

(2014) 02 BOM CK 0168

Bombay High Court

Case No: Notice of Motion (L) No. 160 of 2014 in Suit (L) No. 57 of 2014

ITD Cementation India Ltd.

APPELLANT

Vs

Reliance Infrastructure Limited
and Others

RESPONDENT

Date of Decision: Feb. 4, 2014

Citation: (2014) 3 ALLMR 506 : (2014) 4 BC 9 : (2014) 2 BomCR 1

Hon'ble Judges: S.J. Kathawalla, J

Bench: Single Bench

Advocate: D.D. Madon, instructed by Mr. Kunal Damle, for the Appellant; Janak Dwarkadas along with Dr. B.B. Saraf, D.J. Kakalia, Paresh Parkar instructed by M/s. Mulla and Mulla, Cragie Blunt and Caroe for Defendant No. 1, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

S.J. Kathawalla, J.

The Plaintiff in the present Suit is seeking a restraint order against Defendant No. 1 from in any manner demanding and/or receiving the amounts under Bank Guarantees (Exhibits-A to A-10 of the Plaint) bearing Nos. 1100041BGP00335, 1201261BGA00008, 1201261BGA00010, 1201261BGA00011, 032821GPER002011, 03821GPER002111, 03821GPER002211, 03821GPER002311, 13940100000510, 13940100000511 and 0156111IPG000052 ("the said Bank Guarantees"). The Plaintiff has also taken out the present Notice of Motion seeking ad-interim and interim injunction against the Defendant No. 1 from receiving and against Defendant Nos. 2 to 5 from making any payments to the Defendant No. 1 under the said Bank Guarantees.

2. The Defendant No. 1 had entered into a concession agreement with the National Highways Authority of India for designing, engineering, construction, development, finance, operation and maintenance of the Pune-Satara Section of National Highway-4. The Defendant No. 1 entered into an Agreement dated 12th April, 2011

under which the Plaintiff was appointed as a sub-contractor of Defendant No. 1 ("the said Agreement").

3. Clauses 5(a) and 13.4(a) of the said Agreement provided as under:

5. Mobilization Advance

The EPC Contractor, at its own discretion, may provide to the Contractor an interest free advance upto 10% of Contract Value and an interest bearing advance upto 5% of Contract Value as "mobilization advance" in the following manner:

(a) 5% (Five percent) of the total Contract value shall be paid as first advance upon submission of Advance Bank Guarantee (ABG) from a nationalized/scheduled bank approved by EPC contractor for equal amount and upon signing of this Agreement and submission of Contract Performance Bank Guarantee (CPBG).

13.4 ADVANCE BANK GUARANTEE (ABG)

(a) The Contractor shall, within thirty (30) days from date of Letter of Award provide an advance bank guarantee in an amount equal to five percent (5%) of total Contract value being referred as First Advance calculated in accordance with terms and procedures of payment of the contract agreement, and in the currency or currencies of the Contract, with an initial validity of up to ninety (90) days beyond the schedule date of completion of the contract.

Pursuant to the above terms of the said Agreement dated 12th April, 2011, the Plaintiff got issued various Bank Guarantees of which Defendant No. 1 was the beneficiary. The format of the Advance Bank Guarantee and Performance Bank Guarantees are set out in Schedule F of the Contract at pages 179 and 183 respectively of the Construction Agreement. The Bank Guarantees furnished by the Plaintiff were therefore in the format provided by the Defendant No. 1 in the Construction Agreement. In the said Bank Guarantees the Plaintiff is referred to as "the Construction Contractor" and the Defendant No. 1 is referred as the "EPC Contractor".

4. The essential terms of the Mobilization Advance Guarantees are set out hereunder.

3. AND WHEREAS in conformity with the provisions of clause 5(a) and 13.4(a) of Special conditions of Contract, the Construction Contractor has agreed to furnish a Bank Guarantee for an amount equivalent to the Advance Payment of Rs. 4,60,00,000/- (Rupees Four Crore Sixty Lakh only) extended by the EPC Contractor to the Construction Contractor for the faithful execution of the Contract.

4. And whereas the Construction Contractor has agreed to provide the EPC Contractor and the EPC Contractor has agreed to accept the Advance Bank Guarantee for five per cent (5%) of the total Contract Value from BANK OF BARODA having its head/registered office at Mandvi, Baroda, through its Backbay

Reclamation Branch, Ram Mahal, Dinshaw Vachha Road, Churchgate, Mumbai 400 020, hereinafter referred to as "the bank", (which expression shall unless it be repugnant to the context or meaning thereof be deemed to include its successors and permitted assigns).

