

(2009) 11 GUJ CK 0098
In the Gujarat High Court

Case No : Appeal From Order No. 71 of 2009 and Civil Application No. 1971 of 2009 in Appeal From Order No. 71 of 2009

Aquafil Polymers Company Pvt. Ltd.

APPELLANT

Vs

ICICI Bank Limited and Another

RESPONDENT

Date of Decision : 10-11-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 43 Rule 1

Citation : (2009) 3 GLH 774

Hon'ble Judges : K.A. Puj, J

Bench : Single Bench

Advocate : Mihir Joshi and Mitul K. Shelat, for the Appellant; Mihir Thakore and Jal Soli Unwala, for the Respondent

Final Decision : Dismissed

Judgement

K.A. Puj, J.—The appellant - original plaintiff has filed this Appeal From Order challenging the order passed by the learned City Civil Judge, below notice of motion Exh.7 in Civil Suit No. 2461 of 2008 on 11.02.2009. While dismissing the Notice of motion application, the learned City Civil Judge has observed in the order that the Bank Guarantee in question is unconditional and the Bank has acted upon the words stated in the Bank Guarantee. Therefore, as per settled law, in such cases, Bank Guarantee cannot be stayed unless pure case of fraud has been established by the plaintiff. The contention of the fraud has no force at all and the plaintiff has not established any prima facie case nor any balance of convenience can be said to be in favour of the plaintiff. Since the plaintiff has failed to prove his case in his favour, the stay initially granted during the pendency of the notice of motion application is required to be vacated.

2. The learned City Civil Judge has extended the ad-interim relief so as to enable the plaintiff to approach this Court and this Court vide its order dated 24.02.2009 further extended the interim relief without prejudice to the rights of the parties and without entering into merits of the case.

3. It is the case of the appellant plaintiff that Indian Oil Corporation Limited (IOCL) awarded the contract for Balance Offsite and Utilities and Interconnection with Panipat Refinery / Marketing Terminal (EPCC Package 9) for Panipat Napththa Cracker Project of M/s. IOCL in the State of Haryana to Naftogaz India Private Limited. The respondent No. 2 - defendant No. 2 has been awarded the said contract by Naftogaz. The respondent No. 2 invited the appellant to submit its offer for undertaking the work of designing, construction and commissioning of the water treatment plant forming part of the scope of the contract of the respondent No. 2 on 100% back to back basis.

4. It is also the case of the appellant that the respondent No. 2 at all material points of time represented to the appellant that it was competent to award the contract on a back to back basis. If the appellant had known that it was not a turnkey contract, but was in essence a labour contract, the appellant would not have submitted its offer. On the basis of the representation made by the respondent No. 2 before the appellant, the appellant had entered into a contract with the respondent No. 2 for installation, execution and maintenance of water treatment plant on 100% back to back basis. The contract was valued at Rs. 33 Crores and the respondent No. 2 gave an amount of Rs. 3.10 Crores by way of mobilisation advances and a Bank Guarantee of equal amount was given by the appellant as security towards the said advance.

5. It is also the case of the appellant that having regard to the representation made by the respondent No. 2 to the effect that the contract was to be on a back to back basis and in terms of the agreements entered into, the appellant on the basis of its reputation and goodwill entered into the negotiations with the vendor and finalised the major orders for commissioning of the water treatment plant. The appellant also purchased the requisite materials, namely, cement, steel, equipments, plants etc. Thus, the appellant mobilised the requisite resources and commenced the acquisition of the contract as agreed.

6. It is also the case of the appellant that when the bills were submitted by the appellant and not cleared by the respondent No. 2, upon inquiry, it was learnt from the respondent No. 2 that in fact, IOCL had not permitted the respondent No. 2 to execute the work in question on 100% back to back / turnkey / EPC basis and the bills would not be cleared as sent. The respondent No. 2 suggested an amendment to the agreement by which the agreement in essence became a labour contract. The appellant had already mobilised its resources, invested capital, men power and provided a Bank Guarantee. Under threat of invocation of Bank Guarantee and block of the capital already invested, the appellant agreed to the amendments to the Contract under compulsion and duress. The respondent No. 2 thereafter also did not act in terms of the amended agreement.

