

## Man Industries India Limited Vs Indian Oil Corporation Limited

**Court:** Delhi High Court

**Date of Decision:** Sept. 24, 2008

**Acts Referred:** Arbitration and Conciliation Act, 1996 & Section 9

**Hon'ble Judges:** S. Ravindra Bhat, J

**Bench:** Single Bench

**Advocate:** A.S. Chandhiok, Geetika Panwar, Mamta Tiwari and Arti, for the Appellant; V.N. Koura and Paramjeet Benipal, for the Respondent

**Final Decision:** Dismissed

### Judgement

S. Ravindra Bhat, J.

In these proceedings u/s 9 of the Arbitration and Conciliation Act, 1996 (hereafter called "the Act"), the petitioner

seeks an order restraining invocation of a bank guarantee, by the respondent, Indian Oil Corporation (hereafter "IOC").

2. The petitioner entered into an agreement with the IOC, for supply of 20,000 metres of 48" size API 5L X 65 Grade Line Pipes for which the

IOC issued a Purchase Order on 5-8-2004. In terms of that Order, the petitioner had to -and did - furnish a bank guarantee, for Rs. 5,49,77,184/

- to secure due performance of the agreement. The guarantee was issued by the second respondent (hereafter called "the bank"). In terms of

Clause 4.19.2 of the Purchase Order, the guarantee had to be valid and in force for 21 months from the completion of all deliveries under the

contract. Clause 4.19.2 reads as follows:

4.19.0 Performance Guarantee:

....

4.19.2 Said Performance Guarantee shall be and remain in force and shall be irrevocable upto and until 21 (twenty one) months from completion

of all deliveries under the contract, and as long as defect liability period for all replacement pipes shall have not expired and all obligations relative

thereto shall not have been discharged.

3. In terms of Clause 11 (of the Purchase Order) the warranty period was 12 months from the date of commissioning, or 18 months from the date

of dispatch (of the supplies) whichever was earlier. Clause 9 stipulated for third party inspection of the equipment, at the stage of dispatch, by one

Intertek. The petitioner claims to have executed the contract in accordance with agreed terms, adhering to the delivery schedule and dispatching

the goods after their due inspection; it relies on inspection certificates by Intertek, dated 28-12-2004, 11-1-2005 and 18-1-2005. The last

certificate is particularly relied on to say that it was a cumulative dispatch certificate, also reflecting a deduction of Rs. 43, 27,706/- 48 made by

the IOC on allegations of the petitioners' delay in delivery of the pipes.

4. According to the petitioner, IOC lifted three (3) pipes more than six months after inspection (18-1-2005) on 5-8-2005, despite having been

intimated a number of times about readiness of such equipment. The petitioner relies on letters and copies of e-mails, dated 19-3-2005; 24-3-

2005; 31-3-2005; 11-4-2005 and 30-6-2005 sent to IOC asking the latter to lift the pipes. The petitioner contends that though the bank

guarantee was to be valid and in force till 4th October, 2006, yet IOC insisted that its validity should be extended by another seven months. The

petitioner had little choice, but to yield to this demand; resultantly, the bank guarantee was extended till 4th May, 2007.

5. The petitioner avers that when the pipes reached Paradip, Orissa, IOC, after their inspection, alleged defects in two of them, and demanded Rs.

25, 31, 315/0 as damages; the break-up for such damages was furnished on 12-2-2007. The petitioner contends that though it had no contractual

obligation towards coating on the pipes, or their transportation, since it ceased to exercise control, after dispatch, yet, in order to maintain business

relations, it paid Rs. 25, 31, 315/- through a demand draft, for Rs. 15, 37, 048/- and adjustment, made by IOC, of Rs. 10,00,000/- lying with it.

The petitioner next contends that though there were no pending issues (about performance of contract) and despite expiration of 21 months from

completion of all deliveries, the IOC, on 27-4-2007, wrote to the bank, for extension of the guarantee for a further six months. The petitioner, in its

letter of 30-4-2007 said that the guarantee could be in force only for 21 months, from completion of all deliveries which was last done on 18th

January, 2005. It contends that the validity of the guarantee had expired, and could not be extended unilaterally. Yet, to bring the matter to a close,

the petitioner extended the validity period of the guarantee by another month, to 4-6-2007.

