(1993) 11 MP CK 0011

Madhya Pradesh High Court (Indore Bench)

Case No: Civil Rev. No. 372 of 1993

Mandovi Marine Pvt. Ltd.		APPELLANT
	Vs	
Project and Equipment Corporation and Others		RESPONDENT

Date of Decision: Nov. 24, 1993

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 39 Rule 1

Citation: (1993) ILR (MP) 641 : (1994) 39 MPLJ 910 : (1994) MPLJ 910

Hon'ble Judges: A.R. Tiwari, J

Bench: Single Bench

Advocate: Shekhar Bhargava, for the Appellant; Satish Dagaonkar, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

A.R. Tiwari, J.

The order dated 12th October, 1993, rendered by the District Judge, Indore in Civil Suit No. 17-A/93 registered on application u/s 20 of the Arbitration Act (for short ''Act''), dismissing applicant''s application, moved u/s 41 of the Act read with Order 39, Rules 1 and 2 of the CPC (for short ''Code'') is under challenge in this revision petition presented u/s 115 of the Code.

Facts are jejune. The N.A. No. 1 is the Government of India enterprise. The applicant is a Company registered under the Companies Act, 1956, and carries the business of manufacturing and sale of Boats. On 12-10-1988, contract was finalised between applicant (seller) and N. A. No. 1 (buyer), on Government''s approval for four Petrol Boats to be supplied to Government of Mauritius as gift by Government of India at Rs. 45.10 lacs per boat, thus, total contract value being Rs. 1.804 crores. Some of the material terms, inter alia, were that - a) Shipment of all the four boats shall be done within 18 months from the date of signing of the Agreement. b) Phased payment

shall be made as 20% of total contract value against certificate of Indian Registrar of Shipping (for short IRS), certifying that mould of the null was ready; 30% on completion of moulding of the null on certificate of IRS; 20% on receipt of engines in seller''s yard on certificate of IRS; 20% on shipment of boat/boats against requisite documents and 10% on successful launching of boats in Mauritius on certificate of Indian High Commissioner of that place. c) Payment upto receipt of engines, shall be considered as advance payment, adjustable at the time of shipment, and shall be released to the applicant against Bank Guarantees for equivalent amounts to cease to be operative on shipment of the boats. d) Stage payment, as noted, shall be released on receipt of money from Government of India. This contract also contained an arbitration clause vide Number 22.1.

The N.A. No. 1, in compliance of terms of contract, released first stage payment of 20% at the rate of Rs. 9,01,920/- against each boat, thus total sum of Rs. 36,07,680/- for four boats, against four Bank guarantees of this amount. The applicant also furnished performance guarantees to cover 10% of total contract value as required under clause 18.1 of the Contract. Thereafter, things took an ugly and unpalatable turn. It seems that Government of India (Ministry of External Affairs) insisted that stagewise payments shall be released for all four boats together rather than separately boatwise as and when attaining stipulated stage. This position, perhaps unforeseen or unapprehended, ushered the applicant in a state of torture and turmoil. The N.A. No. 1 wrote letter on 16-12-1989 to N. A. 2 saying the Demand Draft No. A630546 dated 15-12-1989 for Rs. 50 lacs towards temporary loan against the contract dated 12-10-1988 and letter dated 14-10-1988 for supply of four Boats to Mauritius Government under M.E.A''s gift programme was being forwarded for being credited to the account of the applicant with reference to loan guarantee No. 23/46 dated 12-12-1989. The contract had required completion of works in 18 months i.e. by 11-4-1990. The applicant addressed the letter on 12-3-1990, just a month before that date, saying that Hull Completion Certificates of two boats from IRS were enclosed and that the moulding of third boat was under process. On this basis, stage payment of two boats against completion of Hull was demanded. This evoked no response and matter seemed to have rested at that.

The N.A. No. 1, on failure to act as agreed, proceeded by its letter dated 31-3-1993 to invoke the encashment of Bank Guarantees (21/52, 21/53, 21/54 and 21/55 all dated 26-11-1988) covering Rs. 9,01,920/- each - total Rs. 36,07,680/- for Advance Payments; 23/46 dated 12-12-1989 for loan of Rs. 50 lacs; 21/47, 21/48, 21/49 and 21/50 dated 11-11-1988 for performance guarantees for Rs. 4,50,960/- each i.e. total Rs. 18,03,840/-. Thus, grand total of Rs. 1,04,11,520/- covered by aforesaid Nine Bank Guarantees towards Advance Payment (4) Performance (4) and loan (1) as per letter dated 31-3-1993 addressed to N.A. No. 2.

