

(2013) 01 BOM CK 0144

In the Bombay High Court

Case No : Arbitration Petition (L) No. 67 of 2013

ANCL and Co. (India) Pvt. Ltd.

APPELLANT

Vs

Corporation Bank

RESPONDENT

Date of Decision : 17-01-2013

Acts Referred:

Citation : (2013) 01 BOM CK 0144

Hon'ble Judges : R.D. Dhanuka, J

Bench : Single Bench

Judgement

R.D. Dhanuka, J.—By this Petition u/s 9 of the Arbitration and Conciliation Act, 1996, petitioner seeks injunction against respondent nos. 2 to 4 from in any manner whatsoever from invoking the bank guarantees all dated 3rd September, 2012 bearing Nos. 2012/247 to 2012/255 being Exs. "D" to "L" to the petition. Some of the relevant facts for the purpose of deciding this petition are set out hereinafter:- Pursuant to the Letter of Intent dated 5th September, 2011 by respondent no. 2 through respondent no. 4, petitioner was engaged as a contractor to carry out civil/structural work and interior for the shell portion of the project described in the Letter of Intent.

2. On 23rd September, 2011, the 4th respondent issued a work order on behalf of the 2nd respondent for civil and structural work and common interior work for the shell portion of the said project for the total value of Rs. 19,32,86,971.85.

3. On 24th October, 2011, the petitioner was issued another work order for carrying out the work of water proofing for the value of Rs. 1,04,62,151/-. The petitioner was given mobilization advance of Rs. 2,43,04,012/- towards civil/contractual work and Rs. 10,04,817/- towards water proofing work and in lieu thereof, the petitioner furnished mobilization advance bank guarantees aggregating to Rs. 2,53,07,000/- towards civil/contractual work and Rs. 10,46,817/- towards water proofing work in favour of the 2nd respondent.

4. It is the case of the petitioner that the 2nd respondent adjusted and recovered

various amounts on a pro rata basis from running account bills submitted by the petitioner from time to time towards recovery of the mobilization advance. It is the case of the petitioner that after effecting such recovery, the balance mobilization advance was of Rs. 1,13,06,063/- and Rs. 5,11,956/- towards civil/contractual work and towards water proofing respectively.

5. It is the case of the petitioner that in the month of June, 2012, the petitioner was issued a fresh work orders in the name of the 3rd respondent altering the value of the work in view of the completion of certain amount of work under the earlier work orders dated 23rd September, 2011 and 24th October, 2011.

6. A fresh work order was issued on 25th June, 2012 for civil and contractual work and common area interiors for a total value of Rs. 11,77,75,049.30 and another work order dated 24th June, 2012 for the water proofing for a total value of Rs. 34,09,638.91. The petitioner was called upon to issue a fresh bank guarantee in favour of the 3rd respondent under the work orders on 24th June, 2012 and 25th June, 2012.

7. The earlier bank guarantees were accordingly discharged and returned back to the petitioner by the 2nd respondent. As on the date of the filing this petition, total nine bank guarantees were furnished by the petitioner under the work orders dated 24th June, 2012 and 25th June, 2012 partly towards mobilization advance, as and by way of performance guarantee and partly towards performance bond in lieu of retention money.

8. On 30th July, 2012, the petitioner alleged default on the part of the 2nd and 3rd respondents and sought extension of time till 2nd January, 2013 to complete the work under work orders dated 24th June, 2012 and 25th June, 2012.

9. By letter dated 9th August, 2012, respondent no. 4 alleged that the petitioner was a non performing contractor and deleted some of the terms pertaining to interior and external development works from the scope of the work orders. It was pointed out that a sum of Rs. 1 crore was outstanding of the steel vendors from the petitioner, towards material procured by the petitioner from the said vendors.

10. By letter dated 24th August, 2012, the petitioner alleged default on the part of 2nd and 3rd respondents.

11. It is the case of the petitioner that on 29th August, 2012, a meeting was held where various issues were resolved, including with regard to the payment to the steel vendors and the construction period was extended till 30th October, 2012. A further meeting was alleged to have been held on 11th October, 2012 between the parties in which it was decided that the petitioner would exit the said project within the time frame stipulated and would send a list of issues to respondent no. 2 for its review and decision. There was further exchange of correspondence between the parties regarding progress of the work.

12. By e-mail dated 27th October, 2012, the 2nd respondent informed the

petitioner that the work of RCC had to be completed by 3rd November, 2012 failing which the petitioner was called upon to vacate the site and submit its bill for the work done till 3rd November, 2012 and to get the same certified with a view to settle the final bill.

13. The petitioner by e-mail dated 31st October, 2012 denied the allegations made by the respondents and stated that if the 2nd respondent insisted on stopping the work then the petitioner would have no choice, but to obey the said instructions.

14. By e-mail dated 1st November, 2012, the 2nd respondent informed the petitioner that the petitioner had to stop all construction activities on 3rd November, 2012 and further stated that for the purpose of contractual obligation and reference of that e-mail, it shall be treated as termination of the work order due to non performance of the petitioner. It was stated that the final settlement shall be made as per the provisions of the work order terms and conditions and other mutually agreed minutes of meeting. It is not in dispute that the petitioner had vacated the site.

15. By e-mail dated 2nd November, 2012 sent to the petitioner, respondent no. 2 alleged that the payment to steel vendors were over due and in case they did not receive confirmation of having effected the said payment, the accounts team of 2nd respondent had been instructed to make the payment directly to the steel vendors and that such payments would be debited from the final settlement dues and in the event the same were not sufficient, the same would be adjusted against the bank guarantees available with 2nd respondent.

16. The petitioner replied to the said e-mail by its e-mail dated 6th November, 2012 and disputed the amount shown as payable to various steel vendors. The petitioner contended that some steel was still lying surplus at site and the same has to be returned. The petitioner disputed that the amount towards alleged liability of vendors could be adjusted towards bank guarantees and as the same were given for the different purpose.

17. By e-mail dated 22nd November, 2012, the 2nd respondent recorded that the petitioner had not vacated the site and the respondents were thus not able to mobilize other resources to start the work. There was a substantial delay in reconciliation of material with their site personnel's which was not acceptable to the respondents. It was further stated that the steel vendors were knocking the doors of the respondents for payment and action of the petitioner was treated as casual and no importance was given to the huge losses being suffered by the respondents. It is further stated that based on what is stated in the said letter as setout aforesaid, the respondents were compelled to invoke the bank guarantees and settle the steel vendors' payment on behalf of the petitioner. The respondents called upon the petitioner to clear the payment to steel vendors on or before 25th November, 2012 making it clear that in case the payments were not cleared by the stipulated date, the respondent would be proceeding with

invocation of the bank guarantees available with the respondents.