6. The petitioner relies on a letter to IOC dated 16th May, 2007 that it had discussed the issue with the Chief Construction Manager, Paradip,

who had informed that there was no further issue with regard to deliveries, except for the two pipes against which necessary compensation had

been received. It is contended that this clarified that the IOC did not indeed have any pending or outstanding issues concerning the deliveries, or

the supply of contracted equipments. The petitioner adverts to other letters, in regard to joint meeting with the IOC. The petitioner alleges that

when an inquiry was made on its behalf about the reasons for extension of bank guarantee, IOC officials mentioned about a minutes of meeting,

previously held on 20-3-2006, regarding ovality in the pipes supplied. This, it is contended, was never mentioned in previous letters, or brought up

as a pending or outstanding issue, for more than one year; no complaint about the standard of the pipes was ever made to it. The petitioner

received a letter dated 28-5-2007 for the first time discussing about the question of ovality of the pipes; it alleges that such defect or deficiency falls

within the domain of the transporter, and is not its fault. The petitioner replied to the letter, refuting its role, on 31-5-2007; it also took steps to

extend the bank guarantee validity by another month. The petitioner also wrote to IOC on 15th June, 2007 submitting its report, mentioning about

having checked all records and stating that the pipes were supplied according to specifications, and that no ovality or other defects were found at

that time, or during dispatches.

7. The petitioner alleges fraud by IOC in regard to transportation by the coating contractor, which was not according to specifications. The goods

were inspected and found in order by the third party inspector; the IOC's contractor thereafter had to follow instructions. The non-adherence to

such specifications by that party could not lead to the petitioner being prejudiced by invocation of the bank guarantee, as is sought to be done. The

petitioner also refers to the arbitration clause, i.e. 4.26.0 and contends that the IOC cannot invoke the guarantee; it seeks a restraint order u/s 9,

against the letter of 23-6-2007 by IOC seeking further extension of the guarantee, failing which it is sought to be invoked. It is contended that the

dispatch of all the agreed and contracted goods led to completion of the contract, and performance of the petitioner's obligations. The IOC never

raised any issue concerning ovality. Even after the minutes of meeting of 20th March, 2006, IOC raised demands only in regard to delay in supply,

for which over Rs. 43 lakhs was deducted; more importantly, an amount exceeding Rs. 25 lakhs was given to it in April, 2007, after it raised the

issue of two defective pipes. Therefore, claiming that pipes were not according to specifications, on account of their ovality, was not justified; the

third party inspection too did not support this stand.

8. IOC, in its reply, relies on a letter dated 29-6-2007, issued to the bank, in continuation of its letter of invocation dated 23rd June, 2007, stating

that a demand for Rs. 26.94 lakhs plus US \$ 20,70,000 was payable by the petitioner, on account of ovality supplied pipes. According to IOC,

the petitioner neither extended the validity of the bank guarantee beyond 4th July, 2007, nor responded to its claim; it therefore, requested the

bank to treat its letter as a demand and release Rs. 5,49,77,184/- to it. On 3rd July, 2007, IOC wrote another letter to the bank, further to its

previous letters, stating that Rs. 26.94 lakhs plus US \$ 20,70,000 was payable by the petitioner for losses and damages suffered on account of

excessive ovality of the pipes supplied by the latter.

9. By ex-parte order dated 27th June, 2007, in the meanwhile, this Court had entertained this petition, and suspended operation/ stayed the letter

dated 23rd June, 2007 issued by the petitioner. That interim order has subsisted, and binds the parties, till date.