The applicant, enmeshed in an embroglio, took shelter under the arbitration clause 22.1 and applied to the Court u/s 20(1) of the Act praying for a direction that

agreement be filed in Court. This was then registered as suit in terms of Section 20(2) of the Act. Notices were issued in accordance with Section 20(3) of the Act. In this proceeding, applicant also filed an application for grant of temporary injunction as noted above. The N. A. No. 2 remained absent. As such, the order was passed that suit be heard ex parte against it. N. A. No: 1 oppugned the application as well as suit and labelled the same as untenable in law. The Court below, on hearing the applicant and contesting N.A. No. 1, dismissed the application and disallowed the prayer of injunction against encashment of the Bank guarantees as particularised in letter dated 31-3-1993 on grounds, prodigious in number, which are being stated hereafter.

Aggrieved by this order, the applicant has preferred this revision petition.

Sub-section (b) of Section 41 of the Act provides as under -

(b) The Court shall have, for the purpose of, and in relation to, arbitration proceedings, the same power of making orders in respect of any of the matters set out in the second schedule as it has for the purpose of, and in relation to, any proceedings before the Court.

The Second Schedule contains five powers of Court which include power of issuing interim injunctions.

Clause 22.1 of the Contract embodies that -

"In the event of any dispute which cannot be settled mutually, the same shall be referred to arbitration under the Rules of ICA, Delhi. The venue of arbitration shall be Delhi. The Arbitrator shall give a reasoned award. The parties to the arbitration shall have a right to enlarge the time for the Arbitrator to make his award."

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The Court below has dismissed the application on the undernoted grounds -

a) No perpetual injunction is claimed in the suit i.e. application u/s 20 of the Act. As such, no temporary injunction is grantable in view of M. P. State Amendment to Order 39, Rule 2(2) of the Code. (Para 12 of the order)

b) Bank of India (N.A. No. 2) is not a party to the arbitration agreement. As such, no injunction can be granted as it would not be "for the purpose of or "in relation to the arbitration proceedings" - as envisaged u/s 41 of the Act. (Para 15 of the order)

c) Bank Guarantee of Rs. 50 lacs, being towards loan, is a separate matter outside the purview of the Contract containing clause for arbitration. (Para 16 of the order)

d) Bank Guarantees are in the nature of independent contract and enforceable on terms incorporated therein. (Para 16 of the order)

e) There is no prima facie proof of fraud. (Para 17 of the order)

f) No such difference, as cannot be settled mutually, has been shown to exist. (Para 19 of the order)

g) Three pillars, requisite for grant of temporary injunctions, did not exist. (Para 21 of the order)

h) The main application is premature. (Para 19 of the order)

I have heard Shri S. Bhargava, learned counsel for the applicant and Shri Ashok Chitale, learned Senior Counsel with Shri Dagaonkar for the N.A. No. 1 at length, Shri Namjoshi, learned counsel for the N.A. No. 2, opted to offer no particular comments and registered presence as an impartial observer of the hotly contested proceedings.

Shri Bhargava urged that -

a) N.A. No. 1 elvishly created dispute about stage payments on the ground that liability to pay existed for all Four Boats together and not oh the basis of each boat separately, and contaminated the course. The stoppage of payment on this basis violated the term of contract and spelt doom for the applicant. Such a term of linkage was not incorporated in the contract as a result of protest through pre-contract notes and negotiations. The applicant had rejected the proposal of payment on four boats basis and as such, the contract did not say so. Clause 12.1, thus, spoke about each boat. This was then crude and rude way of dishonouring the commitment and leaving the applicant in lurch and to the state of complete bankruptcy as a result of investment in machine, men and material. The departure from term is a masquerade to obtain freedom from contract.

b) N.A. No. 1 practised ''fraud'' firstly in obtaining the contract on cajolement and secondly in advancing loan to induce further process of project against Bank guarantees on misrepresentation about stage-wise payments on unbearable rate of interest. The manner was deludable. The applicant is the victim of inveiglement and is in neck-deep crisis.