5. NOW THEREFORE, in consideration inter alia of the EPC Contractor granting the Construction Contractor the contract, the Bank hereby unconditionally and irrevocably guarantees and undertakes, on written demand, to immediately pay to the EPC Contractor any amount so demanded (by way of one or more claims) not exceeding in the aggregate Rs. 4,60,00,000/- (Rupees Four Crores Sixty Lakhs only) without any demur, reservation, contest or protest and/or without reference to the Construction Contractor and without the EPC Contractor needing to provide or show to the Bank, grounds or reasons or give any justification for such demand for sums demanded.

6. The decision of the EPC Contractor as to whether the Construction Contractor has fulfilled its obligations or not towards set-off of Advance Payment extended by the EPC Contractor to the Construction Contractor shall be final and binding on the Bank and the Construction Contractor. The Bank acknowledges that any such demand by the EPC Contractor of the amounts payable by the Bank to the EPC Contractor shall be final, binding and conclusive evidence in respect of the amounts payable by the Construction Contractor to the EPC Contractor. Any such demand made by the EPC Contractor on the Bank shall be conclusive and binding, notwithstanding any difference between the EPC Contractor and the Construction Contractor or any dispute raised, invoked, threatened or pending before any Court, tribunal, arbitrator or any other authority.

9. The Bank's obligations under this guarantee shall not be reduced by reason of any partial performance of the contract. The Bank's obligations shall not be reduced by any failure by the EPC Contractor to timely pay or perform any of its obligations under the contract.

10. The Bank further unconditionally and unequivocally agrees with the EPC Contractor that the EPC Contractor shall be at liberty, without the Bank's consent and without affecting in any manner its rights and the Bank's obligations under this Guarantee, from time to time, to;

(i) vary and/or modify any of the terms and conditions of the contract;

(ii) forebear or enforce any of the rights exercisable by the EPC Contractor against the Construction Contractor under the terms and conditions of the contract; or

and the Bank shall not be relieved from its liability by reason of any such act or omission on the part of EPC Contractor or any indulgence shown by the EPC Contractor to the Construction Contractor or any other reason whatsoever which under the law relating to sureties would, but for this provision have the effect of

relieving the Bank of its obligation under this Guarantee.

5. The essential terms of the Performance Bank Guarantee are set out hereunder.

3. AND WHEREAS in conformity with the provisions of the Contract, the Construction Contractor has agreed to furnish an unconditional and irrevocable bank guarantee for an amount which is ten per cent (10%) of the Contract Price (the "contract Price") for the timely completion and faithful and successful execution of the Contract.

5. NOW THEREFORE, the Bank undertakes the pecuniary responsibility of the Construction Contractor to the EPC Contractor for the due performance of the Contract and for the payment of any money by the Construction Contractor to the EPC Contractor and hereby issues in favour of the EPC Contractor this Guarantee in the amount of Rs. 46,00,00,000/- (Rupees Forty Six Crore only).

6. The Bank for the purposes hereof unconditionally and irrevocably guarantees and undertakes as a direct responsibility, to immediately pay to the EPC Contractor on demand any amount or amounts (by way of one or more claims) not exceeding in the aggregate of Rs. 46,00,00,000/- (Rupees Forty Six crore only) without any demur, reservation, recourse, contest or protest and/or without reference to the Construction Contractor and without the EPC Contractor needing to provide or show the Bank grounds or reasons for such demand for the sum specified.

7. Any such demand made by the EPC Contractor on the Bank shall be conclusive and binding, notwithstanding any difference between the EPC Contractor and the Construction Contractor or any dispute pending before any Court, tribunal, arbitrator or any other authority. The Bank undertakes not to revoke this guarantee herein contained and this Guarantee shall continue to be enforceable until its expiration.

8. The decision of the EPC Contractor as to whether the construction Contractor has fulfilled its obligation or not shall be binding on the Bank. The Bank acknowledges that any such demand by the EPC Contractor of the amounts payable by the Bank to the EPC Contractor shall be final, binding and conclusive evidence in respect of the amounts payable by the Construction Contractor to the EPC Contractor.

11. Except as provided herein, the Bank's obligations under this Guarantee shall not be reduced by reason of any partial performance of the contract. The Bank's obligations shall not be reduced by any failure by the EPC Contractor to timely pay or perform any of its obligations under the Contract.

