, 1972, which reads thus:

126. ''Contract of guarantee'', ''surety'', ''principle debtor'' and ''creditor'' A ''contract of guarantee'' is a contract to perform the promise, or discharge the liability, of a

third person in case of his default. The person who gives the guarantee is called the ''surety'', the person in respect of whose default the guarantee is given is called the ''principal debtor'' and the person to whom the guarantee is given is called the ''creditor''. A guarantee may either be oral or written.

6. The principles upon which bank guarantees can be invoked or restrained 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 Energy 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: ...[U]p. Upon on 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 (now Reliance Energy Limited) (supra), 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 or a fraud on the part 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'' necessitating the grant 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 (supra), the appellant invoked the bank guarantee submitted by the respondent in respect of the contract entered between the parties. An application was filed by the 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 guarantee 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, the appellant was the best judge to decide as and when and for what reason the bank guarantee should be encashed. In the said case, as there was no situation of irretrievable injustice if the bank guarantee was invoked, the application seeking injunction for restraining the appellant from invoking the bank guarantee was accordingly dismissed.

9. Reliance, in the present context, may also be placed on my decision dated 27. 7.2007 in O.M.P. Nos. 239 and 248 of 2007 entitled Ms. CWHEC-HCIL (JV) v. Calcutta Haldia Port Road Co. Ltd. and Ors., wherein, upon considering the vast expanse of judicial pronouncements underlying the invocation and restrain of bank guarantees, the following principles were 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 case of 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 is issued.

(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 circumspective and sporadic 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. In light of the aforesaid general principles on invocation of bank guarantees and the exceptions thereof, I shall deal with the rival submissions of both sides in extenso in paragraphs infra.

11. However, before going into merits as to whether or not the bank guarantees in the present case should be invoked, I would first and foremost like to have an overview of the terms of these bank guarantees. There are in total eight bank guarantees in the present case, six of which secure sums advanced by the respondent to the petitioner and the remaining two are performance bank guarantees. While it is not necessary to reproduce all the eight bank guarantees here, nevertheless, for felicity of reference, the bank guarantee dated 5.1.2002, which is a performance bank guarantee furnished by the petitioner to the respondent in respect of Package? 4, is extracted as under:

The Chairman

National Highways Authority of India

1-Eastern Avenue

Maharani Bagh

New Delhi-110065

Whereas M/s United Engineers Malaysia and Essar Projects Limited forming the UEM-Essar JV having its office at Essar House, No. 11, K.K. Marg, Mahalakshmi, Mumbai-400 034 (hereinafter called "the Contractor") has undertaken in pursuance of Contract No. NHAI/GM(PI)ADB/LOI/TUM-HAV dated 28th November 2001 to execute ''Western Transport Corridor Tumkur-Haveri section of NH-4-Rehabilitation and upgrading of Chitradurga-Harihar Section (Km 207 to Km 284) in the State of Karnataka "Package 4" (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, Standard Chartered Bank, 6th Floor, Trade Services, Raheja Towers, 26/27, MG Road, Bangalore 560 001, 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 up to a total of Rs. 135,084,911.56/- (Indian Rupees One Hundred Thirty Five Million Eighty Four Thousand Nine Hundred Eleven and Paise Fifty Six Only), 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.

135,084,911.56/-(Indian Rupees One Hundred Thirty Five Million Eighty Four Thousand Nine Hundred Eleven and Paise Fifty Six 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 there under 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 until 28 (twenty eight) days after the date of issue of the Defect Liability Certificate but not beyond 19.07.2005.

Notwithstanding anything contained herein above:

1. Our liability under this guarantee shall not exceed Rs. 135,084,911.56/-(Indian Rupees One Hundred Thirty Five Million Eighty Four Thousand Nine Hundred Eleven and Paise Fifty Six Only);

2. This bank guarantee shall remain in force only up to and inclusive of 19.07.2005; and

3. 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 (and which should be received by us at our counters) on or before 19.07.2005 before 14.00 hours (Indian Standard Time) where after it ceases to be in effect in all respects whether or not the original bank guarantee is returned to us. If no such notice is received, this Bank Guarantee shall stand cancelled and we shall stand absolutely and unconditionally absolved and discharged hereunder without the need for the return to us by you of this original Bank Guarantee document, cancelled or otherwise.

12. Perusal of the performance bank guarantee dated 5.1.2002 clearly brings out the unequivocal and unambiguous language in which the bank guarantee is couched. As per the terms of the performance bank guarantee dated 5.1.2002, the bank has clearly stated that:

(i)the bank is the guarantor and responsible to the beneficiary/respondent herein up to a total of Rs. 135,084,911.56/-.

(ii) the bank undertakes to pay the beneficiary/respondent any sum or sums within the aforesaid limit of payment.

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

(iv) the payment would be made without the beneficiary/respondent needing to prove grounds or reasons for the demand.

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

13. It is trite that a bank guarantee, being an independent and distinct contract between the bank and the respondent/beneficiary, both the parties are bound by the terms thereof. In the present petitions, while the terms stipulated in the performance bank guarantee dated 5.1.2002 as well as those stipulated in the other bank guarantees are not in dispute, it is the invocation thereof that has become the bone of contention between the parties.

14. Mr. Rajiv Nayyar and Mr. N.K. Kaul, learned senior Counsel for the petitioner, have vehemently opposed invocation of the bank guarantees by the respondent primarily on the ground of the respondent''s failure to fulfill its obligations under the contract dated 16.1.2002.

15. According to learned senior Counsel for the petitioner, although the work of construction under the contract dated 16.1.2002 was stipulated to get completed on 31.8.2004, it was extended from time to time due to default of the respondent in providing unhindered, unobstructed and continuous portions of the road for execution of the works. A detailed account of the number of extensions granted to the petitioner as well as the length of the hindrances at the site of construction has been provided by the petitioner on page 18 of its written synopsis.

16. Learned senior Counsel for the petitioner submit that the various extensions of time granted by the respondent were putatively to mitigate the hardships faced by the petitioner on account of the hindrances and obstructions at the site of construction. It is submitted that the respondent randomly kept on granting extensions of time to the petitioner without ever being able to completely clear the hindrances from the site of construction. It is the case of the petitioner that owing to the uncertainty prevailing in the time taken by the respondent in clearing the hindrances and obstructions from the site of construction, the petitioner proposed to introduce the concept of ''Zero Date'', whereby a deadline was to be assigned to the respondent within which the respondent was obliged to clear all hindrances from the site of construction. Explaining the significance of the concept of Zero Date, learned senior Counsel submit that it was envisioned by the petitioner that the date on which the respondent managed to clear all hindrances from the site of construction was to be reckoned as the Zero Date, and any extension sought by the petitioner pursuant to the Zero Date was to be granted to the petitioner as a matter of right so as to enable it complete the work of construction expeditiously. Learned senior Counsel for the petitioner have placed on record the letter dated 13.7.2006 wherein the petitioner had proposed 1.10.2006 as the Zero Date for the respondent to clear the hindrances from the site of construction. It is the case of the petitioner that not only did the respondent blindly turn down the petitioner''s request for having 1.10.2006 as the Zero Date, but even otherwise, the respondent has till date failed to provide a completely hindrance-free site, thereby impeding the petitioner

from completing on time the work of construction stipulated under the contract dated 16.1.2002.