c) Contract is not repudiated by N.A. No. 1. Hence, when huge amount is due to and recoverable by the applicant itself, then there was no question of encashing or enforcing the Bank guarantees. Loan was integral part of contract in view of letter dated 16-12-1989.

d) It is a case of ''dispute'' and ''difference'' which cannot be settled mutually because its resolution, according to N. A. No. 1, depended on receipt of money from Government of India. Hence, application u/s 20 of the Act was competent and prayer for ''status quo'' till conclusion of arbitration proceedings was just and reasonable. The applicant has been thrown into reticulum and put on a smogmatic soil to fall on thorns of life.

e) The application has been improperly dismissed. The appeal thus, merits acceptance and interim injunction is grantable on proper exercise of discretion. The applicant suffers strangulation by the act of N.A. No. 1. N. A. No. 1 is attempting to fish in troubled waters.

Shri Chitale, on the other hand, supported the order and contended that -

a) The N.A. No. 1 is under no obligation either on facts or terms of contract and in law to accept delivery in instalments. Sections 37 and 38 of Sales of Goods Act further fortified this stand. Even first stage payment was released in respect of all four boats at a time. It is illogical to argue about boat-wise pattern for subsequent stages.

b) The allegation of ''fraud'' is born of ''airy nothings''. The fairness in matter of aid and assistance through loan could not be given insignia of deception. The contract was to be performed by 11-4-1990 letter of March, 1990 indicated the inkling of non-adherence to outer limit. Time being essence of the contract and property procurable under M.E.A.''s gift programme, delay, inexcusable at that, entitled the N.A. No. 1 to treat the contract as cancelled and to encash the Bank guarantees, without hindrance. The applicant, even after pocketing about 86 lacs, failed to discharge the obligation. Obviously, N.A. No. 1 was wronged and the applicant had wronged. Where is then fraud? This accusation is in fact well merited by the applicant itself which retained boats as well as 86 lacs, despite performance guarantee of about 18 lacs. The applicant has defrauded N.A. No. 1.

c) Bank Guarantees are not liable to be injuncted. Encashment has to be free from fetters. Bank is liable to N.A. No. 1. Loan is after all loan, not payment towards contract. Enforceability of guarantees depends on the linchpin of language employed in these documents.

d) The applicant did not speak of dispute and made no efforts to have it settled mutually. The latest development is that Ministry of External Affairs by its letter dated 12-4-1993, a copy of which is placed on record, has demanded from N.A. No. 1 deposit of Rs. 44,98,832/- along with interest of 22-25% at the earliest. This proclaimed cancellation of contract and deal. Sum of Rs. 50 lacs, with interest, is additionally recoverable from the applicant towards loan. There is no question of seeking or obtaining order of ''status quo''. Contract was on approval of Government of India which stands withdrawn on non-performance within stipulated time. The contract thus, ceased to subsist. There is no succulence left.

e) The application has been rightly dismissed. The order is not liable to be subverted. Injunction is not grantable against enforcement of Bank guarantees. There are no elements of ''fraud'' or ''irretrievable injustice''. Even latter was inconsequential without prima facie proof of the former.

The revision deserves to be dismissed. The applicant is wrong to say that N.A. No. 1 exhibited any conduct to triturate it.

Shri Chitale, in pursuit of these contentions, placed reliance on JT 1993 (6) C 189 , U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd., U. P. Co-operative Federation Ltd. 1993 76 Company Cases 446 , Kalpavtikasha v. National Projects, 1993 Vol. 78 Company Cases 54, General Electric Technical Services Company Inc. Vs. M/s. Punj Sons (P) Ltd. and another, General Electric Technical Services Co. Inc. v. Punj Sons (P) Ltd. and on provision of Sales of Goods Act. He refuted the allegation of meandrine mode. It was vigorously asserted that N.A. No. 1 did nothing to masticate. The counsel questioned whether it was wrong to advance loan for help and wait till 31-3-1993?

I proceed to examine the worth of rival contentions.