12. The Bank further unconditionally agrees with the EPC Contractor that the EPC Contractor shall be at liberty, without the Bank's consent and without affecting in any manner the Bank's obligations under this Guarantee, from time to time, to:

(i) extend and/or postpone the time for performance of the obligations of the Construction Contractor under the Contract; and the Bank shall not be relieved from

its liability by reason of any such act or omission on the part of the EPC Contractor or any indulgence by the EPC Contractor to the Construction Contractor or any other reason whatsoever which under the law relating to sureties would but for this provision, have the effect of relieving the Bank of its obligations under this Guarantee provided nothing contained herein shall enlarge the Bank's obligation hereunder.

6. Certain disputes arose between the Plaintiff and Defendant No. 1 under the said Agreement. The Defendant No. 1 invoked the aforesaid Bank Guarantees aggregating to Rs. 92,00,00,000/- (Rupees Ninety two crores only) on 23rd January, 2014. The Plaintiff has filed the present Suit on 24th January, 2014 for the aforestated reliefs and also taken out the above Notice of Motion seeking urgent ad-interim reliefs. By consent of the Parties, the Notice of Motion is taken up for final hearing at the ad-interim stage.

7. Mr. Madon, the Learned Senior Advocate appearing for the Plaintiff, has submitted that the Bank Guarantees submitted by the Plaintiff are not unconditional Bank Guarantees as alleged by Defendant No. 1, but are in fact conditional, inasmuch as the Clauses 3 and 5 of the Performance Bank Guarantee as well as Clause 3 of the Advance Bank Guarantees clearly qualify the Bank Guarantee. He has submitted that the terms of the Bank Guarantees read with the terms of the said Agreement make it clear that Defendant No. 1 would be entitled to invoke the Bank Guarantees only if the conditions mentioned in the Agreement dated 12th April, 2011 are satisfied.

8. The Learned Senior Advocate appearing for the Plaintiff has relied on certain letters written by the Plaintiff to the Defendant No. 1 and has submitted that from the said letters it is clear that the delay in execution of the project was solely on account of the failure of Defendant No. 1, inter alia, to provide possession of the project site and to make necessary payments in accordance with the payment obligations of Defendant No. 1 under the said Agreement. Even in respect of the sites that were handed over, it was not possible to carry out work on large portions thereof on account of several defaults on part of the Defendants. The Plaintiff has in its correspondence with the Defendant No. 1 called upon Defendant No. 1 to take steps for resolving the issues. The Plaintiff also gave detailed reasons for the delay in execution and also requested for extension of time provided under the Agreement for completion of the project. In fact, though the time under the Agreement expired on 24th July, 2013, the Parties by conduct continued to act in furtherance of the Agreement dated 12th April, 2011. On account of the default by Defendant No. 1, the Plaintiff vide its letter dated 16th October, 2013, intimated Defendant No. 1 that the Plaintiff was incurring continuous losses and called upon Defendant No. 1 to foreclose the Agreement, which letter was not replied to by Defendant No. 1. The Plaintiff also requested the Defendant No. 1 to refer the matter to Dispute Resolution in case the defaults are not remedied. This request

was also rejected by Defendant No. 1. Soon thereafter, Defendant No. 1 issued the termination notice dated 23rd January, 2014 which termination itself was contrary to clause 41.1 of the Agreement, which required Defendant No. 1 to give 15 days notice prior to termination.

9. The Learned Senior Advocate appearing for the Plaintiff relying upon the judgment of the Hon'ble Supreme Court in the case of [Hindustan Construction Co. Ltd. Vs. State of Bihar and Others](#), submitted that the facts of the present case are similar to the facts in the said judgment. He submitted that in that case though the Bank Guarantees issued had used the expression "unconditional and irrevocable", the same were qualified by making a reference to the terms of the Agreement. Similarly, in the present case though the Bank Guarantees used the expression "unconditional and irrevocable", the same are not only qualified by the terms of the said Agreement but the default by Defendant No. 1 would not entitle Defendant No. 1 to invoke such Bank Guarantees against the Plaintiff and special equities would arise in favour of the Plaintiff. It was therefore submitted on behalf of the Plaintiff that the Defendant No. 1 was not entitled to invoke the Bank Guarantees, the same have been invoked fraudulently, and invocation of the same will cause irretrievable injury to the Plaintiff. The Plaintiff is therefore entitled to the reliefs as prayed for in the Notice of Motion.