17. Learned Counsel for the petitioner contend that apart from the aforesaid extensions of time granted by the respondent in lieu of the latter''s inability to fulfill its obligation of providing an unhindered and unobstructed site for construction, the respondent further committed various other breaches and violations under the contract dated 16.1.2002, which, in effect, precluded the petitioner from completing on time the work of construction stipulated in the contract. These breaches and violations, as collated by the petitioner at paragraph 10 on page 4 of the paper book, both in O.M.P. No. 32/2007 as well as O.M.P. No. 33/2007, are extracted as under:

Breaches and Violations by the Respondent:

10. Following are some of the violations and breaches that have been committed and continued by the respondent till the Contract was put to an end and even thereafter, as a result of which the petitioner had been prevented/precluded from completing the works under the Contract:

(a) The possession of the entire site required for execution of works had not been given to the petitioner till 28.12.2006, despite the fact that as against stipulated period of 30 months for completion of the works over 56 months had gone by.

(b) Although the contract expired on 31.12.2005, despite various written requests, no extension of the Contract was awarded making it impossible for the petitioner to work. Even now, the respondent has tacitly admitted that there is no extension of the Contract beyond 31.12.2005.

(c) The escalation amount on the foreign currency component of the Contract had been denied causing financial loss to the petitioner. This had also affected the cash flow required periodically for the execution works.

(d) As against the deduction of 10% of each bill towards recovery of advances made available to the petitioner, the respondent has been illegally deducting/recovering 30% of each bill and thereby caused similar disruption in cash flow which adversely affected the due execution of the works.

(e) Enhanced Royalty differentials payable due to change in the Legislature has not been paid resulting in the same problem as above.

(f) DAB awards have not been honoured forthwith either in part or in full.

(g) Extended stay Compensation claims, which follow from Clause 42.2(b), as integral to having granted extension of time have not been deliberated upon by the Engineer leave aside determination and settling of the same.

(h) Cutting of trees which was to be carried out by a separate agency was not done fully requiring the petitioner to carry out the left over parts of this work.

(i) Relocation of utilities which had to be carried out by a separate agency was not done requiring the petitioner to carry out the major part of the work of providing all utility ducts.

(j) Approval required from the railway authorities have not yet been obtained and consequently works on the two ROBs is held up.

(k) Continuous stretches were required to be given, to enable the petitioner to carry out construction in the manner of his choice. However (a) possession of site as per schedule ''A'' has not been given and (b) what is given is also in intermittent lengths of broken stretches.

18. The long and short of the aforesaid averments of the petitioner is that the obligation of the petitioner to complete the work of construction stipulated in the contract dated 16.1.2002 was reciprocal and subject to the obligation of respondent of providing the petitioner with an unhindered and unobstructed site of construction. However, owing to the respondent''s consistent failure to fulfill its obligation, the petitioner was impeded from carrying out the work of construction and thus could not complete the work within the stipulated deadline which further resulted in the contract getting extended several times. It is thus the case of the petitioner that inasmuch as the respondent failed to clear the hindrances and obstructions at the site of construction, despite several extensions of time granted by it, the failure in completion of the contract dated 16.01.2002 cannot be attributed to the petitioner.

19. Learned senior Counsel for the petitioner further contend that the extensions of time approved by the respondent on several occasions were an implicit admission of default on the part of the respondent to fulfill its own obligation of providing an unhindered site of construction. It is contended that upon finding the petitioner entitled to extensions of time for reasons, which, by the respondent''s own implicit admission were not attributable to the petitioner, the Engineer vide its letter dated 11.12.2006 should not have assailed the petitioner for slow progress by invoking Clause 46.1 of the General Conditions of Contract.

20. Learned senior Counsel for the petitioner have strenuously argued that slow progress especially cannot be imputed to the petitioner owing to the latter managing to complete a substantial portion of the work of construction by December, 2006. Recalling the petitioner''s avowed commitment made on 17.3.2006 before the Union Minister of Road and Transport to complete 60 Km of DBM and 25 Km of BC in respect of Package 4 and 50 Km of DBM and 15 Km of BC in respect of Package 5, learned senior Counsel for the petitioner submit that by 20.7.2006 the petitioner had successfully lived up to its commitment by managing to complete 59.50 Km of DBM and 17.15 Km of BC as against the agreed 60 Km of DBM and 25

Km of BC respectively in respect of Package 4, and further, 40.55 Km of DBM and 14 Km of BC as against the agreed 50 Km of DBM and 15 Km of BC respectively in respect of Package 5. It is also the case of the petitioner that even as hindrances and obstructions of almost 11 Km in length continued to pervade the site of construction, the petitioner, by the end of December, 2006, further managed to complete 61.7 Km of DBM and 34.75 Km of BC in respect of Package 4 and 46.4 Km of DBM and 14 Km of BC in respect of Package 5. It is thus the case of the petitioner that inasmuch as the petitioner managed to complete work of more than the available unhindered length at the site of construction thereby achieving 100% progress in completion of the construction work by the end of December, 2006, the Engineer''s invocation of Clause 46.1 alleging slow progress is per se bad and devoid of merit.

21. Learned senior Counsel for the petitioner have assailed the invocation of the said Clause 46.1 on the ground that the said invocation eventually paved way for the respondent to expel the petitioner from the site of construction in terms of Clause 63.1 of the General Conditions of Contract. It is strongly argued that the invocation of Clause 63.1 for expelling the petitioner from the site of construction is patently illegal, not only because the said invocation was premised on the wrongful invocation of Clause 46.1, but also because the respondent by invoking Clause 63.1 has unlawfully sought to recoup the amount secured under the bank guarantees furnished by the petitioner. Learned Counsel for the petitioner submit that the bank guarantees furnished by the petitioner can only be invoked so long as the contract between the parties is live and subsisting. It is the case of the petitioner that inasmuch as the contract dated 16.1.2002 had already been repudiated by the petitioner vide its notice issued to the respondent on 28.12.2006, the bank guarantees furnished by the petitioner to secure the performance of the contract automatically stand lapsed, and thus, the respondent cannot now unduly constrain the petitioner to make good the amount furnished under the bank guarantees by ostensibly invoking Clause 63.1.

22. The various grounds assailing wrongful invocation of Clauses 46.1 and 63.1 of the General Conditions of Contract, as consolidated by the petitioner on page 28 of its written synopsis filed in the Court, are reproduced as under:

(i) The petitioner submits that Clause 10.3 of the contract specifically mandates that NHAI must provide for the reasons for invocation of the performance security prior to invocation of the same.

(ii) Clause 42.2 read with Clause 44 mandates that in case NHAI is not able to provide the site for doing the works then appropriate extension shall be determined by the Engineer along with the extra costs which the petitioner may have to incur because of this default of the employer/NHAI.

(iii) Clause 46.1 of the Contract stipulates that in case the contractor is not entitled to an extension of time then if the rate of progress of the work is in the opinion of the Engineer too slow then the engineer can give a notice to the contractor to increase the progress within 28 days of the said notice.

(iv) Clause 63.1(b)(ii) of the Contract provides that in case the contractor does not improve the rate of progress in response to a notice under Clause 46.1 then the employer has the right to expel the contractor.

(v) The Dispute Adjudication Board which is a body created under the contract on 21.7.2004 has held that in case an extension of time is granted then Clause 46.1 cannot apply or invoked. Under Clause 67.2 it is mandated that that the decision of DAB dated 21.7.2004 has not been challenged by NHAI and continued to have force.