But before doing so, it seems apt to notice that suit u/s 20 of the Act is extremely limited in extent and content. It is not concerned with merits as such. The Division Bench of this Court in Associated Commercial Engineer''s case, reported in 1979 MPLJ 91, held that -

"The Supreme Court in Union of India (UOI) Vs. Chaman Lal Loona, has held that on an application u/s 20, ordinarily, the only point for decision for the Court was if there was an arbitration agreement and the question of liability was one for the arbitrator to go into the question of merits of the claim of the respective parties. Under the arbitration clause, it is open to the Arbitrator to examine the question as to whether any breach of the contract has been committed and by whom."

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It is thus, luculent that merits are not required to be gone into lest it should prejudice the parties in any way. The inbred question is whether injunction, a discretionary order, is grantable.

It can, however, be at once noticed that grounds, as chronicled by the Court below, are not totally fault-free. To illustrate, it is wrongly held that a) main application is premature because dispute, defying settlement on mutual basis, did come into being, b) temporary injunction was not grantable in the absence of relief of perpetual injunction because by amendment, as quoted, it is emphasised that principles for temporary and perpetual injunctions were same and no temporary injunction was grantable in cases on those facts where perpetual injunction could not be granted in view of Sections 38 and 41 of the Specific Relief Act, 1963. c) Loan is not linked with contract because as per letter dated 16-12-1989, loan was advanced against the contract only and disputes, subject matter u/s 20 of the Act, is also relatable to "any part of it". d) Injunction is not grantable because Bank was not a party to contract because Bank is a guarantor between applicant and N.A. No. 1 and guarantees pertained to matters under the contract. e) No difference has been

shown to exist because there was evidently dispute and difference as to how and when stage payment could be released i.e. all four boats together or boat-wise as and when ready. f) Injunction was not grantable in case of Bank guarantees being transaction independent of contract because it was obtainable on establishment of fraud leading to irretrievable injustice. In view of this erroneous view as indicated by this Court in the shape of "because" as above, these conclusions are dislodged and demolished as being not on firm foundation and not in conformity with law.

Yet, the million-dollar question, needing my answer, is whether enforcement of Bank-Guarantees to the extent of advance payment of (Rs. 36.07 lacs) and return of loan (Rs. 50.00 lacs) is, in these facts and circumstances of the case, injunctable in terms of Section 41 of the Act? The issue of enforcement of performance guarantees (Rs. 18.03 lacs) at this stage is demonstrably distinguishable due to factors like boats are not shipped; stage of successful launching has not reached yet; payments are withheld by N.A. No. 1 and nothing has been paid by N.A. No. 1 against the same. This is how the question in this revision petition falls for determination. It is clear that there ought to be no final or formal expression on merits of matter as regards principal issue of arbitration and its view and purview as such in this proceeding.

It cannot be gainsaid that ''credibility'' is the most important factor for banking institution. Minus that, no one shall trust Bank or guarantees. In transactions, bank has to be most upright and honest. It cannot afford to side any one. It has to function according to the dictates of directions contained in relevant documents. Since the bank pledges its own credit, entailing and embracing its own reputation, it has no defence except fraud or limitation by terms. The last word in law so far is that ''unconditional commitment'' made by the Bank in the guarantees'' should suffer no eclipse and be permitted to prevail. The applicant holds that on lapse of N.A. No. 1, it faces the situation of collapse and that attitude is precipitous.

Law is thus not in tenebrosity. The dispute between the parties must be settled between themselves. The exception to this doctrine is the plea and prima facie proof of fraud or fetter which alone can permit Bank to dishonour and say monosyllabic ''no'' to beneficiary''s demand for payment.

Order VI, Rule 4 of the Code mandates as under -

"4. Particulars to be given where necessary. - In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading."

The principles of Leroux v. Brown was affirmed by the House of Lords in Maddison v. Alderson (1883) 8 A C 467, Lord Blackburn stated in classic terms that -

"It is now finally settled that the true construction of the statute of Frauds, both the 4th and 17th sections, is not to render the contracts within them void, still less illegal, but to render the kind of evidence required indispensable when it is sought to enforce the contract."