18. By e-mail dated 24th November, 2012 to the 2nd respondent, the petitioner informed the respondents that the petitioner was pressing hard for the measurement and their bill had not been processed by the site engineers of the respondents and requested the respondents to depute the responsible officials from the side of the respondents to complete the measurement at the site expeditiously, to reconcile all the material including unused steel lying at site, to measure the steel shuttering retained by the respondents, to process pending bills expeditiously to enable the petitioner to finalise and settle the final account. The petitioner requested the respondents not to invoke/encash the bank guarantees in terms of e-mail dated 22nd November, 2012.

19. By another e-mail dated 28th November, 2012, the petitioner informed the respondent that the respondent was not accepting the hard copy of the bill. The petitioner alleged that representative of the respondents had informed that the hard copy would be available only after the measurements were verified and checked as per the instructions of the Mr. Arun Aggarwal. It is alleged that the respondents were delaying verification of the bill and not the petitioner though the same had been submitted long back during the visit of Mr. Grover to Bhilwara.

20. By e-mail dated 28th November, 2012, the respondents denied that the engineer of the respondents had refused to accept the bill and stated that he had given the receipt. It is stated that the bill was not signed by the representative of the petitioner and called upon the petitioner to follow the procedure while submitting the bill.

21. By e-mail dated 28th November, 2012, the petitioner disputed that the petitioner was not aware of the procedure of submitting the bill. It is stated that to cut short the matter, the site engineer of the petitioner had been instructed to submit both invoice as well as covering letter with the signature and requested to instruct Mr. Soni to accept the same.

22. By e-mail dated 28th November, 2012, the respondents once again submitted that final bill was never submitted by the petitioner on 7th November, 2012. It is submitted that the final bill had not been submitted by the petitioner till 26th November, 2012. However, only a part unsigned bill in the form of measurements was submitted by the petitioner with the respondents and the representative of the respondents had cross verified the same. The respondents informed that the bill shall be, however, checked and be verified by the same day and shall be reciprocated if any mis-match of measurements was observed.

23. It is the case of the petitioner that in the last bill submitted to the respondents, the petitioner has already given a credit in respect of the balance mobilization advance in the sum of Rs. 2,43,04,012/- and also Rs. 10,04,817/- and after adjusting such amount which were due and payable to the respondents by the petitioner, still an amount of Rs. 7,35,67,910/- is due and payable by the respondents to the petitioner. It is submitted that the respondents have not

certified the said bill for the reasons best known to them.

24. By letter dated 10th January, 2013, the 3rd respondent addressed to the Manager of the Corporation Bank invoked six bank guarantees in the sum of Rs. 1,66,75,000/-. Out of such six bank guarantees, five bank guarantees were furnished by the petitioner towards mobilization advance and one bank guarantee was furnished towards retention money, the details whereof are set out in para (6) of the arbitration petition. Remaining two bank guarantees were furnished by way of performance bond and one bank guarantee by way of performance bond in lieu of retention money and have not been invoked so far by the 3rd respondent. The petitioner, however, in the present proceedings have sought injunction in respect of those three bank guarantees also.

25. Mr. Kamdar, the learned senior counsel appearing on behalf of the petitioner submits that on 11th October, 2012, the petitioner as well as respondent no. 3 had a meeting and the minutes of such meeting were drawn. It is submitted that in the said meeting both parties agreed that amicable settlement shall be arrived at and site shall be vacated by the petitioner by 15th November, 2012. It is submitted that various other issues were agreed to be resolved and recorded in the minutes. It is submitted that the petitioner had taken responsibility of completing balance RCC works and shuttering and part of reinforcement was completed by 22nd October, 2012. The learned counsel submits that out of the said balance work referred in item no. 1 of the said minutes, part of the work was completed by the petitioner. It is submitted that as the petitioner has vacated the site, the question of completing the balance part of the work as provided in the said minutes of the meeting did not arise. The learned counsel submits that the contract has been already terminated.

26. The learned counsel submits that admittedly the 3rd respondent has not invoked the remaining three bank guarantees which were by way of performance guarantee. It is submitted that as the petitioner has already given credit of the amount due and payable under mobilization advance guarantee, respondent no. 3 could not apply for encashment thereof. It is submitted that in so far as retention money bank guarantee is concerned, respondent no. 3 could not apply for encashment thereof as the same could be done only after the expiry of defect liability period. It is submitted that as the work was not completed, the defect liability period did not start and thus there was no occasion to make any claim and/or invoke the retention money bank guarantee. It is submitted that as the contract was not completed, defect liability period has not been begun.

27. Mr. Kamdar, the learned senior counsel then submits that the bank guarantee could be invoked only for the purpose for which such bank guarantee was furnished by the petitioner. The learned counsel invited my attention to the terms of the mobilization advance guarantees and submits that the said guarantees were specifically furnished to secure the mobilization advance given by respondent no. 3 to the petitioner. It is submitted that since the 3rd respondent had threatened to recover in their correspondence the amount alleged to be due

by the petitioner to steel vendors if not paid by the petitioner by appropriating the same towards bank guarantee, it is clear that the invocation was not for the purpose for which such bank guarantees were given. It is submitted that the steel vendors would have separate cause of action in respect of their alleged dues against the petitioner and the respondents were not concerned with the same. It is submitted that the bank guarantee could not be invoked for the adjusting alleged dues of the steel vendors payable if any by the petitioner.

28. The learned senior counsel submitted that though even if the terms of the bank guarantee are construed as on demand and unconditional bank guarantee, and the bank would not be able to refuse payment to the beneficiary but that does not prevent the petitioner from raising any objection to the encashment itself on the ground that the invocation was illegal, fraudulent and such action was not inconsonance with the terms of the bank guarantee read with the terms of the contract.

29. The learned senior counsel for the petitioner as well as respondents placed reliance on paragraphs 22, 26 to 28 of the judgment of the Supreme Court in case of State Bank of India and Another Vs. Mula Sahakari Sakhar Karkhana Ltd.,

22. We are, however, unable to accept the submissions of the learned Senior Counsel that the bank guarantee must be construed in the light of other purported contemporaneous documents. A contract indisputably may be contained in more than one document. Such a document, however, must be a subject matter of contract by and between the parties. The correspondences referred to hereinbefore were between the cooperative society and Pentagon. The said correspondences were not exchanged between the parties hereto as a part of the same transaction. The Appellant understood that it would stand as a surety and not as a guarantor.

26. It is one thing to say that the nature of a transaction would be judged by the terms and

conditions together with the surrounding and/or attending circumstances in a case where the document suffers from some ambiguities but it is another thing to say that the court will take recourse to such a course, although no such ambiguity exists.

27. It is beyond any cavil that a bank guarantee must be construed on its own terms. It is considered to be a separate transaction.