10. Mr. A.S. Chandhiok, the petitioners' learned senior counsel argues that the IOC's so called invocation of the guarantee is unlawful. It was

argued that a cumulative reading of the letters dated 23rd June, 2007, 29th June, 2007 and 3rd July, 2007, all clarify that the IOC had no doubt in

its mind that what was sought was merely extension of the bank guarantee; the tenor of the first two letters was not aimed at invoking the

guarantee. Counsel relied on the phraseology in the guarantee, issued by the bank, to submit that invocation had to be in terms with that document.

Aware that the first two letters did not conform to the terms of the guarantee, the IOC wrote on 3rd July, 2007, for the first time, mentioning about

alleged damages. As this aspect was conspicuously absent in the previous letters, there was no invocation in accordance with the guarantee; the

court, according to counsel should continue the interim order, till completion of arbitration proceedings. Counsel relied on the decision reported as

Hindustan Construction Co. Ltd. Vs. State of Bihar and Others, in support of this submission.

11. It was contended that the facts of this case disclose that special equities existed, to prompt the court into granting a restraint order, in respect

of the bank guarantee, and irretrievable injustice would result if such order were not given. The record disclose that the third party inspector was

satisfied about the dispatch of the equipment, quantities, and the delivery schedule; any doubts in that regard were concluded, with the deduction in

excess of Rs. 43 lakhs, in January, 2005. The petitioner was no doubt aggrieved by allegations about three defective pipes, and the demand for

Rs. 25 lakhs odd; yet, it paid off the amounts in April, 2007. All this while, the IOC never made reference to the question of ovality of the pipes;

they had been supplied much earlier. In these circumstances, when all pending issues were closed, and the contract had been performed, the IOC

could not have legally sought extension of the bank guarantee, and its subsequent invocation, and that too in a conditional manner. As a matter of

fact, the IOC's demand was that the guarantee should be extended, failing which it stood invoked. Since this Court has ensured that such

extension has taken place, the IOC cannot now seek encashment of the amounts, as no reason for doing so exists. Reliance was placed on U.P.

Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd., and Hindustan Steel Workers Construction Ltd. Vs. G.S. Atwal and

Co. (Engineers) Pvt. Ltd.,

12. It was also urged that the invocation was unlawful, since the obligations spelt out under the guarantee, covered only demands made up to and

as on 4-10-2006. Since, undeniably the question of ovality of pipes supplied was not raised as an issue as on, or before that date, the bank

guarantee could not cover such demand. Counsel contended that the two extensions of bank guarantee, firstly till 4th May, 2007, and later, till 4th

July, 2007, did not alter the situation, since they merely extended the validity of the bank guarantee; however, the bank's liability to pay was limited

to what was demanded before 4th October, 2006, as there was no extension of that clause or condition. Counsel placed reliance on the decision

reported as State of Maharashtra Vs. Dr. M.N. Kaul (Deceased by his Legal Representatives) and Another, to say that a guarantor cannot be

made liable beyond the terms of his engagement.

13. Learned Counsel submitted that the invocation in question here disclosed fraud relating to the performance of the contract. No doubt, the

Supreme Court had in many judgments, ruled that fraud, to enable the court to injunct invocation, should be in regard to the underlying contract,

yet subsequent developments in relation to the documents, concerning the contract, or its performance, could also be valid grounds for granting

stay of the bank guarantee. The manner in which documents were sought to be used, established the fraud of the IOC; it did not also intend to

invoke the bank guarantee, as is clear from the letters dated 23-6-2007, 29-6-2007 and 3-7-2007. Reliance was placed on the judgment

reported as M/s Synthetic Foams Ltd. v. Simplex Concrete Piles (India) Pvt. Ltd. AIR 1988 Del 207.

14. Mr. V.N. Kaura, IOC's counsel, contends that courts can injunct a bank from paying under an unconditional bank guarantee, only if clear

circumstances establishing a fraud, in connection with the underlying contract, and not in manner of invocation of the guarantee. The other

circumstance would be if it is shown that allowing encashment of a guarantee would result in irretrievable harm or injustice to one of the parties

concerned. Such fraud should be of an egregious nature. He relied on the ruling of the Supreme Court, in Vinitec Electronics Private Limited Vs.