To my mind, there are no particulars and proper evidence to demonstrate existence of ''fraud''. Incorrect interpretation or inglorious stoppage of payment or impeachable breaches or intention to ruin the opponent by subsequent action or inaction are not and could not be indicators of fraud. In any case there is none from the side of the beneficiary. The question of prima facie case or balance of convenience does not actually arise if the Court has to keep its hands off and is forbidden by law from interference with the commitment of Bank. Ordinarily the bank guarantees must be kept insulated from all disputes, between the parties, unless special features are shown to be in existence.

In Shiv Kumar Chadha and Others Vs. Municipal Corporation of Delhi and Others, Shiv Kumar Chedha v. Municipal Corporation of Delhi and Ors., the Apex Court held that -

"It has been pointed out repeatedly that a party is not entitled to an order of injunction as a matter of right or course. Grant of injunction is within the discretion of the Court and such discretion is to be exercised in favour of the plaintiff only it is proved to the satisfaction of the Court that unless the defendant is restrained by an order of injunction, an irreparable loss or damage will be caused to the plaintiff during the pendency of the suit. The purpose of temporary injunction is, thus, to maintain the status quo. The Court grants such relief according to the legal principle ex debito justitiae. Before any such order is passed the Court must be satisfied that a strong prima facie case has been made out by the plaintiff including on the question of maintainability of the suit and the balance of convenience in his favour and refusal of injunction would cause irreparable injury to him."

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As argued language used in the documents may now be seen. Bank guarantees Nos. 21/52, 21/53, 21/54 and 21/55 contain promise of the bank (N.A. No. 2) to make payment to the beneficiary in the form that "We, Bank of India.....at the request of M/s Mandovi Marine Pvt. Ltd.....hereby irrevocably and unconditionally guarantee.....and undertake to pay you on your first demand in writing" the amount as stated therein "with interest @ 9% p.a.....without demur, protest or legal contestation or any reference to" applicant. The same is the case about Bank guarantee No. 23/46 for loan of Rs. 50 lacs. As regards four performance guarantees Nos. 21/47, 21/48, 21/49 and 21/50, the undertaking seems to be conditional as below in each guarantee :-

"In consideration of the foregoing and at the request of MMPL (Applicant), we hereby guarantee irrevocably and unconditionally that MMPL shall perform their obligations with regard to timely delivery, quality of goods and other conditions, as stipulated, in the order and in case they fail to perform all or any of the above said obligations. We undertake to pay on your first demand all or any sum upto maximum of Rs. 4,50,960/-."

The provision about finality of decision of N.A. in this behalf is however, one sided and unconscionable and leads to irretrievable injustice. It is vitiated by the doctrine of inequality in bargaining capacity and is rendered acarpous in the face of arbitration clause. To this limited extent, there are undeniably special features emanating from the terms and conditions. The language used itself tears the tenebrosity.

The Court, acting reasonably and judiciously, cannot close its eyes to an uncontemplated turn of events. In case of tussel between ''words'' as employed and ''worth'' as exhibited, one must lean towards worth and real intent. The background has to be kept in focus. Performance guarantees cover 10% of the price of the boats payable to the applicant as assurance to fulfil its obligation under the contract. These are encashable and enforceable "in case they (applicants) fail to perform all or any of the above said obligations." Failure is thus, sine qua non. Here parties (applicant and N. A. No. 1) accuse each other. Both are reeling under assumption of their own impeccability. This is then the dispute to be resolved. One-sided decision is inconsequential and inoperative in the face of arbitration clause. Lord Denning stated that -

"The court qualifies the literal meaning of the words so as to bring them in accord with true scope of the contract. Even if the contract is absolute in terms, nevertheless if it is not absolute in intent, it will not be held absolute in effect. The day is done when we can excuse an unforeseen injustice by saying to the sufferer, "it is your own folly. You ought not to have passed that form of words. You ought to have put in a clause to protect yourself."

None can be credited with foresight of a prophet. The maxim "quihaeret in litera, haeret in cortice", when interpreted, means that he, who clings to the letter, surrenders to the dry and barren shall and misses the truth and substance of the matter.