28. If a construction, as was suggested by Mr. Naphade, is to be accepted, it would also be open to a banker to put forward a case that absolute and unequivocal bank guarantee should be read as a conditional one having regard to circumstances attending thereto. It is, to our mind, impermissible in law.

30. Mr. Kamdar also placed reliance on the judgment in case of Larsen and Toubro Limited Vs. Maharashtra State Electricity Board and others, and more particularly paragraphs 10 and 11 which reads thus:-

10. Items 3 and 5, though come under the same category, are not similar in content and scope. Item 3, relates to Bank Guarantee furnished by the Citi Bank, N.A. in the sum of Rs. 2.72 cores. It is a conditional Guarantee. Copy of the document is available in paper book Volume II at pages 122 to 126. The relevant portions in the Guarantee in volume II at pages 124 and 125 of the paperback, are as follows:

AND WHEREAS at the request of the contractors, we, CITI BANK N.A. (hereinafter referred to as "The Bank" has agreed to guarantee 2, 72,39,850 (Rupees Two Crores, Seventy Two lakhs, Thirty Nine thousand, Eight hundred fifty only) covering the amount of the said

payments till successful completion of trial operations.

In pursuance of the said agreement and in Consideration of the board making the said payment to the contractors, the Bank hereby agree with the Board as follows:

1. The Bank hereby agree unequivocally and uncondition to guarantee the said amount released by the Board till successful completion of trial operations in due performance of the contract and undertakes to at Bombay within 48 hrs. on demand in writing from MSEB, or any officer authorised by it in this behalf of any amount upto and not exceeding Rs. 2,72,39,850/- (Rupees Two crores, Seventy two lakhs, Thirty nine thousand, Eight hundred fifty only) to the Maharashtra State Electricity Board on behalf of the contractors....

2. That the guarantee hereby given shall be continuing guarantee upto 19 May, 1990. The validity of this Bank guarantee will be extended one month prior to its present validity at the request of the Board for suitable period (s) till successful completion of trial operations.

(emphasis supplied)

11. Volume II, pages 46 to 108, contains a copy of the agreement executed between the appellant and the first respondent Board. The following Clauses 7 therein at pages paragraphs 70.1, 70.2, 70.3 and 70.4.01, appearing at pages 92 to 95, are relevant in the this connections. They are as fellows:

70.1

i)...

ii)...

iii) After the precommissioning tests are satisfactorily completed equipment shall be considered ready for initial operation. During initial operation, the complete equipment shall be operated integral with sub-system and supporting equipment as a complete plant.

70.2 TRIAL OPERATION:

i) After satisfactory initial operation, the Plant shall then be put on trial operation. The period of trial operation shall be 30 days from the date of completion of initial operation. During the period of trial operation, all the necessary adjustments in the plant/equipments shall be made by the Contractor and make ready the same in all respects for performance and guarantee test. Out of the total period of 30 days of trial operation, the plant shall run for atleast a period of 100 hours at the rated capacity. Out of these 100 hrs. a minimum of 20 hours of operation at the rated load shall be established for the mode of operation from wagon tippler to the bunker.

70.3 PERFORMANCE TESTS AT SITES:

i) The performance test shall be conducted at site by the Contractor, after successful completion of trial operation. The duration of the performance test of the plant at the rated capacity shall be of 2 hours. Performance Guarantee test shall in any case be conducted within 45 days of successful completion of trial operation or within the extended period as can be mutually agreed. In case the performance test cannot be conducted within a period of 75 days after successful completion of trial operation due to reasons solely attributable to owner, the time frame and method of conductance of the same shall be discussed mutually and finalised.

v) Any special equipment, tools and tackles required for the successful completion of the performance tests shall be provided by the Contractor free of cost.

70.4.01 Upon successful completion of all the performance tests at site, the owner shall issue to the Contractor a "Taking Over Certificate" as a proof of the final acceptance of the equipment....

The first respondent Board intimated the appellant by communication dated 10.6.1994 thus:

After reasonable completion of the Coal Handling Plant works as per the contract 2 M part-A, capacity operation of the various equipments of C.H.P. were planned from 15th January, 1994. Rates as well as design capacity trials also tried Certain Points for stabilisation which were pointed to L&T were attended. Since these trials are generally satisfactory as per Clause No. 70.2 & 70.3, all the commissioned equipments under the contract of 2M Part-A are taken over by MSEB for regular operation and maintenance from 10th June, 1994 as per Clause No. 70.4 of Contract Agreement Vol. I.

(emphasis supplied)

The appellant wrote to the first respondent on 21.2.1994 that the plant was completed and so all Bank Guarantees have served their contractual requirements. On a perusal of the relevant Clauses 7 in the contract, executed between the appellant and the first respondent, and the communication of the first respondent dated 10.6.1994, it is fairly clear that the stipulations or

conditions mentioned as per Clauses 70.2, 70.3 and 70.4 have been successfully fulfilled and the Plant was admittedly taken over by the first respondent. The Guarantee given by the Citi Bank, N.a. dated 10th of May, 1989 appearing in Volume II at pages 122 to 126 will ensure only till successful completion of the trial operations and the plant is taken over. That event having ensued, the invocation of the Guarantee given by the Citi Bank dated 10.5.1985 in the sum of Rs. 2.72 crores is not encashable on its terms and in order to prevent irretrievable injustice, an injunction as prayed for, to respondents 1 and 4 deserves to be issued on that score. The Court below was in error in not doing so. We hereby restrain respondents 1 and 4 from invoking the Bank Guarantee aforesaid.

31. Learned senior counsel placed reliance on the judgment of this court in case of Western Coalfields Limited and another vs. Rajesh Nandlal Biyani 2012(1) MLJ 394 and more particularly paragraphs 20, 21, 22, 23, 24, 31 and 33 which reads thus:-

20. Section 31 of the Indian Contract Act, 1872, defines the contingent contract and the same is reproduced below-

Chapter III: OF CONTINGENT CONTRACTS

Section 31. "Contingent contract" defined--A "contingent contract" is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen.

Section 32 of the said Act, deals with the enforcement of the contracts contingent on an event happening, and the same is also relevant hence reproduced below-

Section 32. Enforcement of contracts contingent on an event happening. Contingent contracts to do or not to do anything if an uncertain future event happens, cannot be enforced by law unless and until that event has happened.

If the event becomes impossible, such contracts become void.

A contract of guarantee is an independent contract between the Bank and the beneficiary thereof and if it is a contract, which permits the creditor to invoke the Bank guarantee upon happening of an uncertain future event, then it becomes a "contingent contract" as defined u/s 31 and it cannot be enforced by law unless and until that event has happened, in view of the provision of Section 32. Till happening of an event, it merely remains a contract which is unenforceable. In case of such contingent contract, the beneficiary has no unfettered right to invoke the Bank guarantees and to demand immediate payment. The terms of such contract will have to be strictly construed and if it prescribes the manner in which performance is to be claimed, it will have to be seen as to whether the performance is claimed, in the manner so prescribed. If the invocation is not in accordance with the terms and the manner prescribed, it would be bad. The violation of the terms can be regarded as the species of the same genus as fraud

which disentitles a beneficiary to invoke the Bank guarantees.