10. Mr. Dwarkadas, the Learned Senior Advocate appearing for the Defendant No. 1, submitted that the Bank Guarantees issued in favour of Defendant No. 1 were unconditional and the invocation thereof is not subject to the terms of the Agreement dated 12th April, 2011 and/or the dispute between the Parties. He submitted that it is well settled that an unconditional and irrevocable Bank Guarantee is an independent contract and whether encashment of the same ought to be permitted or not has to be considered without any reference to the underlying or main contract or to the disputes/claims thereunder. He submitted that in any event the compilation of documents submitted by the Defendant No. 1 belies the submissions of the Plaintiff that the Plaintiff has not committed any default and it is the Defendant No. 1 who has breached its obligations under the said Agreement, and that the termination of the said Agreement is bad in law. He submitted that the judgment in the case of Hindustan Construction Company (supra) has no application to the facts of the present case and the Bank is obliged to make payments to the Defendant No. 1 in accordance with the terms of the Guarantee subject to two exceptions viz. fraud of an egregious nature of which the Bank has notice and irretrievable injury of the nature set out in the case of Itek Corporation vs. First National Bank of Boston [566 Fed Supp. 1210]. In support of this submission, the Learned Senior Advocate appearing for Defendant No. 1 inter alia relied upon the judgments of the Hon'ble Supreme Court in the case of AIR 1997 1644 (SC) , and [Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works \(P\) Ltd., and another](#), .

11. The Learned Senior Advocate appearing for Defendant No. 1 also relied upon the judgment of the Hon"ble Supreme Court in the case of [Vinitec Electronics Private Limited Vs. HCL Infosystems Limited](#), and the judgment of this Court in the case of [M/s. ABG Ports Limited Vs. M/s. PSA International Pte Limited, Bank of Baroda and The Board of Trustees of the Jawaharlal Nehru Port Trust](#), to contend that the judgment in Hindustan Construction has been interpreted in the abovementioned judgments and it is clear that the observations at para 21 therein were in the context of a conditional guarantee. The Court in that case considering clauses of the Bank Guarantee in paragraphs 12 and 13 held that the Bank Guarantee was not an unconditional Bank Guarantee. Referring to the averments made in the Plaint, the Learned Senior Advocate for Defendant No. 1 submitted that the Plaintiff has failed to make out any case of fraud or irretrievable injury or special equities in their favour and therefore the question of restraining Defendant No. 1 from invoking the said Bank Guarantees or from receiving any payments thereunder from the Banks does not arise.

12. In rejoinder, the Learned Senior Advocate appearing for the Plaintiff has submitted that none of the judgments relied upon by Defendant No. 1 support the case of Defendant No. 1, inasmuch as the said judgments relied upon by Defendant No. 1 do not deal with the aspect of special equities as set out inter alia in paragraph 21 of the judgment of the Hon"ble Supreme Court in the case of Hindustan Construction (supra). It is submitted that it is pertinent to note that whilst Defendant No. 1 sought to contend that the Plaintiff has been unable to complete the construction work in respect of the sites which were delivered to the Plaintiff, the submission of Defendant No. 1 was not supported by the documents on record. It is further submitted that the fact that there was substantial delay in making payments was admitted by Defendant No. 1. It was therefore submitted that the present case is governed by special equities as held by the Hon"ble Supreme Court in the case of Hindustan Construction (supra) and it is clear from the documents on record that the Defendant No. 1 itself was in default. It was therefore reiterated on behalf of the Plaintiff that the Defendant No. 1 was not entitled to invoke the Bank Guarantee and the Plaintiff is entitled to interim and ad-interim injunctions in terms of the Notice of Motion.

13. I have considered the submissions advanced by the learned Senior Advocates appearing for the Parties and the case law relied upon by them in support of their submissions.

14. The Plaintiff has contended that the Guarantees are conditional and the said contention is refuted by Defendant No. 1. The Plaintiff has inter alia relied on recital (3) as well as clause 5 of the Performance Bank Guarantee as well as recital 13 of the Advance Bank Guarantees to contend that they clearly qualify the Bank Guarantee and require the Bank Guarantee to be read with the terms of the Agreement. Recital (3) of the Bank Guarantees only records that the Plaintiff has agreed to furnish Bank