7. It is, therefore, the case of the appellant that the respondent No. 2 has made a false representation regarding award of contract on turnkey basis, which it knew from inception was false. On the basis of the said statement, the appellant was induced to enter into a contract and provided a Bank Guarantee in respect of

the mobilisation advance and invested its own capital in the execution of the work contract. Having induced the appellant in commencing the execution of the work contract, the respondent No. 2 thereafter compelled the appellant to agree to an amendment in the contract, changing the nature, purport and essence of the contract and under threat of invocation of Bank Guarantee and blockage of capital already invested. The appellant was forced into agreeing to the amendments. Thus, in a pre-determined manner, the respondent No. 2 defrauded the appellant.

8. It is also the case of the appellant that the appellant had till the date of filing of the suit executed work of Rs. 24,34,66,635/-. Out of the total mobilization advance of Rs. 3.10 Crores, the respondent No. 2 has already recovered a sum of Rs. 2.40 Crores towards the mobilisation advance in terms of payment made so far. Despite this fact, the respondent No. 2 raised allegations regarding the performance of the contract. The appellant responded to each of the allegations and brought to the notice of the respondent No. 2 that there was no delay in performance of the contract by the appellant and the delay, if any, was attributable to the respondent No. 2; that the respondent No. 2 had failed to make payments of the bills raised; that the materials were not being supplied on time etc. According to the appellant, it was evident from the communications were that the respondent No. 2's sole motive was of escaping its liability to make payments to the appellant. The respondent No. 2, on the other hand, threatened to invoke the Bank Guarantee and in fact, wrote a letter to the Bank invoking the said Bank Guarantee. However, none of the disputes raised by the respondent No. 2 had any reference to breach of obligation regarding mobilization advance. The appellant, therefore, approached the City Civil Court, Ahmedabad by filing Regular Civil Suit No. 2461 of 2008 challenging the action of the respondent No. 2 in invoking the Bank Guarantee dated 22.12.2006 for Rs. 3.10 Crores, seeking a declaration that the said action was fraudulent, against the terms of the Bank Guarantee and hence, illegal, wrongful, null and void and praying for a permanent injunction. The appellant has also moved an application praying for temporary injunction against invocation of the Bank Guarantee and against the respondent No. 1 Bank from making payment against the same. The City Civil Court vide its order dated 05.11.2008 granted an ex-parte injunction restraining the encashment of the Bank Guarantees. However, the said ex-parte injunction was vacated after by-parte hearing on 11.02.2009.

9. It is this order of the learned City Civil Judge which is under challenge in the present Appeal From Order.

10. Mr. Mihir Joshi, learned Senior Advocate appearing with Mr. Mitul Shelat for the appellant has submitted that the Trial Court has failed to apply the settled principles in respect of considering an application seeking injunction against encashment of Bank Guarantee. The Trial Court has not rendered any decision on the ground that the respondent No. 2 had made false representation regarding the nature and scope of the contract and induced the appellant to enter into the

contract and providing the Bank Guarantee. Making of a representation which the defendant knew to be false has resulted into commission of a fraud upon the appellant. The fraud practised by the respondent No. 2 vitiated the Contract and the very foundation of the Bank Guarantee. He has further submitted that Bank Guarantee was conditional in as much as it could be invoked only in respect of the failure of the appellant to perform any of its obligations regarding mobilisation advance. The Bank Guarantee was invoked alleging breach in performance of the contract and not any obligation regarding mobilization advance. The invocation was not in terms of the Bank Guarantee. The said fact was within the knowledge of the respondent No. 1 Bank and the respondent No. 1 Bank itself had refused to entertain the first invocation on the said ground. There being no change in the nature of dispute subsequent thereto, the second invocation was also illegal for the same reasons and could not be honoured by the respondent No. 1. The Bank Guarantee can be invoked only in terms of the guarantee and not otherwise. The invocation was not in terms of the Bank guarantee and, therefore, the same could not be encashed. The Bank guarantee was only for the purpose of securing the mobilization advance of Rs. 3.10 Crores. The Bank Guarantee thus contemplated that it shall remain effective till the said advances are repaid or adjusted against the running bills. Against the advances of Rs. 3.10 Crores, a sum of Rs. 2.40 Crores had already been deducted by the respondent No. 2 from the running bills submitted by the appellant. Stores of Rs. 2,15,25,030/- were seized and illegally detained by the respondent No. 2. An amount of Rs. 2,07,62,580/- is receivable by the appellant towards the amount of retention money (billing made at the rate of 80% for the work done of 100%). An amount of Rs. 36,90,111/- towards price escalation wrongfully withheld by the defendant No. 2. An amount of Rs. 1,16,24,118/- towards the work done and not paid and Rs. 75,12,780/- towards reimbursement for VAT is also withheld by the respondent No. 2. Thus, in all, an amount of Rs. 6,51,14,619/- is recoverable by the appellant from the respondent No. 2. Mr. Joshi has further submitted that the Bank Guarantee was a conditional bank guarantee in as much as it could be invoked only if the amount lent to the appellant on advance remained outstanding. Since no amount remains as balance towards advance and in fact, huge amount is recoverable, the Bank guarantee was rendered inoperative. He has, therefore, submitted that the appellant and the respondent No. 1 Bank are absolved from honouring the Bank Guarantee. The attempt to encash the Bank Guarantee was on the face of it dishonest, fraudulent and an attempt to obtain an unfair advantage over the appellant.