21. In the light of the aforesaid position of law, it is required to be found out from the terms of the Bank guarantees in question as to whether it is a contingent or conditional contract or an unconditional or irrevocable contract. A Proforma of Bank guarantee in lieu of security deposit relied upon by both the parties in support of their rival contentions contained under an Agreement No. 08/2007-2008, is reproduced below:

On Stamp of Rs. 100

PROFORMA OF BANK GUARANTEE IN LIEU OF SECURITY DEPOSIT.

M/s. Western Coalfields Limited. Coal Estate, Civil Lines, Nagpur.

Dear Sir,

1. In consideration of M/s. Western Coalfields Limited, having its Registered Office at Nagpur (hereinafter called "The Company" which expression shall unless repugnant to the subject or context includes its successors and assigns) having agreed under the terms and conditions contained in letter No. dated..... Issued in favour of M/s..... for..... (hereinafter referred to as "the contract" to accept the Deed of guarantee as herein provided for Rs. from the Schedule/Nationalized Bank (whose branches are scheduled at Nagpur) in lieu of security deposit to be made by M/s..... (hereinafter called "the Contractor") or in lieu of deduction to be made from the contractor's bill for due fulfillment of the terms and conditions contained in the said contract by the contractor, we the..... Bank (hereinafter referred to as the said Bank) having its Registered Office at..... do hereby undertake and agreed to pay the company to the extent of Rs. On demand stating that the amount claimed by the company is due and payable by the contractor for the reasons of failure/negligence in performing the terms and conditions contained in the contract by the buyer and to unconditionally pay the amount claimed by the company on demand without any demur to the extent aforesaid-

1. We.... Bank agree that the company shall be the sole judge as to whether the said contractor has failed/neglected in performing any of the terms and conditions of the said contract and the decision of the company in this behalf shall be final and binding on us.

2. We the said Bank further agree that the Guarantee herein contained shall remain in full force and effect upto..... And any claim received after the said date shall in no case bind the Bank.

3. The Company shall have the fullest liberty without affecting in any way the liability of the Bank under this guarantee or indemnity from time-to-time vary any of the terms and conditions of the said contract or to extend the time of performance by the said contractor or to postpone any time and from time-to-time any of the powers exercisable by it against the said contractor and either to

enforce or to forbear from enforcing nay of the terms and conditions governing the said contract or securities available to the company and the said Bank shall not be released from its liability under these presents.

4. Notwithstanding anything contained herein the liability of the said Bank under this guarantee is restricted to Rs. and this Guarantee shall come into force from the date hereof and shall remain in full force and effect till..... Unless the written demand or claim under this guarantee is made by the Company with us on or before..... all rights of the company under this guarantee shall cease to have any effect and we shall be relieved and discharged from our liabilities hereunder.

5. The said contractor hereby covenants with the company that the Company shall retain a sum of Rs., or such sum as may be arrived at based on the executed value of the work, as security deposit for the fulfillment of the contract to the satisfaction of the Company.

IN WITNESS WHEREOF THE parties herein have set their hands and seals the date and year above written.

In consideration of the appellant M/s. Western Coalfields Limited, (the company) having agreed under the terms and conditions contained in the letter dated 18.5.2007 issued in favour of the contractor (M/s. Shree Sai Construction Company, the respondent No. 1) the deed of guarantee has been executed by the Bank (Oriental Bank of Commerce, the respondent No. 2) for the fulfillment of the terms and conditions contained in the contract by the contractor (the respondent No. 1). The preamble of the Bank guarantee recites that the Bank (respondent No. 2) has undertaken and agreed to pay the Company (M/s. Western Coalfields Limited), the amount stipulated in each of the two Bank guarantees on demand stating that the amount claimed by it is due and payable by the contractor for the reasons of failure/ negligence in performing the terms and conditions contained in the contract by the contractor (respondent No. 1) and to unconditionally pay the amount claimed by it on demand without any demur.

22. From the contents of the Bank guarantee it is clear that the contract is already formed containing the terms and conditions. Hence, the terms of contract are extremely material and the same are required to be looked into. The obligation of the respondent No. 2 Bank to make the payment of the amount covered by the Bank guarantees arises, only on the demand to be made in writing and this is apparent from Clause 5 under the Bank guarantee, which speaks about the written demand or claim under the Bank guarantee. The demand in writing must state exactly the amount assessed as due and payable by the respondent No. 1 Company for the reason of failure/negligence of the respondent No. 1 Company in performing certain specified terms and conditions contained in the contract between the appellant and the respondent No. 1. If the demand is not in writing stating the actual amount which is assessed and found

to be due and payable for the reason stated in the Bank guarantees, then there is no obligation to make payment. Unless there is a failure/negligence in performing the terms and conditions of contract, the amount which becomes due and payable by the respondent No. 1 cannot be assessed and claimed. Hence, it is a "contingent contract" as defined u/s 31 of the Contract Act and it becomes enforceable only upon happening of the event specified therein, as per Section 32 of the Contract Act.

23. The question is whether, in fact there is such compliance of the conditions stipulated under the Bank guarantees in the present case. Undoubtedly, it is by letter dated 17.2.2011, that there is a demand made by the appellants to the respondent No. 2 Bank for payment of the amount of Bank guarantees which has been impugned in the civil suit. The said letter is relevant and the same is, therefore, reproduced below-

Ref No. NGP/WCL/Civil/66-67/1106 Date 17.2.2011

To,

The Branch Manager, The Oriental Bank of Commerce, "Gold Sukh", Kasturba Chowk. Shree Ram Market, Chandrapur-442401.

Sub: Encashment of Bank guarantees.

Ref: (A) BG NO. 02020002908 dated 19.02.2008 for Rs. 1,54,94.580/ and (B) BG No. 02020002808 dated 19.02.2008 for Rs. 69.79.000/-.

Dear Sir,

Enclosed find herewith photo copies of BG No. 0202002808 dated 19.2.2008 for Rs. 69,79,000/- and BG No. 0202002908 dated 19.2.2008 for Rs. 1,54,94,580/- both valid upto 19.11.2011 for encashment.

You are hereby requested to send us an amount of Rs. 2,24,73,580/- which (sic) total amount of both the BGs duly encashed through Demand Draft drawn (sic) favour of M/s. Western Coalfields Limited payable at Nagpur.

On receipt of DD for the above amount, the original Bank guarantees shall be returned to you.