(vi) The petitioner submits that in the present circumstances before issuing the notice under 63.1 by NHAI on 16.1.2007 a recommendation was made by the engineer to invoke the said Clause by its letter dated 12.1.2007. The letter of the engineer dated 12.1.2007 under Clause 63.1 was based upon its own letter dated 11.12.2006 invoking Clause 46.1. The letter dated 12.1.2007 itself mentions that the recommended extension up to 31.12.2006 ''was under active consideration'' by the competent authority. This clearly shows that Clause 46.1 could not be invoked by the engineer for the following reasons:

a) In view of the DAB award dated 21.7.2004.

b) The letter dated 11.12.2006 invoking Clause 46.1 was merely 20 days before the expiry of the recommended extension but gives 28 days to the petitioner to improve the rate of progress which goes beyond the contract period.

c) The letter dated 11.12.2006 invoking Clause 46.1 is clearly to create an unsubstantiated ground for invocation of the bank guarantee because this Hon''ble Court on 29.11.2006 had recorded the statement of NHAI that 5 days written notice will be provided to the petitioner before the invocation of the bank guarantees.

d) It is surprising to note that NHAI has taken more than 8 months to decide regarding the extension of time and has till date not granted the same despite the petitioner''s insistence because only upon the grant of the extension of time the petitioner is able to get monies from the bank or discounts on the material. However, with regard to the invocation of Clause 63.1 by NHAI the same was done within 4 days of the engineer''s recommendation on 12.1.2007. This shows that the issuance of the letter dated 12.1.2007 as well as 11.12.2006 were merely to create a reason for the respondent to encash the bank guarantees of the petitioner.

(vii) This shows that the action contemplated by NHAI to invoke the bank guarantees apart from being against equity and justice as hereinabove mentioned, is also in violation of the specific contractual provisions of the contract.

23. Learned senior Counsel for the petitioner have vehemently pleaded with this Court that owing to the failure in completion of the contract dated 16.1.2002, which is otherwise solely attributable to the respondent the plant, machinery and human resource mobilised by the petitioner have either remained idle or could not be optimally utilized thereby causing the petitioner a loss of over 1.50 crores. It is thus the case of the petitioner that owing to the huge losses sustained by it due to non-performance of the contract dated 16.1.2002, special equities exist in its favor thereby entitling it to an injunction on the invocation of the bank guarantees.

24. It is further contented that irretrievable injustice would be caused to the petitioner, if the bank guarantees furnished by it to the respondent are allowed to be encased inasmuch as it would result in banks initiating recoveries against the petitioner thereby bringing its business to a standstill.

25. Lastly, learned senior Counsel for the petitioner fervently contend that invocation of the bank guarantees would result in undue enrichment of the respondent thereby defying the sacrosanct principles upon which the Courts generally restrain themselves from invoking bank guarantees. It is further submitted that the facts and circumstance of the present case as well as the prevalent judicial dicta governing invocation of bank guarantees and the exceptions thereof tip the balance of convenience in favor of the petitioner thereby entitling him to the relief prayed for.

26. Per contra, Mr. A.S. Chandhiok and Mr. Sandeep Sethi, learned senior Counsel for the respondent have vehemently opposed the present petitions contending that the petitioner has approached this Court by suppressing certain material facts and documents, which, if revealed, would establish that the petitioner is not entitled to invoke the equitable jurisdiction of this Court u/s 9 of the Arbitration and Conciliation Act, 1996.

27. To substantiate their plea, learned senior Counsel have placed on record a list of documents stating that perusal thereof would bring to the fore the glaring inconsistencies, lacunae and opacity inherent in the petitioner''s contentions. Learned senior Counsel have particularly relied upon the Engineer''s Monthly Progress Report of December, 2006 to falsify the petitioner''s claim of achieving 100% progress in completion of the contract dated 16.1.2002. Learned senior Counsel state that the petitioner''s claim of doing work of more than the available length was only with respect to the work done on the Main Carriage Way (MCW) and not with respect to the entire work stipulated in the contract dated 16.1.2002. Learned senior Counsel contend that the petitioner, as a matter of fact, was able to complete by December, 2006 only 38.71 Km (out of 76 Km) in Package 4 and only 37.70 Km (out of 56 km) in Package 5, thereby achieving only 55% progress in completion of the construction work and that too only in respect of the MCW.

28. It is further contended by learned senior Counsel for the respondent that the petitioner has misled this Court by stating that a stretch of almost 11 Km was ridden with hindrances and obstructions at the site of construction. To buttress their contention, learned senior Counsel have relied upon the letters dated 20.07.2002 and 22.07.2006, wherein the Engineer has expressly stated that the hindrances at the site of construction stood reduced to a mere stretch of 4.5 Km in respect of Package 4 and 900m in respect of Package 5.

29. Learned senior Counsel for the respondent have strenuously argued that the petitioner has wrongly construed the extensions of time granted to it for completion of the contract dated 16.1.2002 as a justification for its slow rate of progress. Learned senior Counsel submit that the extensions were granted to the petitioner not on account of the hindrances at the site of construction but only with a view to somehow get the work completed keeping in mind its substantial national importance. It is further clarified that the extensions so granted to the petitioner were not intended to absolve the petitioner of its obligations or liabilities for the breach thereof under the contract dated 16.1.2002.

30. It is vehemently contended by learned senior Counsel for the respondent that the petitioner cannot claim special equities inasmuch as it has premised its case on false, suppressed and misconstrued facts, and even otherwise, has failed to explain its slow rate of progress in completion of the contract dated 16.1.2002. It is further contended that the petitioner has merely made a passing reference on special equities without justifying its case by furnishing the requisite particulars and documents.

31. Learned senior Counsel for the respondent further submit that the petitioner''s plea of irreparable damage or irretrievable injury being caused to him if the bank guarantees in the present case are allowed to be invoked is devoid of merit inasmuch as the petitioner can always recover the amount secured vide the bank guarantees if it ultimately succeeds in the arbitration proceedings impending between the parties.

32. I have heard learned Counsel from both sides and have given my thoughtful consideration to the matter.

33. The present case has placed before this Court a complex juggernaut of conflicting averments clothed in cloaked facts and startling revelations, which, nevertheless, I propose to unravel in the manner hereunder:

Re : Slow Progress Hindrances Imbroglio.

34. Learned senior Counsel for the petitioner have vehemently argued that the dismal rate of progress exhibited by the petitioner and its eventual failure to complete the work of construction stipulated in the contract dated 16.1.2002 was squarely on account of the respondent''s failure to remove the hindrances and

obstructions besetting the site of construction. It is thus submitted that on account of the respondent having failed to remove the hindrances from the site of construction even after the expiry of the contract on 31.12.2005, the petitioner cannot be held liable for its inability to complete the work of construction stipulated under the contract dated 16.1.2002.

35. The aforesaid averments of the petitioner prima facie appear true until they are dispelled by the documents placed on record by the respondent which clearly establish that despite the respondent being able to remove substantially the hindrances afflicting the site of construction, the petitioner owing to various factors squarely attributable to it viz. poor planning, financing, inefficient running of machinery, lack of requisite labour, etc., failed to expedite the work of construction thereby eventually resulting in failure of the contract dated 16.1.2002.

36. Reliance in this regard may be placed on the Engineer''s letter dated 7.7.2005, wherein the Engineer has expressly stated that despite the respondent managing to make a substantial portion of the site of construction hindrance free, the petitioner''s performance in completion of the contract dated 16.1.2002 remained abysmally low. Following observations of the Engineer in its letter dated 7.7.2005 are notable and reproduced thus:

At the review meeting held by Hon''ble Union Minister for Road Transport and Highways followed by the meeting with Secretary (Transport), MORT and H, Member (Administration), NHAI and the Engineer during March, 2005 you have committed to complete 70 km length of Package 4 and 50 km length of Package 5 by December, 05. While making this commitment you were fully ware of the ground realities together with some minor difficulties that existed at that point of time. You have, however, again taken this opportunity to raise these issues regarding obstructions such as land problems, delay in issue of designs and drawings, relocation of structures, etc. All these for the purpose of completeness, have been examined and the detailed position in respect of each of these issues is given in the enclosed Annexure I for Package 4 and Annexure II for Package 5. It will be seen there from that such obstructions have hardly affected about 5% of the entire length of the Project, thereby clearly bringing out that bulk of the site free of obstructions was available for the JV for honouring their commitment. Further, the JV has already been compensated for such obstructions by grant of EOT of 12 months as also another 4 months on account of additional works, etc. Despite this extension and even after lapse of 10 months beyond the earlier completion date, the performance of the JV shows consistent lack of due diligence to proceed with the works and also lack of men, material, machinery, money and adequate management which has resulted in a mere progress of 40 to 43% being achieved

xxx

From the above position it is apparently clear that the JV''s efforts to get over their poor performance by citing side issues are clearly untenable. Their commitment a well as their capacity to adhere to their programme are suspect, unless and until they take radical measures to augment their capability on all the fronts.