HCL Infosystems Limited,

15. IOC contends that the requirements of alleging fraud are compelling; one who says so, should make clear and unambiguous averments. Here,

in this case, the petitioner has not made any specific averments about fraud, or special equities. There is no dispute that arbitral proceedings are

pending; in case the petitioner is aggrieved by invocation of the guarantee, it can always seek relief in that regard too, provided a case is made out.

Counsel next relied on the judgment reported as Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works (P) Ltd., and another, in

support of the submission that to seek injunction of bank guarantee, i.e. result of irretrievable injury, should be of such magnitude that it would

render impossible for the guarantor to reimburse himself, if he ultimately succeeded. In this connection, counsel placed reliance on the kind of

circumstances that would fit the description of irretrievable injustice, and illustrated the case of Itek Corpn. case 566 Fed Supp 1210, quoted with

approval in AIR 1997 1644 (SC)

16. Learned Counsel submitted that evidence of fraud (or irretrievable injustice) should be clear, both as to the fact of fraud and as to the bank's

knowledge. He relied on the judgment of the Supreme Court, reported as Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Company, in

that regard.

17. Before proceeding with a discussion on merits of this case, it would be relevant to notice the law applicable to actions seeking restraint of

obligations arising under bank guarantees. A bank guarantee is an independent contract between the bank and the beneficiary and its terms bind

both the parties. The terms of the bank guarantee are, thus, extremely material. The invocation must, be in accordance with the terms of the bank

guarantee. Except in the case of fraud, which could be as established fraud, or where irretrievable injury likely to be caused to the guarantor,

courts would be reluctant to grant injunction against the invocation of bank guarantee. In U.P. Cooperative Federation Ltd. Vs. Singh Consultants

and Engineers (P) Ltd., the Supreme Court held:

...an unconditional bank guarantee could be invoked in terms thereof by the person in whose favour the bank guarantee was given and the courts

would not grant any injunction restraining invocation, except in the case of fraud or irretrievable injury.

The same principle has been noticed in Svenska Handelsbanken v. Indian Charge Chrome (1994) SCC 502) Larsen and Toubro Limited Vs.

Maharashtra State Electricity Board and others, Hindustan Steel Workers Construction Ltd. Vs. G.S. Atwal and Co. (Engineers) Pvt. Ltd.,

National Thermal Power Corporation Ltd. Vs. M/s. Flowmore Private Ltd. and another, ; State of Maharashtra and another Vs. M/s. National

Construction Company, Bombay and another,

18. A bank guarantee should be in unequivocal terms, unconditional and recite that the amount would be paid without demur or objection and

irrespective of any dispute that might have cropped up or might have been pending between the beneficiary under the bank guarantee and the

person on whose behalf the guarantee is furnished. The bank has to verify whether the amount claimed is within the terms of the guarantee. Unless

fraud or special equity is, prima facie, made out as a triable issue by specific pleading and strong evidence, to prevent irretrievable injustice to the

party concerned, the beneficiary cannot be restrained from encashing the bank guarantee till decision of the arbitrator/court on amount due and

payable to the beneficiary.

19. In Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Company, the Supreme Court held that:

14. From the discussions made hereinabove relating to the principles for grant or refusal to grant of injunction to restrain enforcement of a bank

guarantee or a letter of credit, we find that the following principles should be noted in the matter of injunction to restrain the encashment of a bank

guarantee or a letter of credit:

(i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional bank guarantee or letter of

credit is given or accepted, the beneficiary is entitled to realise such a bank guarantee or a letter of credit in terms thereof irrespective of any

pending disputes relating to the terms of the contract.

(ii) The bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.

(iii) The courts should be slow in granting an order of injunction to restrain the realisation of a bank guarantee or a letter of credit.

(iv) Since a bank guarantee or a letter of credit is an independent and a separate contract and is absolute in nature, the existence of any dispute

between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of bank guarantees or letters of credit.

(v) Fraud of an egregious nature which would vitiate the very foundation of such a bank guarantee or letter of credit and the beneficiary seeks to

take advantage of the situation.