Yours faithfully. Sd/17.2.2011

General Manager (Civil Incharge)

Copy to information to:

1. Director (Tech) P & P
2. Director (Fin)

Perusal of the contents clearly reflect that there is no demand in writing as envisaged by the Bank guarantees in question. What is the exact amount i.e.

claimed by the appellant, which according to it has become due and payable from the respondent No. 1, has not been stated. In fact, there is no assessment of the amount which is said to have become due and payable in terms of the Bank guarantees. It is not stated as to whether such amount has become due and payable for the reasons of failure/negligence in performing any of the specified terms and conditions contained in the contract between the appellant and the respondent No. 1. The cause of action for seeking enforcement of the obligation on the part of the respondent No. 2 Bank to make the payment of the amount covered by the Bank guarantees, has not at all been disclosed. The claim for seeking enforcement is also not in the manner prescribed under the contract of Bank guarantees. There is nothing to show that the events specified for invocation of Bank guarantees have occurred. Hence, the invocation is not in accordance with the terms and conditions prescribed, the same is, therefore, bad and unenforceable. It is not a case of mere reference to the terms of the contract entered between the appellant and the respondent, but it is a case where the appellant Company is required to process its claim by assessing the amount due and payable by the respondent No. 1 for the reason of failure/negligence to perform the terms and conditions contained in the contract, which forms a condition precedent to seek enforcement of Bank guarantees. It is not a case of conferment of an unfettered right to demand immediate payment upon the appellant.

24. The requirement of unconditional payment of the amount of Bank guarantee without any demur, has nothing to do with the compliance of the conditions of Bank guarantees and it only prohibits the respondent No. 2 Bank from raising any dispute as to compliance or fulfillment of the terms and conditions of the contract between the appellant and the respondent No. 1 Company. The respondent No. 2 Bank cannot insist for proof of failure or negligence of respondent No. 1 Company in performing the terms and conditions contained in the contract. It is in this background that the Condition No. I has been incorporated in the Bank guarantees, agreeing, that the appellant Company shall be the sole judge as to whether the said contractor has failed/neglected in performing any of the terms and conditions of the said contract and the decision of the appellant Company in this behalf shall be binding upon the respondent No. 2 Bank. Hence, on the basis of condition No. 1 in the Bank guarantee it cannot be urged that it is an unconditional Bank guarantee and confers an unfettered right upon the appellant to invoke the Bank guarantees and to demand immediate payment.

31. The entire conduct of the appellant and the conspectus of facts depict that the invocation of the Bank guarantees is, *prima facie* not for the purpose or the reason stated in the Bank guarantees, but is for some extraneous reasons, may be to cover up the lapses on the part of the appellant in performing their obligations. The contention of Mr. J.P. Pendse, the learned Counsel for the respondent No. 1, that the invocation of the Bank guarantees could have been only during the subsistence of contract or at the most while terminating the

contract on 16.9.2010, sounds correct. Undisputedly, the invocation of the Bank guarantees is after lapse of five months from the date of termination of contract. Prima facie in my view, the invocation of the Bank guarantees much after the date of termination of contract, is an afterthought and not bona fide. The Trial Court has recorded the finding that there is no fault on the part of the appellant, in delay caused in completion of the work and it is the appellant/defendant Nos. 1 and 2 and the State Government, who were unable to remove the hindrances as a result of which the respondent No. 1 /plaintiff could not execute the work. The Trial Court has held that in such a situation, there is no question of recovery of any damages from the security deposit in respect of which the Bank guarantees have been furnished and refusal to grant an injunction would result in frustrating the claim of the respondent No. 1/plaintiff. In the background of the facts of this case, I do not find any fault with such a finding recorded by the Trial Court.

32. Dr. Sathe, the learned senior counsel appearing on behalf of the respondent nos. 2 to 4 on the other hand submits that though under the work order issued to the petitioner, the work was supposed to be completed on or before 15th July, 2012, the petitioner did not complete the work. Though extension of time was granted, the petitioner did not show any progress.

33. The learned counsel submits that the respondents have already terminated the contract on 1st November, 2012 reserving its liberty to get balance work completed at the risk and cost of the petitioner. It is submitted that the termination was effected in view of the non performance on the part of the petitioner and such termination has not been challenged by the petitioner.

34. The learned senior counsel placed reliance on clauses 1, 2, 3 and 8 of the mobilization bank guarantees and also similar clauses in retention money bank guarantees and submits that the bank guarantees were absolutely unconditional and the respondents being beneficiaries under such bank guarantees having made demand in terms of the bank guarantees, the bank was bound to make payment to the beneficiaries without any demur or contestation. Clauses 1, 2, 3, 5 and 8 of one of such mobilization advance bank guarantee reads as under:-

1. In consideration of the said advance or any balance thereof made by the Company to the Contractor and to assure repayment of the same by the Contractor, the Surety hereby irrevocably and unconditionally guarantees to pay the amount due and payable to the Company without any demur and contestation and merely on demand from the Company, irrespective of the validity and effects of the said Contract and waiving all the rights of objection and defence arising therefrom the said sum of Rs. 20,00,000/- (Rs. Twenty lacs only) or any lesser sum specified by the Company, without prejudice to any other rights of the Company to take any other action, by transfer to an account in the Company's name at such bank as the Company shall stipulate or in such other manner as shall be acceptable to the Company upon receipt of Company's written demand addressed to the Surety.

2. Any such demand made by the Company on the Surety shall be conclusive and binding for all purposes under this Guarantee notwithstanding any difference between the Company and the Contractor or any dispute pending before any Court, Tribunal, Arbitrator or any other authority or any instructions, letter contrarily issued by the Contractor.

3. The Surety agrees that any changes, modifications, additions or amendments which may be made to the said Contract, or in the work to be performed thereunder, or in the payments to be made on account thereof, or any extensions of the time for performance or other forbearance on the part of either the Company or the Contractor to the other or to any other guarantor of the obligations of either of them or any indulgence shown by the Company to the Contractor, shall not in any release the Surety from their continuing liability hereunder, and the Surety expressly waive their rights to receive notice of any such changes, modifications, additions, amendments, extensions or forbearance of any nature whatsoever.

5. The Surety further agrees that the Company, at its option, shall be entitled to invoke this Guarantee against the Surety, without in the first instance proceedings against the Contractor or making any demand upon the Contractor to pay and notwithstanding any security or other Guarantee that the Company may be possessed of in relation to the Contractor's liabilities, either in relation to this Contract or otherwise and the Surety's liability to make unconditional and unquestionable payment on demand by the Company shall not be affected or diluted and shall remain valid, enforceable and unaltered and that it shall continue to be enforceable till all the dues of the Company have been fully paid and its claims satisfied or discharged or till the Company certifies discharging this Guarantee.

8. The Surety further agrees that for the purpose of this Guarantee any notice issued to the Surety by the Company and the amount claimed in such notice shall be deemed to be correct and shall not be disputed or questioned by the Surety but shall be paid in the manner herein before stated forthwith and without delay.