In the recent meeting held by the Hon''ble Minister on 28th June, 2005, the JV reiterated their commitment to complete 70 km of Package 4 and 50 km of Package 5 by Dec. 05. It clearly warrants a progress of about 4% a month against the attained monthly progress of 1 to 1'' % so far. The performance of the JV in the coming months would be critically monitored to judge as to whether further action under Clause 46 and allied conditions of contract are warranted or any other suitable action taken.

37. It is noteworthy that the Engineer in the letter dated 7.7.2005 has categorically stated that despite an extension of 12 months being granted to the petitioner, and futher, despite the respondent being able to clear most of the hindrances from the site of construction, the petitioner has failed to expedite the work at the site of construction. These observations of the Engineer clearly establish that the various extensions of time granted to the petitioner were not on account of the hindrances at the site of construction but in order to enable the petitioner to expedite the work of construction. Further, the Engineer in the letter dated 7.7.2005, while recalling the petitioner''s commitment of completing 70 Km in respect of Package 4 and 50 Km in respect of Package 5 by December, 2005, the Engineer had forewarned the petitioner that owing to his poor rate of progress in completion of the work of construction, his performance would be critically monitored, and if the need be, action in terms of Clause 46.1 would be take against him.

38. The respondent has further taken me through a series of letters wherein the Engineer, whilst monitoring the rate of the petitioner''s progress in completing the work of construction, has acknowledged the respondent''s efforts in progressively reducing the hindrances at the site of construction. A conjoint reading of all these letters, that is, the letters dated 3.2.2006, 28.4.2006, 6.7.2006 and 22.7.2006 clearly brings out how the hindrances at the site of construction were reduced by the respondent from 8.4 Km to 7.5 Km to 7 Km and finally to 4.5 Km. The Engineer''s letter dated 22.7.2006 is particularly significant as it comprehensively brings out how the hindrances at the site of construction have been reduced to a mere 4.5 Km length in respect of Package 4 and 900 m length in respect of Package 5. A copy of the letter dated 22.7.2006 is reproduced thus:

ICT : 362 : NCS : 6650 Ju

Mr. T.K. Nagraj

Member JV Board,

M/s. UEM ESSAR (JV)

IOCL Jubilee Retail Outlet Complex,

254 Km., P.B. Road,

PO : Honor Gollarahatti,

Davangere 577, 556,

Karnataka

Fax # 018192 251181, 253101.

Subject : Western Transport Corridor Tumkur

Haveri NH "4 Project" Package 4 and 5.

Dear Sir,

Please refer to you letter No. UEPL/WTC/P4 and P5/2654 dated 7th July 2006 regarding completion of the works in Packages 4 and 5. In this connection I would like to inform you as under:

Package 4.

The position of obstructions still existing is as under:

| | LHS | RHS | Obstructions |
|---|---|---|---|
| Total length | 74.34 km | 68.56 km | |
| (i) | 1183 m | 1183 m | Kolahal |
| (ii) | (250 m) | (250 m) | Baramsagar<br>Contractor to provide utility duct. |
| (iii) | (155 m) | - | Lakhamuthenahalli<br>Gap may be left as it is. |
| (iv) | (1000 m) | (1000 m) | Hebbalu<br>Work has since started. |
| (v) | 3090 m | 3090 m | Shammnur |
| (vi) | 3275 | 3275 | Bathi village<br>Since work started hence no obstruction. |
| (vii) | 189 m | 189 m | Rotary at end of Pkg 4. |
| | 4462 m | 4462 m | Net Obstructions |

Thus, you will notice that except for about 4.5 km length, you can complete the work of DBM as well as BC in the remaining about 70 km length on LHS and 64 km length on RHS without any obstruction.

Package 5

The position of obstructions still existing is as under:

| | LHS | RHS | Obstructions |
|---|---|---|---|
| Total length | 56 km | 56 km | |
| (i) | (600 m) | (600 m) | At Kakol Since work started. |
| (ii) | 700 m | 700 m | Motebennur |
| (iii) | (100 m) | (100 m) | Km 47+477 Contractor to start EW |
| (iv) | 200 m | 200 m | Km 50+060 |
| | 900 m | 900 m | Net Obstructions |

In this package also, you can complete the works in about 55 km length on both sides. So far as the availability of earth, sand, etc. is concerned, since the work had been delayed, the responsibility for procurement of the additional quantity lies with the Contractor. As such you have to arrange the balance quantity of earth as well as sand from alternative sources as well as by contacting the District Authorities.

Regarding the side and service roads, we have been requesting you to take up the work at least on scrubbing and grubbing, so that one would know if there are any obstructions from the side of villagers. Unless you take up the work on side and service roads along with construction of causeways, you will not know, where the villagers may come and obstruct your works. You are Therefore, advised to take up the work as above in Packages 4 and 5 and side and service roads on an immediate basis, so that the works are completed in time. This also refers to you letter No. UEPL/WTC/P4andP5/2664 dated 14th July, 2006. Thanking you, Yours truly, For I.C.T. Pvt. Ltd. (N.C. Saxena) Executive Director and Addl. Project Director.

39. Despite the fact that the hindrances at the site of construction stood reduced to a mere nothing and despite the Engineer''s constant reminders to that effect, the petitioner could not expedite the rate of progress in completion of the contract even until December, 2006. This fact is clearly evident from the Monthly Progress Reports filed by the Engineer in respect of Package 4 and Package 5. Relevant portions of both these Reports, appended as ''Annexure MM'' and ''Annexure NN'' in respect of Package 4 and Package 5 respectively to the Additional Affidavit of the Petitioner, are extracted hereunder:

Package 4:

The JV promised to complete 65 kms of DBM and 35 kms of BC of the MCW by the end August but failed and has still not achieved these targets in December. Instead they completed only 61.7 kms of DBM and 34.75 kms of BC. The JV has failed to deliver on any of their other programme commitments. The figures are as follows:

```
Construction of MCW  =          74.0%
Side/Service Roads,  =          26.0%
Drainage and the rest          --------
The Works                      = 100.0%
                              --------


Progress to December 2006    =  60.4%
Side/service +Drainage etc.   =   4.6%
                             ----------
Progress of MCW only           = 55.8%

Balance of MCW  = 74.0 - 55.8 = 18.2%
```

Unfortunately, as the figures show:

Average progress in 2005 = 1.5% Average progress in 2006 = 1.3% Average quarry production = 2,030 tons per day in 2005 Average quarry production = 1,825 tons per day in 2006 Asking rate to complete = 4,000 tons per day the works The JV''s financial problems continue to impede the progress of works and make it financially improbable for the JV to complete the works unless HO ESSAR comes to the rescue. At 0.06% progress the Package is not self-financing. At the 2006 average rate of progress of 1.1% it will take an additional 35 months to complete the works = October 2009. The JV must submit a resource based programme 2006 to complete the works. This was requested in January by Member (Admn) NHAI without success. There are many work fronts available to the Contractor where there are no hindrances. Instead, the JV concentrates on the hindrance areas.