So viewed, I am inclined to take the view that performance guarantees (Nos. 21/47 to 21/50) are not encashable and enforceable right at this stage until adjudication about "failure" and position as to who is wronged and who has wronged. These four guarantees of about 18 lacs are thus clearly distinguishable from other five guarantees of about Rs. 86 lacs. Clause 18.1 of the contract provided as under -

"You will be required to furnish a performance guarantee of 10% of the total contract value at the time of signing of contract and this guarantee shall remain

valid for a period of 18 months beyond the date of shipment. This performance guarantee is required for fulfilment of the warrant and other contractual obligations and shall come into force from the date of signing of the contract "

The expression ''beyond the date of shipment'' discloses the intention and inbred stage of its attractability and depicts the object behind the same. The orchestra of life, submitted counsel, is bereft of melody and brings malady and thus, applicant, bleeding in the process, deserved soothing hand of law and order to get rid of ill-health of the concern. Undeniably, law is great leveller but then it depends on facts and features of lis.

Taking into account the facts of the instant case as unfolded and bearing in mind the principles of law as enunciated, I find that there is no special equity in favour of the applicant, retainer of boats as well as 86 lacs of N. A. No. 1, and alleged non-performer of the contract till 11-4-1990 and as such the prayer for injunction against encashment of 5 Bank-Guarantees (four towards advance payment and one towards Loan - totalling about 86 lacs) deserves to be disallowed. To this extent, the order of the Court below, albeit for different reasons as chronicled above, is upheld. As regards remaining four Bank-guarantees, towards performance, covering about 18 lacs, I am of the view that the N.A. No. 1 and N.A. No. 2 should suffer restraint against encashment as a premature and pressure-tactic act. These four Bank Guarantees, intended to be operative after supply of boats, shall then not be encashed but shall be kept alive and made operative and valid upto one month beyond the date of adjudication or award as the case may be. After all, guarantee is not meant to be used for enrichment and cannot turn out to be a weapon of oppression in the hands of adversary, in fanciful manner.

The old adage says that "all are queer except me and thee". And in case of dispute or difference, even this changes to a song that ''even thee is also little queer''. Parties here hold each other at fault and turn out to be haters. Tacitus in Agricola observed that "It is principle of human nature to hate those whom you have injured". In the instant case, it is yet to be determined as to who has and who is injured.

In the ultimate analysis, I dismiss the revision petition as regards five Bank-Guarantees for about Rs. 86 lacs and uphold the order occlining injunction against encashment, subject to direction about short eclipse is being made hereafter, but accept it as regards Four Bank-guarantees, towards performance, as particularised above, for about 18 lacs and issue interim injunction qua these four guarantees in terms of Second Schedule, as embraced by Section 41 of the Act, till determination of suit, and in case of reference to arbitration, till passing of the award by the Arbitrator. There pillars for issuance of injunction about this small part are held to coexist.

To this extent, it is held that the Court below has acted in exercise of its jurisdiction illegally or in any case with material irregularity and the order, if allowed to stand in its entirety, would occasion failure of justice. There can be no lis like law v. justice. Both have to live in harmony.

So the injunction is refused as noted above. Yet it is apt to take notice of certain submissions finally founded on letter dated 12-4-1993 issued by Government of India to N.A. No. 1. The applicant is supplied copy of this letter only on 20-11-1993 and has denounced this letter incogitant and incapable of incinerating injustice said to be writ large. It was further stated that the letter, categorised as having been issued ''impromptu'' without due application of mind to entire facts, was undoubtedly unfair and unjust even to N.A. No. 1. The applicant hopefully maintained that Government of India, and N.A. No. 1, conjunct is virbus, can mend matters and end episode fraught with tragic consequences leading to liquidation and urged that Small Scale Unit, like the applicant, on investment of all its resources on the coveted project, needed help, not harassment. Elaborating further, it was submitted that the Government of India, expected to be fair to course and commitment, should play effective role to nuzzle the contract and, acting like Rommo Desprit, should lend its mighty hand to save the unit, involved in deal of Boats, from sinking beyond repair and ensure that the situation, otherwise catapulting catastrophe, should not be snowballed out of control Cachexy, urged the counsel, needed to be cured.