11. In view of the above contentions, Mr. Joshi has submitted that the Trial Court has failed to consider that on one hand, the respondent No. 2 had sought to invoke the Bank Guarantee for non-performance of the Contract and on the other hand, the respondent No. 2 had prevented the appellant from performing its contractual obligation. Thus, the conduct of the respondent No. 2 does not disentitle the appellant to the grant of relief as prayed for. He has further submitted that the Trial Court has misread and misinterpreted the terms of the

Bank Guarantee to entitle the encashment thereof on a mere intimation regarding breach of any of its obligations. The Trial Court has failed to consider that the guarantee was qualified to the extent of obligations regarding mobilization advance alone. Thus, the entire reasoning of the Trial Court has proceeded on erroneous premises.

12. Mr. Joshi has further submitted that the findings of the learned City Civil Judge regarding prima facie case, balance of convenience and irreparable injury are bereft of reasoning and contrary to the evidence on record and the settled principles governing grant of injunction against encashment of Bank Guarantee. He has, therefore, urged before the Court that having regard to the facts pleaded, the documents on record and the law laid down by this Court as well as by the Apex Court, it was imperative and in the interest of justice that the order of the learned City Civil Judge be reversed and the interim relief as prayed for in the suit be granted.

13. In support of his submission that the invocation of the bank guarantee is not in accordance with the terms of the Bank Guarantee, Mr. Joshi relied on the decision of the Apex Court in the case of National Highway Authority of India Vs. Ganga Enterprises and Another, Centurion Bank Limited Vs. Larsen and Tubro Limited, Wires and Cables India Private Limited v. Voltamp Transformers Private Limited 2006 (0) GLHEL : 2006 JX (Guj) 629 . In support of his submissions that invocation of Bank Guarantee of respondent No. 2 is a fraudulent and dishonest, Mr. Joshi relied on the decision of this Court in the case of Prem Conductors Pvt. Ltd. Vs. State Bank of India and Another , Hindustan Steel Works Construction Ltd. Vs. Tarapore and Co. and another, and Hindustan Construction Co. Ltd. Vs. State of Bihar and Others,

14. Based on the aforesaid fact situation and the settled legal position, Mr. Joshi has strongly urged that the Appeal From Order be allowed by restraining the respondents from encashment of the Bank Guarantees.

15. Mr. Mihir Thakore, learned Senior Counsel appearing with Mr. Jal Soli Unwala, learned advocate appearing for the respondent No. 2, on the other hand, has opposed this Appeal From Order and taken the Court through the entire background of the case. IOCL accepted the tender submitted by Naftogaz India Private Limited for the work of Balance Offsite and Utilities and Interconnection with Panipat Refinery / Marketing Terminal (EPCC Package 9) vide fax of acceptance dated 28.09.2006. The said tender was accepted on the terms and conditions mentioned in the tender documents, amendments, letter of waiver and were based on the schedule of prices. Immediately upon the receipt of such facts of acceptance, Neftogaz issued a letter of intent for the said work to respondent No. 2 in accordance with the terms and conditions agreed between Neftogaz and the respondent No. 2 and also sent a copy of the fax of acceptance issued by IOCL to Neftogaz. The appellant approached the respondent No. 2 with a proposal to execute the work relating to Raw Water Treatment Plant which was one of the tasks awarded by Neftogaz to the respondent No. 2. In pursuance of

the discussions that took place between the appellant and the respondent No. 2, the respondent No. 2 has awarded Raw Water Treatment Plant work to the appellant and issued letter of intent dated 24.10.2006 to the appellant. The respondent No. 2 entrusted the work of construction of the Raw Water Treatment Plant forming part of the EPCC-9 Project, Panipat valued at Rs. 33.05 Crores to the appellant. In the said letter of intent, the respondent No. 2 clearly stated that it intended to execute the Raw Water Treatment Plant work under Sub-contract to be entered into between respondent No. 2 and the appellant. The respondent No. 2 accepted the proposal of the appellant for execution of such work under sub-contract. The letter of intent contained the terms and conditions upon which such sub-contract was awarded to the appellant.