(vi) Allowing encashment of an unconditional bank guarantee or a letter of credit would result in irretrievable harm or injustice to one of the parties

concerned.

20. The first question which arises is whether the bank guarantee was invoked in its terms and if the petitioner is right in contending that the Bank

could not have allowed its encashment. Considerable reliance is placed upon the letters of 23rd June, 2007 and 29th June, 2007 for this purpose.

No doubt, ex facie, they do not anywhere disclose reference to loss or damage suffered or incurred by the IOC in express terms. The tenor of

these letters is that in the event of refusal to extend the bank guarantees further, the same should be encashed. However, one cannot be unmindful

of the fact that the bank guarantee was in force and valid till 4th July, 2007. The last in the series of these correspondences between IOC and the

Bank is a letter dated 3rd July, 2007. This letter reads as follows:

Indian Oil Corporation Limited

Paradip-Haldia Crude Oil Pipeline Project

1205, Forest Park, Bhubaneswar -751009 (Orissa)

Tel.: 91-674-2595401, 2595318, 2595373

Fax: 91- 674-2595234

PHCPL/PDP/66511 Date: 03.07.2007

The Manager,

Bank of Baroda,

Mumbai Main Office,

Post Box No. 347,

10/12, Mumbai Samachar Marg,

Fort.Mumbai-400 001

Fax No.: 022 22040494

Sub: Bank Guarantee No. BMO:FGN:GTEE:P/86/94 dated 31.08.2004 and as extended upto 04.07.2007 for Rs. 5,49,77,184.00.

Dear Sir,

This refers to your letter No. MMO:FGN:Prop:89/1157 dated 02.07.2007 and further to our letter No. PHCPL/PDP/665/11 dated 29th June,

2007 which was addressed to you in suppression of our letter dated 23rd June, 2007, in view of omission in the said letter to specify the claim of

Indian Oil Corporation Limited against Man Industries (India) Ltd.

In terms of our letter No. PHCPL/PDP/665/11 dated 29th June, 2007 we had informed you that the Indian Oil Corporation Limited has a claim of



Rs. 26.94 Lakhs plus US \$ 2,070,000/ - for losses and damages suffered on account of the excessive ovality of the pipes supplied by M/s. Man

Industries (India) Ltd. pursuant to Letter of Intent No. PLM/PHCPL/04/04 dated 28.07.2004 and P.O. No. PLM/PHCPL/04/17128226. To put

the matter beyond doubt and ensure that our demand conforms in all respects to the requirements of the above Bank Guarantee we hereby re-

iterate our demand of Rs. 5,49,77,184.00 (Rupees Five crore forty nine lakhs seventy seven thousand one hundred eighty four only) in terms of

the above Bank Guarantee towards our claim inter-alia of Rs. 26.94 lakhs and US\$2,070,000/ - against Man Industries (India) Ltd. for the loss

and damage suffered by the Corporation.

We should remind you that in terms of the guarantee the bank undertook to pay the Corporation forthwith, on demand in writing and without

protest or demur or proof or conditions, any and all monies claimed by the Corporation from the Contractor under or in respect of the contract

referred to in the Bank Guarantee as specified in any notice of demand made by the Corporation on the Bank with reference to the said

guarantee/undertaking.

We are advised that the demand in terms of our letter 29th June, 2007 and this letter are not covered by the order of injunction passed by the

Hon"ble Delhi High Court on 27th June, 2007.

Kindly acknowledge receipt. Thanking you,

Yours faithfully,

(A. Bandyopadhyay)

Senior Construction Manager

21. The authorities are all clear right from the United Commercial Bank, UP Cooperative Federation Limited, Hindustan Steel Works Construction

Ltd. down to the latest rulings in Vinitec Electronic Systems Ltd. and Himadri Chemicals Industries Ltd., that the nature and character of the

guarantee is an unconditional representation by the Bank to honour the demand as and when made. The Courts have to, necessarily adopt a

circumspect approach when an application for injunction is made. The two exceptions universally recognized are fraud of egregious nature and

special equities pointing to irretrievable injustice. In the circumstances of this case, even a facial inconsistency between the demand and the terms of

the guarantee, disclosed in the previous two letters, cannot prevent its performance; the Court would be unjustified in interdicting the Bank on this

score, having regard to the clear terms of the demand, made in the letter of 3rd July, 2007.