Guarantee"s under the provisions of the Contract for the timely completion and the faithful and successful execution of the contract. The Hon"ble Supreme Court has in the case of Vinitec Electronics Pvt. Ltd. (supra) inter alia held that, "mere fact that the Bank Guarantee refers to the principal agreement in the preamble of the deed of guarantee does not make the guarantee furnished by the Bank to be a conditional one unless any particular clause of the agreement has been made part of the deed of guarantee". No clause of the Agreement has been made part of the Deed of Guarantee. In fact, Clauses 5(a) and 13.4(a) of the Contract referred to in recital 3 of the Advance Guarantee (which are reproduced hereinabove) only mention that the Construction Contractor is required to furnish the Advance and Performance Guarantees to the EPC Contractor as set out therein and nothing further. Clause 5 of the Performance Bank Guarantee records that, "NOW THEREFORE, the Bank undertakes the pecuniary responsibility of the Construction Contractor to the EPC Contractor for the due performance of the Contract and for the payment of any money by the Construction Contractor to the EPC Contractor and hereby issues in favour of the EPC Contractor this Guarantee...." Such general reference to the principal agreement also does not make the guarantee furnished by the Bank to be a conditional one.

15. In fact, the said Bank Guarantees clearly and unequivocally provide that the Bank unconditionally and irrevocably guarantees and undertakes as a direct responsibility, to immediately pay to the EPC Contractor on demand the amount or amounts set out therein without any demur, reservation, recourse, contest or protest and/or without reference to the Construction Contractor and without the EPC Contractor needing to provide or show to the Bank, grounds or reasons for such demand for the sum specified. The said Bank Guarantees further provide that any demand made by the EPC Contractor on the Bank shall be conclusive and binding, notwithstanding any difference between the EPC Contractor and the Construction Contractor or any dispute pending before any Court, Tribunal, Arbitrator or any other authority. It is also provided in the said Bank Guarantees that the decision of the EPC Contractor as to whether the Construction Contractor has fulfilled its obligation or not, shall be binding on the Bank and the Bank has acknowledged that any such demand by the EPC Contractor of the amounts payable by the Bank to the EPC Contractor shall be final, binding and conclusive evidence in respect of the amounts payable by the Construction Contractor to the EPC Contractor. It is specifically provided in Clause 11 of the Performance Guarantee and Clause 9 of the Advance Guarantees that the Bank"s obligation shall not be reduced by any failure by the EPC Contractor to timely pay or perform any of its obligations under the contract (emphasis supplied). The language of the said Bank Guarantees therefore leaves no room for doubt that the said Bank Guarantees furnished by the Plaintiff to Defendant No. 1 are unconditional and irrevocable.

16. The Plaintiff has relied on the decision of the Hon"ble Supreme Court in the case of Hindustan Construction Co. Ltd. vs. State of Bihar and others(supra). In that case,

Clause 9 of the Principal Agreement reads thus:

9. ADVANCE MOBILIZATION LOAN:

The Employer, will make an advance loan to the Contractor at 13 per cent simple interest per annum for the costs of mobilization in respect of the works in a lump sum amount equivalent upto 15 per cent of the Contract Price named in the Letter of Acceptance, payable in the proportionate amounts of foreign and local currencies as provided for in the Contract. Payment of the loan will be due under separate certification by the Engineer after (i) execution of the Form of Agreement by the parties thereto, (ii) Provision by the Contractor of the Performance security in accordance with Clause 5, and (iii) provision by the Contractor of a Bank Guarantee by a Bank acceptable to the Employer in an amount equal to the advance loan, such Bank Guarantee to remain effective until the advance loan has been completely repaid by the Contractor out of current earnings under the Contract and certified accordingly by the Engineer. A form of bank guarantee acceptable to the Employer is indicated in Section 9. Annex. B. The advance loan shall be used by the contractor exclusively for mobilization expenditures, including the acquisition of Constructional Plant, in connection with the works. Should the Contractor misappropriate any portion of the advance loan, it shall become due and payable immediately, and no further loan will be made to the Contractor thereafter. The advance mobilization loan, shall be paid within 15 days of the date of certification.

The Bank Guarantee furnished by the Hindustan Construction Company provided as under:

.....In accordance with the provisions of the Conditions of Contract, Clause 9 (Advance Mobilisation Loan) of the above-mentioned contract, the Hindustan Construction Co. Ltd., incorporated in Bombay under the Companies Act, 1956, and having their registered officer at Construction House, Walchand Hirachand Marg, Ballard Estate, Bombay-400 038 (hereinafter called "the Contractor") shall deposit with the Executive Engineer, Kharkai Dam Division II, Icha, Chaliama, Post Kesargarhia, Dist. Singhbhum, Bihar, a bank guarantee to guarantee their proper and faithful performance under the said clause of the contract in an amount of Rs. 10,00,000 (Rupees Ten lakhs only).