16. Mr. Thakore has further submitted that Clause 3 of the Letter of Intent required the appellant to submit a performance bank guarantee to the respondent No. 2 at 10% of the contract value i.e. bank guarantee for Rs. 3.31 Crores and that such performance guarantee would remain valid for 40 months from the date of Letter of Intent. As per Clause 6 of the Letter of Intent, the appellant was to complete the execution of the Raw Water Treatment Plant work within 10 months from the date of the letter of intent i.e. on or before 23.04.2008. Clause 7 provided that the said contract was to be executed strictly as per the terms and conditions laid down in the tender document together with the general conditions, special conditions, specifications, drawings, bill of quantities etc. on the basis of which IOCL had awarded the work to Neftogaz. Clause 10 provided for payment of mobilization advance of 10% of the total value of the Raw Water Treatment Plant work and this advance was payable to the appellant against submission of a Bank Guarantee of equivalent value and the same was to be recovered on pro-rata basis out of the running abstract bills submitted by the appellant.

17. The appellant acknowledged the letter of intent vide letter dated 3.11.2006. The appellant promised and assured the respondent No. 2 that they will execute the work to the utmost satisfaction of the client/consultant and within the time frame stipulated in the letter of intent. Engineers India Limited was the Project Management Consultant appointed by IOCL for the work entrusted to respondent No. 2. The appellant in their letter dated 03.11.2006 to the respondent No. 2 stated that they have considered a composite bank guarantee of 10% amount towards mobilization advance and performance bank guarantee and that during the cost estimation, the appellant had calculated the finance charges only for 10% amount for bank guarantee. They also stated that their existing limit was utilised elsewhere and that they were not in a position to give more than 10% amount as and by way of bank guarantee and, therefore, requested the respondent No. 2 to accept a composite bank guarantee for mobilization advance and performance security and to make necessary amendment in the letter of intent. While requesting the respondent No. 2 to issue necessary amendment to the letter of intent, the appellant simultaneously returned the duly signed duplicate copy of the letter of intent signifying its acceptance to execute the

project work. The acceptance of the letter of intent without even waiting for their request for a composite Bank Guarantee to be accepted, letter of intent dated 24.10.2006, their request made on 03.11.2006, the amendment to the letter of intent dated 05.12.2006 and that the Bank Guarantee furnished by them was a composite bank guarantee i.e. towards mobilization advance cum performance security, were not disclosed either in the plaint or in the application for injunction and thus, the appellant was guilty of suppression of facts.

18. Mr. Thakore has further submitted that both the parties, namely, the appellant and the respondent No. 2 entered into Memorandum of Agreement dated 09.12.2006 for supply of civil, mechanical, electrical and instrumentation items required for execution of the project, valued at Rs. 19.38 Crores and another Memorandum of Agreement dated 09.12.2006 for execution of the design, engineering, construction, testing and commissioning of Raw Water Treatment Plant, valued at Rs. 13.67 Crores and the execution of the project work was to be completed within 18 months from the date of the letter of intent. The appellant furnished to the respondent No. 2 the Bank Guarantee dated 22.12.2006 for Rs. 3.10 Crores drawn on ICICI Bank Limited which was valid upto 15.12.2009 towards mobilization advance cum performance security. The very caption of the said document enumerating Bank Guarantee for Mobilization Advance cum performance security confirms and substantiates the contention of the respondent No. 2 that it was a composite bank guarantee for mobilization advance cum performance security. In addition to the same, perusal of the said Bank Guarantee emphasizes that it is an irrevocable and unconditional bank guarantee for mobilization advance cum performance security. The bank guarantee issued by the respondent No. 1 to the respondent No. 2 is an unconditional and irrevocable composite guarantee in respect of mobilization advance cum performance security. Thus, it can be inferred that the appellant was guilty of suppression of material facts by concealing the fact that the said bank guarantee was issued towards performance security also.