Package 5:

The JV promised to complete 50 kms of DBM and 25 kms of BC of the MCW by the end August but failed and has still not achieved these targets in December. Instead they completed only 46.4 kms of DBM and 14 kms of BC. The JV has failed to deliver on any of their other programme commitments. The figures are as follows:

```
Construction of MCW     =    85.0%
Side/Service Roads,     =    15.0%
Drainage and the rest     --------
The Works               =   100.0%
                         --------
Progress to December 2006     = 63.9%
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Side/service +Drainage etc.   =  1.0%
                              --------
Progress of MCW only            = 62.9%
                              --------

Balance of MCW = 85.0 - 62.9 = 22.1%
```

Unfortunately, as the figures show:

Average progress in 2005 = 1.4% Average progress in 2006 = 1.3% Average quarry production = 1,627 tons per day in 2005 Average quarry production = 1,336 tons per day in 2006 Asking rate to complete = 10,000 tons per day the works The JV''s financial problems continue to impede the progress of works and make it financially improbable for the JV to complete the works without the backing of HO Essar. At this month''s progress of 0.16% the Package is not self-financing. At the 2006 average rate of progress of 1.3% it will take an additional 31 months to complete the works = June 2009. The JV must submit a resource based programme 2006 to complete the works. This was requested in January by Member (Admn) NHAI without success. There are many work fronts available to the Contractor where there are no hindrances. Instead, the JV concentrates on the hindrance areas.

40. On a conjoint perusal of the letters dated 7.7.2005, 22.7.2006 as well as the Engineer''s Monthly Progress Report dated 4.1.2007, the following undisputed facts emerge:

(i) That the hindrances and obstructions afflicting the site of construction were variable in nature and removed by the respondent on a timely basis.

(ii) Although the respondent managed to clear the hindrances to a considerable extent, the petitioner could not complete the work of construction despite seeking several extensions of time.

(iii) That the performance of the petitioner was constantly evaluated and reviewed by the Engineer and the petitioner was regularly intimated of its shortcomings on account of poor planning, inadequate manpower and machinery, etc.

(iv) That despite constant reminders of its dismal performance, neither could the petitioner overcome its shortcomings nor could it expedite the work of construction.

(v) That, even otherwise if the hindrance area is to be excluded, the petitioner has failed to explain why no substantial work has been done by it on the site.

Re : Invocation of Clauses 46.1 and 63.1

41. Before addressing the rival submissions of both parties on this aspect, it is necessary to throw light on Clauses 46.1 and 63.1 of the General Conditions of Contract. The said Clauses are reproduced as under:

46.1 If for any reason, which does not entitle the contractor to an extension of time, the rate of progress of the works or any Section is at any time, in the opinion of the Engineer, too slow to comply with the Time of Completion, the Engineer shall so notify the Contractor who shall thereupon take such steps as are necessary, subject to the consent of the Engineer, to expedite progress so as to comply with the Time for Completion. The contractor shall not be entitled to any additional payment for taking such steps. If, as a result of any notice given by the Engineer under this Clause, the Contractor considers that it is necessary to do any work at night or on locally recognized days of rest, he shall be entitled to seek the consent of the Engineer so to do. Provided that if any steps, taken by the Contractor in meeting his obligations under this Clause, involve the Employer in additional supervision costs, such costs shall, after due consultation with the Employer and the Contractor be determined by the Engineer and shall be recoverable from the Contractor by the Employer, and may be deducted by the Employer from any monies due or to become due to the Contractor and the Engineer shall notify the Contractor accordingly, with a copy to the Employer.

xxx

63.1 If the Contractor is deemed by law unable to pay his debts as they fall due, or enters into voluntary or involuntary bankruptcy, liquidation or dissolution (other than a voluntary liquidation for the purposes of amalgamation or reconstruction), or becomes insolvent, or makes an arrangement with, or assignment in favor of, his creditors, or if a receiver, administrator, trustee or liquidator is appointed over any substantial part of his assets, or if, under any law or regulation relating to reorganization, arrangement or readjustment of debts, proceedings are commenced against the Contractor or resolutions passed in connection with dissolution or liquidation or if any steps are taken to enforce any security interest over a substantial part of the assets of the Contractor, or if any act is done or event occurs with respect to the Contractor or his assets which, under any applicable law has a substantially similar effect to any of the foregoing acts or events, or if the Contractor has contravened Sub-Clause 3.1, or has an execution levied on his goods, or if the Engineer certifies to the Employer, with a copy to the contractor, that, in his opinion, the Contractor:

(a) has repudiated the Contract,

(b) without reasonable excuse has failed.

(i) to commence the Works in accordance with Sub-clause 41.1, or

(ii) to proceed with the Works, or any Section thereof, within 28 days after receiving notice pursuant to Sub-Clause 46.1,

(c) has failed to comply with a notice issued pursuant to Sub-Clause 37.4 or an instruction issued pursuant to Sub-Clause 39.1 within 28 days after having received

it.

(d) Despite previous warning from the Engineer, in writing, is otherwise persistently or flagrantly neglecting to comply with any of his obligations under the contract, or

(e) has contravened Sub-Clause 4.1, then the Employer may, after giving 14 days notice to the Contractor, enter upon the Site and the Works and terminate the employment of the Contractor without thereby releasing the Contractor from any of his obligations or liabilities under the Contract, or affecting the rights and authorities conferred on the Employer or the Engineer by the Contract, and may himself complete the Works or may employ any other contractor to complete the Works.

The Employer or such other contractor may use for such completion so much of the Contractor''s Equipment, Temporary Works and materials as he or they may think proper.

42. On a conjoint reading of Clauses 46.1 and 63.1 of the General Conditions of Contract, the following logical inferences are deducible:

(i) The Engineer, who was authorised under the contract dated 16.1.2002 to recommend extensions of time subject to the approval of the respondent was under no positive obligation to recommend such extensions each time they were sought by the petitioner.

(ii) Whether or not the petitioner was entitled to extension of time was to be determined by the Engineer on the basis of the petitioner''s rate of progress in completion of the contract dated 16.1.2002

(iii) If, at any time, in the opinion of the Engineer, the poor rate of progress in the petitioner''s performance did not justify the grant of extension of time, he could refuse to recommend the extension to the petitioner by invoking Clause 46.1.

(iv) The purpose of invoking Clause 46.1 was not merely to refuse extension of time to the petitioner. Rather, the invocation of Clause 46.1 was more in the nature of a clarion call, or at best, an ultimatum to the petitioner to expedite its rate of progress lest it would be expelled from the site of construction in terms of Clause 63.1.

(v) If the petitioner, within the stipulated period of 28 days from the invocation of Clause 46.1, failed to expedite its slow rate of progress in completion of the contract dated 16.1.2002, the Engineer was authorised to certify to the respondent the inability of the petitioner to fulfill its obligations under the contract thereby impelling the respondent to invoke Clause 63.1 for expelling the petitioner from the site of construction.

(vi) Expulsion of the petitioner from the site of construction was clearly an outcome of the failure of the petitioner to fulfill its obligations and liabilities under the contract dated 16.1.2002, and thus, such expulsion did not in any manner absolve

the petitioner from its liabilities and obligations under the contract dated 16.1.2002.

43. In light of the aforesaid inferences, I shall now address the respective averments of the petitioner as well as the respondent.