We, the State Bank of India, incorporated under State Bank of India Act, 1955, and having one of our branches at Nyayamurti C.N. Vaidya Marg, Fort, Bombay-400 023 (hereinafter referred to as "the said Bank"), as instructed by the Contractor, agree unconditionally and irrevocably to guarantee as primary obligator and not as Surety merely, the payment of the Executive Engineer, Kharkai Dam Division II, Icha, Chaliama, Post Kesargarhia, Dist. Singhbhum, Bihar, on his first demand without whatsoever right of objection on our part and without his first claim to the contractor, in the amount not exceeding Rs. 10,00,000 (Rupees Ten lakhs only) in the event that the obligations expressed in the said clause of the abovementioned

contract have not been fulfilled by the contractor giving the right of claim to the employer for recovery of the whole or part of the Advance Mobilisation Loan from the contractor under the contract.

(emphasis supplied)

We further agree that no change or addition to or other modification of the terms of the contract or of works to be performed thereunder or of any of the contract documents which may be made between the Executive Engineer, Kharkai Dam Division II, Icha, Chaliama, Post Kesargarhia, Dist. Singhbhum, Bihar, 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.....

The Hon^{ble} Supreme Court, whilst interpreting the said Guarantee held that the Bank Guarantee was conditional by observing in paragraphs 12 and 13 of its order as follows:

12. Where the Bank, in the above Guarantee, no doubt, has used the expression "agree unconditionally and irrevocably" to guarantee payment to the Executive Engineer on his first demand without any right of objection, but these expressions are immediately qualified by following:

.....in the event that the obligations expressed in the said clause of the abovementioned contract have not been fulfilled by the contractor giving the right of claim to the employer for recovery of the whole or part of the Advance Mobilisation Loan from the contractor under the contract.

13. This condition clearly refers to the original contract between the HCCL and the defendants and postulates that if the obligations, expressed in the contract, are not fulfilled by HCCL giving to the defendants the right to claim recovery of the whole or part of the "Advance Mobilisation Loan", then the Bank would pay the amount due under the Guarantee to the Executive Engineer. By referring specifically to Clause 9, the Bank has qualified its liability to pay the amount covered by the Guarantee relating to "Advance Mobilisation Loan" to the Executive Engineer only if the obligations under the contract were not fulfilled by HCCL or the HCCL has misappropriated any portion of the "Advance Mobilisation Loan". It is in these circumstances that the aforesaid clause would operate and the whole of the amount covered by the "Mobilisation Advance" would become payable on demand. The Bank Guarantee thus could be invoked only in the circumstances referred to in Clause 9 whereunder the amount would become payable only if the obligations are not fulfilled or there is misappropriation. That being so, the Bank Guarantee could not be said to be unconditional or unequivocal in terms so that the defendants could be said to have had an unfettered right to invoke that Guarantee and demand immediate payment thereof from the Bank. This aspect of the matter was wholly ignored by the High Court and it unnecessarily interfered with the order of injunction, granted by the Single Judge, by which the defendants were restrained

from invoking the Bank Guarantee.

In the circumstances, the submission of the Plaintiff that the said Bank Guarantees are conditional Bank Guarantees cannot be accepted.

17. It is settled law that the Bank Guarantee is an independent contract and a challenge to the invocation/encashment of an irrevocable and unconditional Bank Guarantee has to be considered without any reference to the underlying or main contract or to the disputes/claims thereunder. However, the two exceptions which have been carved out by several decisions of the Hon'ble Supreme Court under which the invocation/encashment of such Bank Guarantee's could be restrained are fraud and irretrievable injury. The Plaintiff has alleged that the invocation of the Bank Guarantees by the Defendant No. 1 is fraudulent. It is trite law that a Court can restrain encashment of Bank Guarantee in cases of established fraud in issuance of the Bank Guarantee. The fraud has to be absolute and egregious vitiating the very foundation of the Bank Guarantee. The Hon'ble Supreme Court has in its decision in *U.P. State Sugar Corporation vs. Sumac International Ltd.* (supra) held as follows:

12.....When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so..... In the case of [U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers \(P\) Ltd.,](#) which was the case of works contract where the performance guarantee given under the contract was sought to be invoked, this Court, after referring extensively to English and Indian cases on the subject, said that the guarantee must be honoured in accordance with its terms. The bank which gives the guarantee is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contractual obligation or not, nor with the question whether the supplier is in default or not. The bank must pay according to the tenor of its guarantee on demand without proof or condition. There are only two exceptions to this rule. The first exception is a case when there is a clear fraud of which the bank has notice. The fraud must be of an egregious nature such as to vitiate the entire underlying transaction. Explaining the kind of fraud that may absolve a bank from honouring its guarantee, this Court in the above case quoted with approval the observations of Sir John Donaldson, M.R. in *Bolivinter Oil SA v. Chase Manhattan Bank NA* (1984 [1] AER 351 (All ER at p.352): (at SCC p.197)

The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear both as to the fact of fraud and as to the bank's knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it charged.