19. Mr. Thakore has further submitted that right from the inception, the appellant's performance has been very poor in every respect. Even the basic designs and drawings submitted by the appellant were of poor quality and lacking in incorporation of desired details and were also not in line with the technical specifications and requirements of the work so assigned. The Project Management Consultant had returned the documents under Category 3 / Category 2 necessitating the submission of the documents once again for approval, after revising the same. Several of the documents consisting of the calculations and general arrangement drawings were returned by the EIL labeled "VOID" . Time and again the respondent No. 2 had requested the appellant to improve the quality of submittals i.e. designs, drawings and documents, but the appellant had not taken adequate steps and measures to do so and many drawings had to be revised several times, sometimes almost upto eight times, before they were finally approved. The failure of the appellant in generating and submitting quality designs and drawings and documents not only tarnished the

image of the respondent No. 2 but also adversely affected and delayed the execution and procurement activities.

20. Mr. Thakore has further submitted that right from the inception, the appellant delayed and defaulted in execution of the work awarded to them as per the said contract entered into with the respondent No. 2. In addition to the above lapses, the appellant delayed the release of the advances to their suppliers who in turn delayed supply of the materials / equipments which were required for execution of the work. He has, therefore, submitted that with a view to ensure that the execution of the work awarded to the appellant was not further delayed, both the parties mutually discussed and agreed that the appellant shall identify and finalise the suppliers of the material / equipment and also finalise the terms of supply and recommend to the respondent No. 2 for placing of an order and for release of the advance to the suppliers of the material / equipment on the terms and conditions of supply, as finalized by the appellant. The appellant and the respondent No. 2 entered into a Deed of Amendment dated 12.09.2007 to record the revised understanding reached between them. This amendment was agreed upon between the appellant and the respondent No. 2 primarily for ensuring better cash flows to the appellant as the appellant always maintained to be scarce on resources / funds right from the beginning. The agreed terms of the amendment were mutually discussed and decided by both the parties to expedite the execution of the work sub-contracted to the appellant and in fact, all necessary steps were taken to ensure that the amendment did not alter the nature of the scope of the work awarded to the appellant.

21. Mr. Thakore has further submitted that the appellant even during the execution of the work failed to depute the required number of competent engineers and supervisors and also failed to deploy adequate labour, resources and machinery to complete all the activities as per the work schedule. In spite of several reminders to the appellant, to adhere to the schedule and complete the project within 18 months as agreed to in the Memorandum of Agreement dated 09.12.2006, the appellant delayed the execution of the work. The respondent No. 2 had even received letters from their employer / client expressing their displeasure regarding delay / tardy execution of the Raw Water Treatment Plant work. The respondent No. 2 forwarded the said letters to appraise the appellant of the seriousness of the situation and with a request to take corrective actions / measures and assured the appellant of cooperation and help from respondent No. 2 in providing office facilities such as e-mail, office, telephone and computers etc.

22. Mr. Thakore has further submitted that apart from taking certain steps and after waiting passionately for over a year for the appellant to improve their performance and to complete execution of the Project within the scheduled time, neither the desired results / nor the targets set were achieved by the appellant. Hence, the respondent No. 2 was constrained to issue letter dated 18.10.2008 invoking the bank guarantee. The respondent No. 1 Bank on receipt of the

invocation letter of the respondent No. 2, intimated the appellant to arrange sufficient funds for the payment of proceeds of the bank guarantee to respondent No. 2. On the other hand, the respondent No. 1 vide their letter dated 22.10.2008 informed the respondent No. 2 that the letter of invocation made on 18.10.2008 is not as per the terms and conditions of the guarantee and hence, the claim was treated as invalid. The appellant wrote letter to the respondent No. 1 Bank on 22.10.2008 clearly instructing them not to pay the beneficiary any sum as demanded. The respondent No. 2 thereafter sent another letter dated 25.10.2008 for invocation of bank guarantee. Mr. Thakore has further submitted that knowing well that several breaches committed in execution of the Raw Water Treatment Plant work awarded to them and apprehending that the respondent No. 2 will invoke the performance cum mobilization advance bank guarantee of Rs. 310 Lacs, approached the City Civil Court and obtained ex-parte ad-interim injunction on false allegations and misrepresentation which ultimately was vacated after by-parte hearing and thereafter, approached this Court challenging the order passed by the learned City Civil Judge, Ahmedabad. Mr. Thakore has further submitted that none of the submissions made on behalf of the appellant either on facts or on law are tenable. The bank guarantee in question is not confining only to mobilization advances but it was towards mobilization advance cum performance security. The respondent No. 2 has invoked the bank guarantee as per the terms of the bank guarantee and no fraud was committed by the respondent No. 2 as alleged by the appellant. On the contrary, fraud has been committed by the appellant by suppressing certain facts before the Court and obtained an ex-parte injunction. It is also not correct to state that the part of the mobilization advances has been recovered by the respondent No. 2 and hence, the respondent No. 2 should not be permitted to invoke the encashment of the bank guarantee. He has further submitted that even if part of the amount towards mobilization advances has been recovered, the respondent No. 2 is still entitled to invoke the encashment of bank guarantee.