22. The second aspect which requires consideration is the contention that the guarantee covered only demands made up to and as on 4th October,

2006. Here the argument is that the demands regarding ovality having been made on the petitioner after April, 2007, i.e. later than 4th October,

2006, the bank guarantee could not have been invoked. The relevant part of the original bank guarantee reads as follows:

We Bank of Baroda, Mumbai Main Branch (hereinafter called "the Bank" which expression shall include its successors and assigns hereby

undertake to pay the corporation in rupees forthwith on first demand in writing and without protest or demur or proof or conditions any and all

monies anyway claimed by the Corporation from the Contractor under in respect of or in connection with the said contract as specified in any

notice of demand made by the Corporation on the Bank with reference to this undertaking upto and aggregate limit of Rs. 5,49,77,184/- (Rupees

Five Crore Forty Nine Lakhs Seventy Seven Thousand One Hundred Eighty Four Only).

And the Bank hereby agrees with the Corporation that:

i. This Undertaking shall be a continuing undertaking and shall remain valid and irrevocable for all claims of the Corporation and liabilities of the

Contractor arising upto and until midnight of 04.10.2006.

ii. This undertaking shall be in addition to any other undertaking or guarantee or security whatsoever that the Corporation may now or at any time

have in relation to its claims or the Contractors obligation/liabilities under and/or in connection with the said Contract and the Corporation shall

have full authority to take recourse to or enforce this undertaking in preference to the other undertaking or security(ies) at its sole discretion, and no

failure on the part of the Corporation in enforcing or requiring enforcement of any other undertaking or security shall have the effect of releasing the

Bank from its full liability hereunder.

vi. The amount stated in any notice of demand addressed by the Corporation to the Bank as claimed by the Corporation from the contractor or as

liable to be paid to the Corporation by the Contractor or as suffered or incurred by the Corporation on account of any losses or damages or costs,

charges and/or expenses shall be between the bank and the Corporation be conclusive of the amount so claimed or liable to be paid to the

Corporation or suffered or incurred by corporation, as the case may be, and payable by the Bank to Corporation in terms hereof.

viii) Notwithstanding anything to the contrary contained hereinabove our liability under this Bank Guarantee shall not exceed Rs. 5,49,77,184.00

(Rs. Five Crores Forty Nine Lacs Seventy Seven Thousand One Hundred Eighty Four Only). This Bank Guarantee shall be valid upto 4.10.2006.

We are liable to pay the guaranteed amount or any part thereof under this Bank Guarantee only and only if you serve upon us a written claim or

demand on or before 4.10.2006.

23. The bank guarantee was later extended on 29.9.2006 in the following terms:

To

Indian Oil Corporation Limited, (Pipelines Division)

4th Floor, A-I, Udyog Marg, Sector-1, Noida - 201301 (U.P)

Dear Sirs,

Re: Our Bank Guarantee No. BMO-FGN:GTEE:P/86/94 Dtd. 31.08.2004 for Rs. 5,49,77,184/- fvg. Yourselves A/c.M/s. Man Industries (I)

Limited. At the request of M/s. Man Industries (India) Limited We, Bank of Baroda, Mumbai Main Office, Mumbai amend the captioned

guarantee as follows:

The Validity of The Bank Guarantee Is Extended From 04.10.2006 To 04.05.2007.

This amendment is an integral part of our original guarantee No. BMO:FGN:GTEE:86/94 dtd. 31.08.2004 for Rs. 5,49,77,184.00 and must be

annexed thereto.