35. Letter of invocation issued by the third respondent on 10th January, 2013 reads as under:-

January 10" 2013

To, The Manager, Corporation Bank, M-3 & 4, Greater Kailash, Part-2, New Delhi - 110048

Dear Sir,

Sub: Invocation of Bank Guarantee Nos. 2012/247 to 2012/252 all dated 03.09.2012 issued on behalf of M/s. ANCL & CO (India) Pvt. Ltd in our favour.

We hereby invoke the below Bank Guarantees issued by you in our favour.

We call upon you and demand from you to immediately pay us an amount of Rs. 1,66,75,000/- (Rupees One Crore Sixty Six Lacs Seventy Five Thousand only), against the Bank Guarantee, by demand draft payable at Mumbai or credit to our A/c. No. 00600310030953 with Fort branch (Mumbai) of HDFC Bank Ltd. (IFSC-HDFC0000060).

Yours Sincerely,

For Reliance Eminent Trading & Commercial Private Limited For Reliance Eminent Trading & Commercial Private Limited

sd/- Authorised Signatory

Authorised Signatory

36. Dr. Sathe, the learned senior counsel further submits that the letter issued by respondent no. 3 seeking enforcement of the bank guarantee was absolutely in-consonance with the terms of the bank guarantee. The bank guarantees furnished by the petitioner are separate and independent contracts between the bank and the beneficiary. It is submitted that only terms of the bank guarantee have to be considered by this court while deciding application u/s 9 of the Arbitration and Conciliation Act, 1996. It is submitted that the petitioner has neither alleged nor established fraud in furnishing the bank guarantees on behalf of the petitioner in favour of the respondents. It is submitted that the amounts under the bank guarantees were reduced under the fresh work orders. It is submitted that even if allegation that the bills submitted by the petitioner are pending, that pendency of any such bill with the respondents cannot be a ground for grant of injunction from encashment of the bank guarantees.

37. The learned counsel submits that under clauses 27 and 28 of the work order, the contractor was under an obligation to carry out the work strictly within the stipulated period of contract and with diligence. It is submitted that in breach of such obligation on the part of the petitioner, the respondents were entitled to deduct liquidated damages from the bills payable to the petitioner and/or to recover the same from the petitioner. It is submitted that as the petitioner has not completed the work within stipulated time and inspite of extension granted by the respondents and has committed breach of the contract, the respondents have already terminated the contract and are entitled to get balance work executed by other agencies at the risks and costs of the petitioner under clause 28.3 of the work order.

38. The learned senior counsel placed reliance upon clause 19 of the work order which provides for furnishing security deposit/retention money by the contractor and rights and obligation of the parties in respect thereto which reads as under:-

19.0 SECURITY DEPOSIT/RETENTION MONEY TOWARDS PERFORMANCE GUARANTEE:-

Contractor shall, at the option of Owner and within three (3) days of the exercise

of such option by Owner.

Provide to Owner a duly issued, on-demand, unconditional, irrevocable and enforceable performance bank guarantee in a form and by a bank acceptable to Owner. The performance bank guarantee shall not be less than 5% of the Total Contract Value. Payment to Owner under such performance bank guarantee shall be without reference to the Contractor. The performance bank guarantee shall be in full force and effect from the date of its issue through and until the date which is six (6) months beyond the date of expiry of the defects liability period. All costs associated with such bank guarantee shall be to the Contractor's account;

OR

In the case of Retention Money (in lieu of security deposit or bank guarantee option), Owner shall deduct an equivalent amount at the time of payment of every monthly RA bill @ 5% of RA bill, which shall be refunded after the expiry of a period of 6 months after the expiry of the defect liability period.

Owner shall refund such security deposit (interest free) or release the Bank Guarantee to the Contractor on the date which is six (6) months beyond the date of expiry of the Defects Liability Period.

Contractor shall have no right to claim that such security deposit be utilized in payment of any of Contractor's dues to Owner. Owner may, however, at its discretion, be entitled to deduct and apply the Security Deposit towards any amounts that may become due and/or payable by Contractor if Contractor fails to carry out any of its obligations under the Contract or commits a breach of any of the terms of the Contract, express or implied. Should Owner at any time do so and advise Contractor of the same, Contractor shall forthwith provide Owner with Demand Drafts for such further sums as may be necessary to restore the security deposit to the required extent.

39. Relying upon this clause, the learned senior counsel submits that the respondents can adjust the bank guarantee amount against any amount payable by the petitioner to the respondents.

40. The learned senior counsel submits that according to the respondents, no amount is due and payable by the respondent to the petitioner. It is submitted that though the petitioner had committed default in respect of their obligations under the provisions of the contract, by way of indulgence, a meeting came to be held by which the petitioner was given an opportunity to complete some part of the work and to vacate the site. The respondents had not given up any right and dues recoverable from the petitioner. It is submitted that since the respondents has to get the balance work done through the other agencies, respondent would have counter claim against the petitioner.

41. The learned counsel submits that at the request of the petitioner, the respondents had recommended the names of some of the steel vendors to the petitioner. It is submitted that as the petitioner refused to clear the dues of the

steel vendors, such vendors have approached the respondents for payment. In that context, the respondents called upon the petitioner to clear the dues of the steel vendors. It is submitted that the bank guarantees are not invoked for such reasons as alleged by the petitioner.

42. The learned senior counsel placed reliance on the judgment of the Supreme Court in case of BSES Ltd. vs. Fenner India Ltd. and another (2006) 2 SC 728 and more particularly paragraphs 9, 15, 16, 21 and 26 to 29 which reads thus:-

The rule and its exceptions

9. Mr. Rohtagi, learned Senior Counsel for the Appellant, urged that the settled law in this country is that a bank guarantee is an independent contract between the bank and the beneficiary thereof. Accordingly, irrespective of any dispute between the beneficiary and the party at whose instance the bank has given the guarantee, the bank is obliged to honour its guarantee, as long as the guarantee is unconditional and irrevocable. Our attention was drawn to the judgment of this Court in U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd., (hereinafter "U.P. Cooperative Federation"). It was pointed out in that case that a bank guarantee must be honoured in accordance with its terms as the bank, which gives the guarantee, is not concerned with the relations between the supplier and the customer. Neither is the bank concerned with the question whether any of them have failed in their contractual obligations or not. In other words, the bank must pay according to the tenor of its guarantee, on demand, without proof or condition.

Contentions of the First Respondent

15. A reading of the impugned judgment of the High Court shows that the learned Judge was cognizant of the settled rule relating to bank guarantees, but came to the conclusion that the encashment of the bank guarantees by the Appellant would present a case under one of the exceptions to the rule viz. would cause "irretrievable injustice" to the First Respondent.