44. First and foremost, reliance may be placed on the letter dated 11.12.2006 whereby notice was issued to the petitioner under Clause 46.1 of the General Conditions of the Contract. The letter dated 11.12.2006 are reproduced as under:

ICT 362 : KK 10913 December 11, 2

To

1) UEM ESSAR JV

17th Floor, Menara 2

Faber Tower, Taman Desa

Sub : Western Transport Corridor "Tumkur" Haveri Construction Package- 4:

Chitragurga to Harihar Section of NH-4 in Karnataka State Notice Under Clause 46.1 of GCC.

Dear Sir,

The progress and management of works of Package-4 over the last almost one year since a notice under Clause 46.1 of GCC was given to you vide our letter No. ICT : 362 : KK: 771 dated 21.01.2006 have been received. Despite adequate front free from obstructions being available, there has been consistent decline in your overall performance, as can be seen from the following average monthly progress for the current year:

| Month | Progress (%) | Cumulative |
|---|---|---|
| January | 1.6 | 50.4 |
| February | 1.3 | 51.7 |
| March | 1.2 | 52.9 |
| April | 1.4 | 54.3 |
| May | 0.9 | 55.2 |
| June | 1.0 | 56.2 |
| July | 0.7 | 56.9 |
| August | 0.7 | 57.9 |
| September | 1.0 | 58.6 |
| October | 1.3 | 59.9 |
| November | 1.1 | 61.0 |
| Average | 1.1 | |

The progress as compared to previous years as given below also shows that the progress of work is continuously slipping down:

| Year | Progress (%) | Average (%) per month |
|---|---|---|
| 2002 | 2.1 | Lost year |
| 2003 | 15.0 | 1.25 |
| 2004 | 16.1 | 1.34 |
| 2005 | 15.6 | 1.30 |
| 2006 | 12.2 | 1.11 |
| Average | 61.1% | 1.07 |

In spite of notice under Clause 46.1 given on 21.01.2006, emphasizing upon you to take substantial steps to expedite the progress, the above figures conclusively demonstrate that you have consistently failed to improve upon your performance. Time and again it has been brought to your notice the following reasons for the slow progress affecting the progress:

Lack of planning, programming, monitoring and determination. Continued short supply of principal construction materials such as bitumen, HSD, cement, etc. Insufficiency of skilled/semi-skilled/un-skilled labour strength. Insufficient deployment of key and sub-professional staff. In a period of almost 57 months the progress of work achieved has only been about 61% (finally) and about 70% (physically) which is far short of the monthly targets required for the project. In view of the fact that the progress on the work has all along been poor and unsatisfactory, and that you have persistently and flagrantly neglected to comply with your obligations under the contract, as ''Engineer'' of the contract, you are hereby given notice under Clause 46.1 of GCC that in case substantial actions/ steps are not taken to demonstrate clearly improved rate of progress within 28 (twenty-eight) days of the receipt of this notice, we shall be compelled to recommend to the Employer to take appropriate steps under Clause 63 of the GCC. Please acknowledge receipt of this Notice.

Thanking you,

Yours truly,

(K.K. Kapila)

Project Director and Engineer

CMD ICT Pvt. Ltd.

45. In the aforesaid letter dated 11.12.2006, the Engineer, after comprehensively reviewing the progress and management of the works undertaken by the petitioner in respect of Package-4 for the year 2006, has come to a categorical conclusion that

the progress of the petitioner in completion of the contract dated 16.11.2002 has been miserably slow. It is also categorically stated by the Engineer that despite a substantial portion of the construction site being hindrance free and despite various reminders assailing the petitioner for slow progress, the petitioner has failed to expedite the completion of the contract.

46. Learned senior Counsel for the petitioner have vehemently assailed the Engineer for wrongfully invoking Clause 46.1 on the ground that inasmuch as the delay in completion of the work of construction under the contract dated 16.1.2002 was occasioned by the respondent''s own default in clearing the hindrances and obstructions from the site of construction, the petitioner could not be assailed for slow rate of progress under Clauses 46.1 and thus denied further extensions. This contention of the petitioner already stands denuded in light of the the letters dated 7.7.2005 and 22.7.2006 as well as the Monthly Progress Report of the Engineer dated 4.1.2007. Despite the fact that the hindrances and obstructions at the site of construction were on a time-to-basis removed by the respondent the petitioner failed to expedite the work of construction, and thus, the Engineer was well within his authority to deny him any further extension by invoking Clause 46.1.

47. Learned senior Counsel for the petitioner further contend that the decision of the Engineer to deny extensions of time to the petitioner by invoking Clause 46.1 run counters to the decision of the Disputes Adjudication Board in its award dated 21.7.2004 The petitioner''s reliance on the DAB''s award dated 21.7.2004 is totally misplaced and devoid of merit. It is to be understood that the DAB in its award dated 21.7.2004 had condemned the Engineer for invoking Clause 46.1 only because the Engineer had wrongfully invoked the said Clause without first ascertaining the petitioner''s request for extension of time. It was explicitly observed by the DAB that the issuance of notice to the petitioner under Clause 46.1 prior to the determination of the validity and quantification of the petitioner''s claim for extension of time was premature. It is to be noted that the findings of the DAB in its award dated 21.7.2004 were only and specifically w.r.t. Engineer''s invocation of Clause 46.1 on 21.1.2006, and thus, such findings were not meant to operate as res judicata on any subsequent invocation of Clause 46.1 by the Engineer. Even otherwise, we have already observed that when the Engineer invoked Clause 46.1 for the second time on 11.12.2006, he did so only after extensively reviewing the petitioner''s progress in completion of the contract dated 16.1.2002. Inasmuch as the petitioner had demonstrated an extremely poor rate of progress despite the various extensions afforded to him previously as well as despite the respondent having cleared most of the hindrances from the site of construction, the Engineer was well within his right to invoke Clause 46.1.

48. Learned senior Counsel for the petitioner have further assailed submits that the letter dated 11.12.2006 was written by the Engineer with the ostensible reason to invoke Clause 63.1 for expelling the petitioner from the site of construction. This

submission of the petitioner is again uncalled for in the light of letter dated 12.1.2007, wherein the Engineer has ably made good the grounds for invocation of the Clause 63.1. Relevant portions of the letter dated 12.1.2007, clearly bringing out the inefficiency in the part of the petitioner to expedite the work of construction of the contract, despite notice under Clause 46.1 having been issued to him, are extracted as under:

ICT : 362 : KKK : 397 12th January

Mr. A.V. Sinha

Member (Technical)

National Highways Authority of India

G5 and 6, Sector 10, Dwarka

New Delhi-110075

Subject : Western Transport Corridor, Tumkur'' Haveri Construction Packet 4:

Chitradurga to Harihar Section of NH4 in Karnataka state : Notice under Clause 63.1

Dear Sir,

The Contract Agreement for the execution of works for Rehabilitation and Upgradation of Chitradurga Haveri section (Km 207 to Km 284) in the State of Karnataka was signed on the 16th day of January, 2002 between National Highways Authority of India (The Employer) and M/s.United Engineers (Malaysia)'' Essar Projects Limited, Joint Venture (The Contractor). The date of commencement of works for this package was 01.03.2002 and the same had to be completed by 31.08.2004 It will be seen that to complete the works in time an average monthly progress asking rate would be 3.3%. However, the contractors need time for mobilization and time is also lost due to bad weather, holidays/festivals and other reasons and Therefore an average monthly progress asking rate of 4% was required to successfully complete the works in time. Whereas, the demonstrated progress of the contractor has been consistently much lower, as would be seen from the average monthly progress achieved since the year 2002. The same is given here under for your ready perusal.

a). 2002 - No progress
b). 2003 - 1.1%
c). 2004 - 1.5%
d). 2005 - 1.45
E). 2006 - 1.1%