This Court set aside an injunction granted by the High Court to restrain the realisation of the bank guarantee.

18. On the issue of the first exception viz. fraud, the Hon^{ble} Supreme Court in the case of Vinitec Electronics Pvt. Ltd. vs. HCL Infosystems Ltd. (supra) held thus:

25. This Court in more than one decision took the view that fraud, if any, must be of an egregious nature as to vitiate the underlying transaction. We have meticulously examined the pleadings in the present case in which no factual foundation is laid in support of the allegations of fraud. There is not even a proper allegation of any fraud as such and in fact the whole case of the appellant centres around the allegation with regard to the alleged breach of contract by the respondent. The plea of fraud in the appellant's own words is to the following effect:

That despite the respondent HCL being in default of not making payment as stipulated in the bank guarantee, in perpetration of abject dishonesty and fraud, the respondent HCL fraudulently invoked the bank guarantee furnished by the applicant and sought remittance of the sums under the conditional bank guarantee from Oriental Bank of Commerce vide letter of invocation dated 16-12-2003.

26. In our considered opinion such vague and indefinite allegations made do not satisfy the requirement in law constituting any fraud much less the fraud of an egregious nature as to vitiate the entire transaction. The case, therefore does not fall within the first exception.

19. The Plaintiff has pleaded fraud in the Plaint primarily on the basis that Defendant No. 1 committed breaches of the underlying contract and as such the invocation of Bank Guarantees is illegal and fraudulent. The Plaintiff has lost sight of the fact that the Bank Guarantees furnished by the Plaintiff to the Defendant No. 1 categorically provides that, "The Bank's obligations shall not be reduced by any failure by the EPC Contractor to timely pay or perform any of its obligations under the contract". The Plaintiff has not made out any case of fraud much less a case of an absolute and egregious fraud to the knowledge of the Bank, which would affect the very foundation of the Bank Guarantee as is required in law. In view thereof it cannot be held that the invocation of the Bank Guarantee by Defendant No. 1 is fraudulent as alleged by the Plaintiff.

20. As regards the second exception viz. irretrievable injury, it has been repeatedly held by the Hon'ble Apex Court that to avail of the said ground it must be decisively established and proved to the satisfaction of the court that there would be no possibility whatsoever of the recovery of the amount by the beneficiary. In this Context, paragraph 14 of the decision of the Hon'ble Supreme Court in U.P. State Sugar Corporation (supra) is relevant and reproduced hereunder:

14. On the question of irretrievable injury which is the second exception to the rule against granting of injunctions when unconditional bank guarantees are sought to be realised the court said in the above case that the irretrievable injury must be of the kind which was the subject-matter of the decision in the Itek Corporation case (supra). In that case an exporter in the U.S.A. entered into an agreement with the Imperial Government of Iran and sought an order terminating its liability on stand by letters of credit issued by an American bank in favour of an Iranian Bank as part of the contract. The relief was sought on account of the situation created after the Iranian revolution when the American Government cancelled the export licences in relation to Iran and the Iranian Government had forcibly taken 52 American citizens as hostages. The U.S. Government had blocked all Iranian assets under the jurisdiction of United States and had cancelled the export contract. The Court upheld the contention of the exporter that any claim for damages against the purchaser if decreed by the American Courts would not be executable in Iran under these circumstances and realization of the bank guarantee/Letters of credit would cause irreparable harm to the plaintiff. This contention was upheld. To avail of this exception, therefore, exceptional circumstances which make it impossible for the guarantor to reimburse himself if the ultimately succeeds, will have to be decisively established. Clearly, a mere apprehension that the other party will not be able to pay, is not enough. In the Itek case (supra) there was a certainty on this issue. Secondly, there was good reason, in that case for the Court to be prima facie satisfied that the guarantors i.e. the bank and its customer would be found entitled to receive the amount paid under the guarantee.

The above view is also reiterated by the Hon'ble Apex Court in paragraph 22 of its decision in the case of Dwarikesh Sugar Industries Ltd. vs. Prem Heavy Engineerings Works (P) Ltd. (supra).