16. Learned Counsel for the First Respondent strongly supported this line of argument of the High Court. He contended that the bank guarantees were for different purposes, either to: (i) secure the payment of advances or (ii) secure performance. As far as the bank guarantees to secure advance payments were concerned, he contends that there is a provision in the contract that the amount of advance was to be recovered by deduction from the gross accepted amount of any running bill. The contract stipulates two modes of recoveries: (i) By deduction from the gross amount from the running bill, and (ii) By invocation of the bank guarantee. Mr. Sorabjee further urged that it had been found by the District Court and the High Court concurrently that the entire amount of the bank guarantee had been recovered from the running bills of the First Respondent. Accordingly, he argued that, encashing the bank guarantee after having recovered the full amount of advances from the running bills was an "egregious fraud" or at any rate, created a situation of "special equities" in favour of the

First Respondent. The High Court, he submits, was fully justified in granting an injunction since these facts were prima facie established as triable issues.

21. Clauses (4) and (5) in express terms respectively state:

In case of any material breach of any or all the Contracts, BSES shall have the right to embark upon the retentions and encashment of Bank Guarantees of all the contracts.

Notwithstanding the works undertaken by the designated sub-contractor (s) of the Contractor subject to provisions of the contract, the Contractor shall remain wholly liable to perform, fulfill and discharge all the obligations and responsibilities under this contract on a turnkey basis and the same shall in no way be reduced or diminished for any reasons whatsoever.

26. Accordingly, we are prima facie not satisfied that performance had been duly and satisfactorily certified. Under the terms of the "wrap-around agreement", the Appellant was entitled to encash all or any of the bank guarantees for breach of the First Respondent's obligations under any one of the contracts. In our view, it is the case of the Appellant that there was no satisfactory performance of the contract, as a result of which, the Appellant was justified in encashing the concerned bank guarantee. Indeed, as per the terms of the bank guarantee itself, the Appellant is the best judge to decide as to when and for what reason the bank guarantees should be encashed.

Further, it is no function of the Second Respondent-Bank, nor of this Court, to enquire as to whether due performance had actually happened when, under the terms of the guarantee, the Second Respondent-Bank was obliged to make payment when the guarantee was called in, irrespective of any contractual dispute between the Appellant and the First Respondent. Indeed, in similar circumstances, this Court in *General Electric Technical Services Company Inc. Vs. M/s. Punj Sons (P) Ltd. and another*, held:

[The Bank must honour the bank guarantee free from interference by the courts. Otherwise, trust in commerce internal and international would be irreparably damaged. It is only in exceptional cases that is to say in case of fraud or in case of irretrievable injustice, the court should interfere. "The nature of the fraud that the courts talk about is fraud of an "egregious nature as to vitiate the entire underlying transaction". It is fraud of the beneficiary, not the fraud of somebody else per *K. Jagannatha Shetty, J.* See also, *U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd.*,

27. This was also a case where, after having recovered certain amount from the running bills, a call was made on the bank guarantee in respect of the full guaranteed amount. In an observation with direct relevance for the present case, this Court pointed out that the bank was not concerned with the outstanding amount payable under the running bills:

The right to recover the amount under the running bills has no relevance to the

liability of the Bank under the guarantee. The liability of the Bank remained intact irrespective of the recovery of mobilisation advance or the non-payment under the running bills. The failure on the part of "(the Beneficiary)" to specify the remaining mobilisation advance in the letter for encashment of bank guarantee is of little consequence to the liability of the bank under the guarantee per K. Jagannatha Shetty.

Irretrievable Injury

28. As we have stated repeatedly, the First Respondent can succeed only if the case can be brought under the two accepted exceptions to the general rule against intervention. Evidently, there is no "egregious fraud" so as to fall within the first exception. Hence, only one more point remains: whether encashment of the guarantees will create special equities (in particular, "irretrievable injury") in favour of the First Respondent? We are not satisfied on facts that such is the present situation.

29. There is no dispute that arbitral proceedings are pending. In fact, we were shown that one of the disputes referred to arbitration is whether the bank guarantees are null and void. Further, one of the substantive prayers in the arbitration made on behalf of the First Respondent, is to make an award declaring the four bank guarantees unenforceable, illegal, void and liable to be discharged. Further, there is also a prayer for permanent injunction to restrain the Appellant from encashing the bank guarantees. Therefore, since this prayer is already pending before the Arbitral Tribunal, we see no situation of "irretrievable injustice" if, at the present moment, the Appellant is allowed to encash the bank guarantees. For justice can always be rendered to the First Respondent, if he succeeds before the Arbitrators. Nor do we see any special equity in favour of the First Respondent, when there is in fact a dispute that performance was prima facie not satisfactory, which enabled the Appellant to encash all or any of the four bank guarantees.

43. The learned senior counsel distinguished the judgments relied upon by Mr. Kamdar, the learned senior counsel appearing for the petitioner and submits that the facts in those cases were different.

44. This court in case of Western Coalfields Limited (supra) has referred to the judgment of the Supreme Court in case of Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Company, and has reproduced para 14 of the said judgment in which Supreme Court has laid down the principles to be noted in the matter of injunction to restrain the encashment of a bank guarantee or a letter of credit which reads thus:-

Para 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.

45. The questions arise for consideration of this court is whether the bank guarantees furnished by the petitioner in favour of the respondents are unconditional bank guarantees or not, whether notice of invocation of the bank guarantee by respondent no. 3 is in accordance with the terms and conditions of the bank guarantee, whether allowing encashment of the bank guarantee would result in irretrievable harm or injustice to the petitioner, whether petitioner has made out any case that fraud is committed in submission of the bank guarantee by the bank in favour of the respondents.

46. On perusal of the mobilization bank guarantee and also the retention amount bank guarantee, it is clear that the bank had irrevocably and unconditionally guaranteed to pay the amount due and payable to the company without any demur and contestation and merely on demand from the company irrespective of the validity and effects of the said contract. The demand made by the beneficiary is conclusive and binding on the bank notwithstanding any difference between the petitioner and the beneficiaries.

47. Clause 5 is clear which provides that the beneficiary is entitled to invoke the bank guarantee against the bank even without first instance proceedings against the contractor or making any demand upon the contractor to pay and notwithstanding any security or other guarantee that the beneficiary may be possessed of in relation to the contractor's liabilities either in relation to this contract or otherwise. In my view, thus even if bill of the petitioner is pending with the respondent no. 3, that cannot be a ground for grant of injunction from encashment of the bank guarantees.