The performance of the contractor has suffered due to poor site organisation, shortage of materials, lack of planning and professional pride to do a job well. The

shortcomings and deficiencies of the contractor have been repeatedly brought to their notice during meetings at various levels and through letters. However, all these had little effect and contractor continued to perform poorly, achieving only 69.5% physical progress up to the end of December 2006. The completion date for the works had been extended up to 31st December 2005 and further extension of time has been recommended up to 31 December 2006, which is under active consideration of the authorities. The contractor has failed to show any sense of urgency to speed up the progress and complete the works even by the recommended extended time. Therefore, under the provision of Clause 46.1 of the conditions of the contract, a notice was last served on the Contractor vide our letter No : ICT : 362 : KK : 10914 dt. 11 December 2006, to demonstrate clearly improved rate of progress within 28 (twenty eight) days of the receipt of the notice. It is sad that even this had no effect on the contractor and practically hardly any works is being carried out. In fact the work has been virtually stopped and only 0.06% work has been done in last 28 days, after the issue of notice. Non availability of basic inputs like diesel and bitumen for days shows complete lack of responsibility and will of the contractor to fulfill his contractual obligation. As ''Engineer'', it is my considered view that there is no hope of contractor taking appropriate steps to improve their performance. Having exhausted all contractually available means to make the contractor perform and seeing no chance of the contract works being completed in near future and persistent attitude of the contractor to continue harping on its claims and other issues, action under Clause 63.1 of the conditions of the contract by the employer is strongly recommended.
With regards, Yours truly,

Sd/-

(K. K. Kapila)

Project Director and Engineer

CMD ICT Pvt. Ltd.

49. The aforesaid letters dated 11.12.2006 and 12.1.2007 of the Engineer evidencing the extremely dismal rate of progress and negligence in completion of the contract dated 16.1.2002 despite a hindrance free site being made available to it, give me no reason to believe in the petitioner''s averments that the Engineer that it has wrongly assailed by the Engineer for slow progress.

50. Even if the petitioner''s averments that the respondent has wrongfully assailed it for slow progress with ostensible reason to invoke Clause 63.1 are believed to be true, the fact that it was the petitioner itself who abandoned the site of construction by repudiating the contract on 28.12.2006 gave a good ground to the respondent to expel the petitioner from the site of construction in terms of Clause 63.1.

Re: Fraud, Special Equities, Irretrievable Injury, etc.

51. Learned senior Counsel for the petitioner have vehemently pleaded with this Court that all exceptions to the general rule on invocation of bank guarantees viz. fraud, special equities and irretrievable injustice, which would entitle the petitioner to a stay on the invocation, are applicable to the present case.

52. It may be mentioned that the petitioner has merely made a passing reference in its pleadings as to how the invocation of bank guarantees in the present case would be fraudulent, without submitting any documents or such other evidence to that effect. If at all the invocation of the bank guarantees was fraudulent, it was incumbent upon the petitioner to prima facie establish the same by placing on record effective documents. This averment of the petitioner, being uncorroborated, are thus rejected.

53. As regards the plea of special equities, learned senior Counsel for the petitioner submit that special equities exist in favor of the petitioner inasmuch as it has endured huge losses on account of failure in completion of the contract dated 16.1.2002, which failure is squarely attributable to the respondent. This contention of the petitioner is not acceptable to me. For one, in view of the discussion and findings in the foregoing paragraphs, it already stands prima facie established that the failure of the petitioner in completion of the contract dated 16.1.2002 was a fallout of the petitioner''s own inefficiency and not on account of the various extensions of time which were granted to the petitioner only to enable it the complete the contract. Secondly, while addressing the plea of special equities raised by the petitioner, this Court cannot be oblivious to the huge losses that the respondent has incurred in granting extensions of time to the petitioner on several occasions on account of its inexplicable delay and under-performance in completion of the construction work stipulated in the contract dated 16.1.2002. Thirdly, it was the petitioner, who, of its own accord removed its plant and machinery from the site of construction and eventually vide letter dated 28.12.2006 repudiated the contract between the parties. It has perhaps now become an inherent wisdom for courts of law that those who seek equity must also do equity, and thus, the petitioner, by pleading special equities today, cannot evade its liabilities for the breaches committed by it qua the contract dated 16.1.2002.

54. Further, I see no irretrievable injustice being done to the petitioner if the bank guarantees furnished by it are allowed to be invoked by the respondent at this stage. The respondent is certainly no ''fly-by-the-night'' entity that will vanish into obscurity as soon as the bank guarantees are encashed. Being an instrumentality of the State, there is no likelihood of the petitioner being unable to recover the amount secured by it under the bank guarantees in the event of it succeeding before the arbitral tribunal.

55. Lastly, learned senior Counsel for the petitioner have, in their submissions, assailed the Engineer for colluding with and acting at the behest of the respondent. It is submitted that the Engineer has failed to discharge his duties impartially and to

the detriment of the petitioner''s interest in the contract dated 16.1.2002. I do not consider it necessary to address these contentions of the petitioner. In terms of the General Conditions of Contract as well as the Conditions of Particular Application, the Engineer has been reckoned as an independent and neutral evaluator having no allegiance with either the petitioner or the respondent except insofar as his duties and obligations are concerned. If the petitioner was indeed aggrieved by the Engineer, it ought to have imp leaded the Engineer as a party to the present petitions. Nor any objection was raised by the petitioner on this ground earlier. Inasmuch as the Engineer, has not been imp leaded as a party to the present petitions, these contentions of petitioner appear to me inconsequential and of no avail.

56. Learned senior Counsel from both sides have also cited various judicial pronouncements to substantiate their respective arguments. Before disposing of the present petitions, 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.

57. Learned senior Counsel for the respondent have consistently maintained that the bank guarantees in the present case, being codified in unequivocal and absolute terms, have to be invoked as per the said terms, and further, that such invocation does not depend on the result of the decision of the dispute between the parties. To this effect, the precedents relied upon by the learned Counsel are as under:

(i) BSES Ltd. (Now Reliance Energy Ltd.) Vs. Fenner India Ltd. and Another, .

(ii) The State Trading Corporation of India Ltd. Vs. Jainsons Clothing Corporation and another, .

(iii) National Thermal Power Corporation Ltd. Vs. M/s. Flowmore Private Ltd. and another, .

(iv) Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works (P) Ltd., and another, .

(v) AIR 1997 1644 (SC) .

(vi) Intertoll ICS Cecons O and M Company P. Ltd. Vs. National Highways Authority of India, .

(vii) Ansal Engineering Projects Ltd. Vs. Tehri Hydro Development Corporation Ltd. and Another, .

(viii) Dewan Chand v. Indian Oil Corporation Ltd. reported as 1999 (50) DRJ 556

(ix) Vinitec Electronics Private Ltd. v. HCL Infosystems Ltd. reported as 2006 (3) Arb LR 560.

(x) Hindustan Steel Works Construction Ltd. Vs. Tarapore and Co. and another, .

(xi) State of Maharashtra and another Vs. M/s. National Construction Company, Bombay and another, .

58. Learned senior Counsel for the petitioner have relied upon Hindustan Constructions Co. Ltd. v. State of Bihar reported as (1999) 8 SCC to contend that injunction should be granted on account of special equities existing in favor of the petitioner. It has been already observed that special equities do not exists in favor of the petitioner. Even otherwise, the facts in Hindustan Constructions Co. Ltd. (supra) are very different. The ''mobilsation advance'' bank guarantee with respect to which injunction was granted in the said case was found by the Apex Court to be a conditional bank guarantee and could be invoked only if the petitioner failed to fulfill its obligations under the contract. The situation in the present case is clearly different as the bank guarantees herein are absolutely unconditional and expressly entitle the respondent to encash the bank guarantees without requiring the latter to make good the grounds for encashment.