21. The Plaintiff has primarily pleaded in paragraph 10 of the Plaint that if Defendant Nos. 2 to 5 make any payment to Defendant No. 1 under the Bank Guarantee, it will be difficult for the Plaintiff to recover the amounts paid under the Bank Guarantee. It is pleaded in paragraph 12 that the encashment of the Bank Guarantee will damage the Plaintiff's credential with the Bank. The Plaintiff has further merely stated without any substantiation that this is a case of special equities. None of these pleadings satisfy the requirement of establishing irretrievable injury as required in law. Special equities and irretrievable injury are aspects of the same contention. In any case, save and except stating that this is also a case of special

equities, nothing further has been pleaded. The mere plea and that too without any basis that it will be difficult to recover the amount from Defendant No. 1 does not fulfil the requirement of establishing irretrievable injury or special equities as laid down in the various cases discussed hereinabove. As held by the Hon"ble Courts, to avail of these exceptions, exceptional circumstances which make it impossible for the party to reimburse itself if it ultimately succeeds, has to be decisively established. A mere apprehension that the other party will not be able to pay is not enough. As regards the contention that it will cause damage to the Plaintiff's credential with the Banks, the same is a vague statement and would lend no assistance to the Plaintiff.

22. The Plaintiff has in support of its contention that special equities have arisen in its favour, has placed reliance on the judgment of the Hon"ble Supreme Court in the case of Hindustan Construction Company (supra) and in particular paragraph 21 thereof which reads thus:

21. We have scrutinized the facts pleaded by the parties in respect of both the Bank Guarantees as also the document filed before us and we are, prima facie, of the opinion that the lapse was on the part of the defendants who were not possessed of sufficient funds for completion of the work. The allegation of the defendants that HCCL itself had abandoned the work does not, prima facie, appear to be correct and it is for this reason that we are of the positive view that the "special equities" are wholly in favour of HCCL.

The judgment of the Hon"ble Supreme Court in the case of Hindustan Construction Company (supra) as can be seen from the Paragraph 9 of the Judgment is purely on the basis of the terms of the Bank Guarantee. The observations at para 21 therein was in the context of a conditional Bank Guarantee. The Court has in the said case considered the clauses of the Bank Guarantee and in paragraphs 12 and 13 held that the Bank Guarantee was not an unconditional Bank Guarantee. The Hon"ble Supreme Court has held that by referring specifically to Clause 9, the Bank has qualified its liability to pay the amount covered by the Guarantee relating to "Advance Mobilisation Loan" to the Executive Engineer only if the obligations under the contract were not fulfilled by HCCL or if HCCL has misappropriated any portion of the "Advance Mobilisation Loan". The Supreme Court further held that it is in these circumstances that clause 12 of the Bank Guarantee would operate and the whole of the amount covered by the "Mobilisation Advance" would become payable on demand and the Bank Guarantee thus could be invoked only in the circumstances referred to in Clause 9. The Supreme Court has held that, that being so the Bank Guarantee could not be said to be unconditional and unequivocal in terms so that the Defendants could be said to have an unfettered right to invoke that Guarantee and demand immediate payment thereof from the Bank. Further, the Court has also held at paras 19 and 20 that the invocation was done wrongfully. It was in the context of such Bank Guarantee that the Hon"ble Supreme Court made

observations in para 21 in the case of Hindustan Construction Company (supra). The judgment and observations of the Hon"ble Supreme Court in para 21 of the judgment in Hindustan Construction Company (supra) cannot by any stretch of reasoning be said to have diluted the laws on Bank Guarantees which has been reiterated repeatedly by the Hon"ble Supreme Court even after the judgment in the case of Hindustan Construction Company. In the case of Vinitec Construction (supra), the Hon"ble Supreme Court expressly dealt with and distinguished the judgment in the case of Hindustan Construction Company at paragraphs 20 and 21 thereof. In fact, in the said Bank Guarantees furnished by the Bank at the instance of the Plaintiff to the Defendant No. 1, it is categorically provided that the Bank's obligations shall not be reduced by any failure by the EPC Contractor to timely pay or perform any of its obligations under the contract. This being the bargain, the Plaintiff now cannot be heard to say that the Defendant No. 1 is not entitled to invoke the Bank Guarantee on the ground that the Defendant No. 1 has not made certain payments on the due dates and/or have not performed their obligations under the principal Agreement and that in view thereof, the special equities are in their favour.

In the light of the above circumstances, in my view, the Plaintiff has failed to make out any case to restrain Defendant Nos. 2 to 5 from invoking the said Bank Guarantees. The above Notice of Motion is therefore dismissed with costs.