48. Clause 8 provides that the bank had agreed that any such notice of invocation shall be deemed to be correct and shall not be disputed or questioned by the bank but shall pay in any manner referred to in the bank guarantee forthwith and without delay. From the perusal of the terms and conditions of the bank guarantee, it is thus clear that bank guarantees furnished by the petitioner were not conditional bank guarantees. The beneficiary thus having invoked it, the bank was liable to honour the same without any dispute or demand. The bank guarantees are independent and separate contract between the Bank and the beneficiary and are absolute in nature, the bank are not concerned with the dispute between the contractor and the beneficiary. Under the terms of the bank guarantee, the beneficiary is the best judge to decide as to when and for what reasons the bank guarantee should be encashed.

49. The Supreme Court in case of BSES Ltd. (supra) has referred to the judgment in case of General Electric Technical Services Company Inc. Vs. M/s. Punj Sons (P) Ltd. and another, in which after considering the terms of the unconditional bank guarantee held that the right to recover the amount under the running bills has no relevance to the liability of the Bank under the guarantee. The liability of the Bank remained intact irrespective of the recovery of mobilization advance or the non-payment under the running bills. It is held that failure on the part of the beneficiary to specify the remaining mobilization advance in the letter for encashment of bank guarantee is of little consequence to the liability of the bank under the guarantee. It has been held that the petitioner can succeed only if the case can be brought under the two accepted exceptions to the general rule against intervention. It is held that as there is no egregious fraud so as to fall within the first exception or there is no special equities in favour of the plaintiff. The Supreme court in case of BESE Limited (Supra) after considering the terms of the bank guarantee as unconditionally held that the justice can always be rendered to the parties, if he succeeds before the Arbitrators.

50. Supreme Court in case of State Bank of India and another (supra) rejected the plea of the plaintiff that the bank guarantee must be construed in the light of other purported contemporaneous documents. In my view as the terms and conditions of the bank guarantees are clear and without any ambiguity, correspondence referred to and relied upon by both the parties would be of no relevance. The Supreme Court has held that it is beyond any cavil that a bank guarantee must be construed on its own terms and considered as a separate transaction.

51. On perusal of judgments in case of State Bank of India (supra) and Larsen and Tourbo Limited (supra) relied upon by the petitioner it is clear that in both the matters the bank guarantee furnished by the plaintiffs were conditional bank guarantees and the invocation of such bank guarantees were not in accordance with terms of the bank guarantees. However, the bank guarantees under consideration in this petition are unconditional bank guarantees. The beneficiary

was not bound to disclose any reason as to why the bank guarantees were required to be invoked. The letter of invocation produced by the petitioner for perusal of this court shows that the letter did not indicate any reason. The terms of the bank guarantee does not require any reason or justification or quantification of the amount due to be disclosed in the letter invoking bank guarantee. In my view, the letter invoking bank guarantee by the 3rd respondent is inconsonance with the terms of the bank guarantee. In my view case of the petitioner does not fall under any exception carved by the Supreme Court i.e. fraud or irretrievable injustice.

52. As far as judgment in case of Western Coalfields Limited (supra) relied upon by the petitioner is concerned, in support of the proposition that the purpose for invocation of the bank guarantees cannot be other than the purpose for which such bank guarantees were furnished and that the principle debtor also have locus standi to complain about non-fulfillment of the bank guarantee is concerned, from the perusal of the facts before this court in case of Western Coalfields Limited (supra) it is clear that it was one of the terms of the bank guarantees that the bank was liable to honour the bank guarantee on demand stating that amount claimed by the beneficiary was due and payable by the contractor for the reasons of failure/negligence in preforming the terms and conditions contained in the contract by the buyer and to unconditionally pay the amount claimed by the company on demand without any demur to the extent stated therein. Considering these terms and also considering the letter invoking the bank guarantees, this court took a view that the obligation of the bank to make the payment of the amount covered by the bank guarantee arose only on the demand to be made in writing which must state exactly the amount assessed as due and payable by the parties furnishing bank guarantees for the reason of failure/negligence of such party in performing certain specified terms and conditions contained in the contract between the plaintiff and the beneficiary. It is held that If the demand was not in writing stating the actual amount which was assessed and found to be due and payable for the reason stated in the Bank guarantees, then there was no obligation to make payment. It is held that unless there was a failure/negligence in performing the terms and conditions of contract, the amount which becomes due and payable by the beneficiary could not be assessed and claimed. Considering these facts, this court took a view that such bank guarantee was contingent contract as defined u/s 31 of the Contract Act and it becomes enforceable only upon happening of the event specified therein, as per Section 32 of the Contract Act. This court took a view that there was no demand in writing as envisaged in the bank guarantee in question. The beneficiary in it invocation letter had not stated the amount due and payable from the plaintiff according to the beneficiary for such letter. It is also held that there was nothing to show that the events specified for invocation of Bank guarantees had occurred. This court took a view that invocation was not in accordance with the terms and conditions prescribed and was therefore bad and unenforceable. In that context, this court took a view that the bank guarantee

could not be invoked for the purpose other than for which the bank guarantee was furnished by the plaintiff in favour of the beneficiary.

53. On perusal of the terms and conditions of the bank guarantee in this case furnished by the petitioner, it is clear that each of such bank guarantees is absolutely unconditional and the bank was under obligation to honour the same on demand issued by the beneficiary. There was no such condition provided in the bank guarantee which obligates any recording of reasons or quantifying the claim while invoking such bank guarantee. It is not in dispute that in the invocation letter addressed by the 3rd respondent, no reason of any nature whatsoever is given.

54. In my view, other correspondence exchanged between the parties need not be dealt with for the purpose of deciding whether the intent of the beneficiary to invoke the bank guarantee was for any other purpose other than for which such bank guarantee was furnished. Issue raised by Mr. Kamdar, the learned senior counsel appearing for the petitioner that the petitioner has to recover substantial amount from the respondents or the issue raised by Dr. Sathe, the learned senior counsel appearing for the respondents that the petitioner had committed breaches of the contract and in view of the termination of the contract, respondents would be entitled to get the balance work done at the risk and cost of the petitioner and would have counter claim against the petitioner are concerned, I am of the view that both these issues can't be decided in the present proceedings while considering application for injunction in respect of the unconditional bank guarantee and such issues in my view can be decided only by the Arbitral Tribunal.

55. In my view, the facts before this court in case of Western Coalfields Limited (supra) are clearly distinguishable in the facts of this case and thus reliance placed by the learned senior counsel for the petitioner on such judgment is of no assistance to the petitioner.

56. I am, therefore, of the view that there is no merits in the submissions made by the petitioner. Petition is devoid of merits. I, therefore, pass the following order:-

(a) Arbitration Petition is rejected.

(b) No order as to costs.

(c) Ad-interim order passed by this Court on 11th January, 2013 is vacated.

Mr. Naik, the learned senior counsel appearing for the petitioner applies for continuation of the ad-interim orders dated 11th January, 2013. Dr. Sathe, the learned senior counsel appearing for respondent vehemently opposes continuation of ad-interim order. Ad-interim to continue till 28th January, 2013.