59. To further substantiate that injunction should be granted in the present case for invocation of bank guarantees, learned senior Counsel for the petitioner have relied upon Hindustan Construction Co. Ltd. and Anr. v. Satulej Jal Vidyut Nigam Ltd. reported as 2006 I AD (Delhi) 466. However, the said case also does not buttress the averments of the petitioner. This Court in Continental Constructions Ltd. and Another (supra) stayed invocation of the bank guarantee for the reason that the internal determinative mechanism and the findings of all forums including foreign experts appointed by the respondent had given verdict holding the petitioner entitled to recovery money from the respondent. This Court thus could not exercise its powers de hors the findings of the internal determinative mechanism set up by the parties. Per contra, in the present case, there are no such findings by the Engineer or the Disputes Adjudication Board as would entitle the petitioner to a stay on invocation of the bank guarantees.

60. Leaned Counsel for the petitioner have relied upon Transmission Corporation of Transmission Corporation of A.P. Ltd. and Others Vs. Lanco Kondapalli Power Pvt. Ltd., to canvass the point that status quo should be maintained pending determination of lis between the parties. The case of Transport Corporation of A.P. Ltd. (supra) also does no good to the petitioner inasmuch as owing to the slow rate of progress demonstrated by the petitioner and its eventual expulsion from the site of construction has virtually rendered the contract dated 16.1.2002 a non-est. Nothing much remains in the contract dated 16.1.2002 except for the liabilities that the petitioner has to the respondent on account of its failure to complete the work of construction. I am afraid that directing status quo by restraining the respondent from invoking the bank guarantees would be prejudicial to the interest of the respondent as it has already incurred huge losses due to delay in extending the contract dated 16.1.2002 on several occasions but to no avail.

61. Whilst praying for status quo to be maintained in the present case, learned senior Counsel for the petitioner have also relied upon Bhatia International Vs. Bulk Trading S.A. and Another, , particularly para 31 of the judgment, which is extracted thus:

31. If a party cannot secure, before or during the pendency of the arbitral proceedings, an interim order in respect of items provided in Sections (9i) and (ii), the result may be that the arbitration proceedings may themselves get frustrated e.g. by non-appointment of a guardian for a minor or person of unsound mind or the subject matter of the arbitration agreement not being preserved. This could never have been the intention of the legislature.

62. The petitioner''s reliance on Bhatia International (supra) is not only misplaced but also borne out of context. The aforesaid observations were made by the Apex Court while explaining the scope and amplitude of the equitable jurisdiction of Courts u/s 9 of the Arbitration and Conciliation Act, 1996. The aforesaid observations, made by the Apex Court in a general context, cannot be applied by this Court in abstract in the present case, and by no means the said observations mandate this Court from maintaining status quo inasmuch as I see no such exigencies herein which are likely to frustrate the impending arbitration proceedings between the petitioner and the respondent.

63. Apart from the judicial decisions delineated above, learned senior Counsel for the petitioner have also relied upon Edwen Owen Engineering Ltd. v. Barclays Bank International Ltd. reported at (1978) 1 All. E.R. 976, National Highway Authority of India (NHAI) v. China Coal Construction Group Corporation, cited as O.M.P. No. 351/2004, Mamta Devi and Ors. (Smt.) v. BSES and Ors. reported as 2006 I AD (Delhi) 484 , Ansal Properties and Industries Ltd. Vs. Union of India and others, , Jai Durga Finvest Pvt. Ltd. Vs. State of Haryana and Others, , Firm Ashok Traders and Another etc. Vs. Gurumukh Das Saluja and Others etc., and State of Haryana v. Continental Construction Ltd., (2002) 10 SCC 508 However, as the factual position in the present case is clearly distinguishable, I do not consider it necessary to delve at length on these decisions.

64. In view of my aforesaid findings and observations, I have no hesitation in stating that the petitioner has not been able to make out a case which would entitle it to an injunction or invocation of the bank guarantees. It is the admitted position of both parties that the hindrances at the site of construction were of a variable nature and could not be removed by the respondent in one go. Nevertheless, the respondent managed to remove most of the hindrances thereby giving the petitioner little chance to complain. Despite most of the site being hindrance free, the petitioner could not expedite the work of construction and kept seeking extensions of time on one pretext or the other. The petitioner has completely failed to acknowledge the fact that the extensions approved by the respondent involved huge stakes for the respondent and thus were more in the nature of concessions a fortiori the petitioner

liable to expedite the contract at the earliest. However, instead of expediting the work of construction, the petitioner has calculative tried to arrogate to itself extensions of time as a matter of right by unilaterally introducing concepts like Zero Date. The petitioner''s assertions that it was entitled to extensions of time and the invocation of Clauses 46.1 and 63.1 were wrong appear to me an after thought to wriggle out of its liabilities under the contract dated 16.1.2002. By surreptitiously repudiating the contract dated 16.1.2002 prior to its expulsion from the site of construction, the petitioner has tried to steal a march on the respondent. The petitioner also cannot claim that inasmuch as it has terminated the contract dated 16.1.2002, the bank guarantees furnished by it have become irrevocable. It is trite law that despite the principle contract and the bank guarantees being ejusdem negotii, the bank guarantee is an independent and self-contained contract enforceable on its own terms.

65. Further, It is difficult for this Court to loose sight of the fact that the contract dated 16.1.2002, which was initially stipulated to expire on 31.8.2004, has far outlived its purpose today. The respondent has already incurred a huge expenditure by allowing extensions to the petitioner several times hitherto. By allowing injunction against invocation of the bank guarantees in the present case, this Court cannot allow the petitioner to take advantage of its own recalcitrance and complacency, especially as it will militate against the respondent''s interest and rights in the contract.

66. On a concluding note, I recall the celebrated maxim juices est in pronunciando sequin regulam, exception non probat, meaning thereby, the judge in his decision ought to follow the rule when the exception is not made apparent. The principle underlying this maxim has to be strictly adhered to by the Courts while disposing of petitions seeking injunction on invocation of bank guarantees. The thumb rule is that the Courts, ordinarily, should avoid granting injunction restraining invocation of bank guarantees, unless they are prima facie satisfied that the act of the beneficiary/respondent is so glaring and unreasonable as to cause irretrievable injury to the petitioner. Inasmuch as the petitioner in the present case has failed to establish special equities in its favor or irretrievable injury being done to it if the bank guarantees are allowed to be invoked, I see no reason why the respondent should not be allowed to invoke the bank guarantees. Even otherwise, I do not see any advantage which the respondent is trying to seek by invocation of the bank guarantees. Moreover, as the bank guarantees in the present case are enforceable unconditionally, this Court cannot ask the respondent to prove the grounds or reasons for their invocation inasmuch as it will defeat the very purpose with which the present bank guarantees, or for that matter, bank guarantee contracts generally are entered into in the world of trade and commerce. Further, the petitioner too, at this stage, cannot be permitted to go into the merits of the lis between the in light the decisions in U.P. Cooperative Federation Ltd. (supra) and BSES now Reliance Energy Ltd. (supra). The said lis, being strictly the subject-matter of arbitration

proceedings between the parties, is beyond the scope and ambit of inquiry in the present petition.

67. The petitions are accordingly dismissed.

68. However, it is made clear that the findings and observations of this Court in the present judgment as well as the amount obtained by the respondent upon invocation of the bank guarantees are not conclusive of the substantive rights of both parties in the matter but shall be subject to the final decision of the arbitral tribunal or the Court, as the case may be.