Notwithstanding Anything Contained Herein:

a) Our liability under this Bank Guarantee shall not exceed Rs. 5,49,77,184/- (Rupees Five Crores Forty Nine Lakhs Seventy Seven Thousand

One Hundred Eighty Four Only).

b) This Bank Guarantee shall be valid up to 04.05.2007; and

c) We are liable to pay the guaranteed amount or any part thereof under this Bank Guarantee only if you serve upon us a written claim or demand

and received by us on or before 04.05.2007.

24. It was again extended in identical terms and kept alive till 4th July, 2007. The argument here, about the bank guarantee not covering any

demand not lodged before 4th October, 2006 would perhaps have been powerful enough to persuade a court in respect of claims for injunction in

other transactions. However, the Court cannot lose sight of the fact that the object of the bank guarantee was to secure due performance of the

contract by the petitioner. Such being the case and the extension documents expressly spelling out that the validity of the guarantee stood extended

from 4th October, 2006 till the dates expressed and all other terms and conditions remaining unchanged, the Court, having regard to the present

state of law (whereby in the existing state of law, egregious fraud and special equities alone can entitle a third party to injunction), cannot agree with

the petitioner's argument. The bank guarantee in this case - as indeed in all other cases - constitutes an independent autonomous arrangement

whereby upon demand being raised by the concerned beneficiary, an unequivocal representation to pay it ("encash"), is made.

25. The interpretation advanced by the petitioner would lead to startling result in that if no claim is lodged before the last date expressed in the

original bank guarantee-which might stand extended- the entire purpose of the guarantee itself would be defeated. There is one more reason why

such construction is unacceptable; the undertaking in the guarantee is expressed to be a continuing one; the original guarantee refers to the date

4.10.2006 at two places. These necessarily had to be so, the reference being to last date of validity. The validity stood extended by successive

letters. If during the period of validity, the beneficiary, i.e. IOC, lodges a claim, there is nothing precluding the Bank from encashing the guarantee

and honouring its unconditional commitment. To hold otherwise would be to inject uncertainty to the contract of guarantee, which is plainly not

permissible.

26. The petitioners' last contention is that the demand amounts to a fraud, in regard to invocation of the guarantee. The IOC, despite several

chances, insisted that there was defective performance and firstly deducted above Rs. 43 lakhs, and later, demanded Rs. 25 lakhs, which was

given in April, 2007. Later, it brought out the issue of ovality of the pipes, for the first time in May - June, 2007. This, it is contended, amounts to a

fraud. The petitioners argue that the IOC could not have relied on the minutes of meeting dated 20-3-2006, which was never mentioned earlier, or

brought up in any correspondence.

27. It would be useful, at this stage to once again notice the relevant summation of law in Himadri (supra) which is as follows:

(iv) Since a bank guarantee or a letter of credit is an independent and a separate contract and is absolute in nature, the existence of any dispute

between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of bank guarantees or letters of credit.

(v) Fraud of an egregious nature which would vitiate the very foundation of such a bank guarantee or letter of credit and the beneficiary seeks to

take advantage of the situation.

The mere fact that IOC, a contracting party, and buyer, did not make any reference to the ovality of the pipes supplied, or demand any amounts

prior to April, 2007, cannot preclude it from doing so. It is not as if such claims were time barred in law, or contractually inhibited. Delay in such

cases would be a relevant factor in adjudicating on the merits of the claim, not concluding that it amounts to a fraud of an "egregious" nature. As far

as special equities are concerned, the standard indicated by judgments of our Supreme Court is extremely high; the reference to *Itek*, found in

several Supreme Court decisions, clearly shows that irretrievable injustice should be of such kind that the aggrieved party in all likelihood would be

unable to recover the money, if the bank guarantee were to be encashed. Surely, such a conclusion cannot be reached here; IOC is rooted in

India, it is not only solvent, but a profit making public sector undertaking. In the event of the bank guarantee being encashed, the petitioner would

not be put to any greater hardship, if its claims were to eventually succeed.

28. For the above reasons, the court is of opinion that this petition has to fail; it is accordingly dismissed, along with the interlocutory application.

The interim orders subsisting till date are vacated. No costs.