(1) Precisely in the light of this surge of an urge, it is deemed necessary to chronicle all features, special as they are, at one place (a) letter, dated 12-10-1988 confirming order for supply stated that "we have received our Government''s approval for procurement of a 4 NOS Patrol Boats to be supplied to Government of Mauritius." This meant that contract and deal depended on green signal from the Government, N.A. No. 1 being its enterprise, (b) Clause 4.4 of the Contract contained that "all the stage payment shall be released immediately on receipt from Government", (c) By letter dated 16-12-1989, N.A. No. 1, acting in fairness, advanced loan "against the contract for supply of 4 NOS boats to Mauritius Government. This can easily be construed as an aid to facilitate performance, (d) by letter dated 12-3-1990, Hull completion certificates, procured from IRS as required for boat yard Nos. 801 and 802 were forwarded with intimation that Moulding of 3rd hull was under process, (e) The money (Rs. 36 lacs) as paid in pursuance of clause of stage-wise payment and loan (Rs. 50 lacs), as claimed, must have been ''invested'' in the project under the contract, implying thereby that applicant may be possessed of material, not money. (f) The applicant advised N.A. No. 1 by letter dated 14-1-1992 that the loan shall be refunded and repaid through the receipts of stage-wise payments and appealed for sympathy. The N.A No. 1 did not take serious steps towards encashment till issuance of letter on 31-3-1993. (g) the nature of goods is such for which search for another buyer was not an easy position. (h) The object behind phased payment is decisively to offer help at all stages of the work. (i) N.A. No. 1 did not choose to repudiate the

contract as such immediately after 11-4-1990 which consigned even N.A. No. 1 to tough task, (k) Nothing worthwhile can be done or imagined without intervention and assistance of Government of India. (1) The facts are eloquent enough to merit concrete steps rather than going into shell of ''fault finding'' mission.

(2) In view of these ''special features'' and considering the fact that Government of India is not a party to the lis and that even N.A. No. 1 is facing problem, I deem it proper to give short time to the applicant to approach the Government of India, if it so chooses, for relief, if possible or permissible. Between law and Justice, there ought to be no antinomy. In 1956, Lord Radcliffe put it elegantly when he said of the parties to an implied term -

"Their actual persons should be allowed to rest in peace. In their place there rises the figure of fair and reasonable man and the Spokesman, who represents after all no more than the anthropomorphic conception of justice, is and must be the Court itself. Devis Contractors Ltd. v. Farcham Urban District Counsel (1956) AC 696.

(3) As seen, on law and logic, I have uttered monosyllabic ''no'' to the plea and prayer of injunction against encashment and enforcement of Five Bank-Guarantees, covering sum of about 86 lacs, the act of encashment seems to be harbinger of bankruptcy and may uproot the Small Scale Unit, yet, this Court, as the spokesman of the fair and reasonable man, as was in the mind of Lord Radcliffe, in exercise of powers u/s 151 of the Code for ends of justice as noted above, directs N.A. Nos. 1 and 2 to postpone the encashment of Bank-Guarantees, as particularised above, - till 12-12-1993 purely on humanitarian grounds so as to enable the applicant if it so desired, to approach the Government of India in this behalf. Once this is done, Government of India, may, if so chooses, consider the matter ''sine ira et studio'' on its own unfettered discretion, without treating these observations as equivalent to judicial command and without feeling tied down by any factor as discussed or referred herein. It was felt necessary to say this because Government of India is not a party here and as such, it may not know properly as to what is really what and what actually ails. However, the Government of India is left absolutely free to take its own decision according to its own light in the light of the conspectus of the above stated position.

It is well established that Courts are primarily concerned only with dispensation of justice according to law. This Court, is therefore, not required to tell the Government of India or N. As. for that matter as to how to act and what to do, if law on their side. Paul A. Freund, however drew attention to the inscription on wall of library that the one of the percepts of the law was "to render each his due". It is ever desired that law and justice should not be treated as distant neighbours and that there has to be proper diagnosis and pregnosis. In fairness to all concerned, the matter is left at that.

Ex consequenti, this revision petition is allowed only in part. The parties are, however, left to bear their own costs of this revision petition as incurred. Counsel fee is fixed at Rs. 2,000/-, if certified.

The Court below shall now proceed further and determine the pending suit expeditiously in conformity with law. However, it is clarified that nothing stated herein, as incidental to the proceedings, shall be construed as expression of opinion on the points to be decided in the suit as indicated above. The course in the Court below shall be fetter-free.

Time has then come to part with this case. The Court thus, bids adieu to this case with omega as noted in paras 31 and 33 above.