23. Mr. Thakore in support of his submission that the bank guarantee contract is an independent contract, has relied on the decision of the Apex Court in the case of General Electric Technical Services Company Inc. Vs. M/s. Punj Sons (P) Ltd. and another, He further relied on the decision of the Apex Court in the case of Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works (P) Ltd., and another, for the proposition that except in cases of established fraud vitiating the very foundation of the Bank guarantee or encashment resulting in irretrievable harm or injustice which would make it impossible for the guarantor to reimburse himself, if he ultimately succeeds, court should not normally grant injunction.

24. He further relied on the decision of the Apex Court in the case of Federal Bank Limited v. V.M. Jog Engineering Limited and Ors. 2001 (1) SCC 663 for the proposition that in case of irrevocable bank guarantee or letter of credit, Court should not issue injunction restraining encashment thereof on ground of breach of the main contract between buyer and seller as contract of bank guarantee or letter of credit is independent of the main contract. The Bank cannot refuse

encashment, if seller prima facie complies with the terms of the bank guarantee or letter of credit. Only exceptions are when fraud is committed by the seller or where encashment will result in irretrievable damage.

25. Mr. Thakore has further relied on the decision of the Apex Court in the case of Mahatma Gandhi Sahakra Sakkare Karkhane Vs. National Heavy Engg. Coop. Ltd. and Another, for the proposition that if the Bank guarantee furnished is an unconditional and irrevocable one, it is not open to the Bank to raise any objection whatsoever to pay amounts under the guarantee. The person in whose favour the guarantee is furnished by the Bank cannot be prevented by way of an injunction from enforcing the guarantee on the pretext that the condition for enforcing the bank guarantee in terms of the agreement entered between the parties has not been fulfilled. Such a course is impermissible. The seller cannot raise dispute of whatsoever nature and prevent the purchaser from enforcing the bank guarantee by way of injunction except on the ground of fraud and irretrievable injury.

26. Mr. Thakore has further relied on the decision of the Apex Court in the case of Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Company, wherein it is held that 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. In the matter of invocation of a bank guarantee or a letter of credit, it is not open to the bank to rely upon the terms of the underlying contract between the parties. The Bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. 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.

27. Lastly, Mr. Thakore relied on the decision of the Apex Court in the case of Vinitec Electronics Private Limited Vs. HCL Infosystems Limited, wherein it is held that mere fact that the bank guarantee refers to the principal agreement in the preamble of the deed of guarantee does not make the guarantee furnished by the Bank to be a conditional one unless any particular clause of the agreement has been made part of the deed of guarantee. The recitals in the preamble in the deed of guarantee do not control the operative part of the deed. After careful analysis of the terms of the guarantee the guarantee is held to be an unconditional one.

28. Having heard learned advocates appearing for the parties and having gone through the impugned order passed by the learned City Civil Judge and considered the same in light of the documents produced before the Court as well as after considering the various judgments cited before the Court by the respective parties in their support, the Court is of the view that the impugned

order passed by the learned City Civil Judge does not call for any interference by this Court. No case is made out before the Court to grant an injunction against the encashment of the bank guarantee in question. The Court is unable to accept the submissions made by Mr. Joshi on behalf of the appellant. The main thrust of the argument of Mr. Joshi is that the bank guarantee is not invoked in terms of the bank guarantee and that the respondent No. 2 has committed a fraud not only at the time of executing the contract for bank guarantee but also at the time of invocation of the said bank guarantee. It is also the submission of Mr. Joshi that despite the fact that substantial amount of mobilization advance has been recovered by the respondent No. 2 and that the appellant has to recover a large sum of the amount, the bank guarantee was invoked by the respondent No. 2. As against these submissions, the arguments of Mr. Thakore appearing for the respondent No. 2 were that the bank guarantee was invoked strictly in terms of the bank guarantee and no fraud at all was played by the respondent No. 2. The Bank guarantee was a composite bank guarantee for mobilization advance cum performance security. It was absolutely an irrevocable and unconditional bank guarantee. The respondent No. 2 has initially insisted for the bank guarantee of mobilization advance as well as performance security and only on the request made by the appellant for amendment in the letter of intent because of their inability to provide bank guarantee as demanded by the respondent No. 2, composite bank guarantee for mobilization advance cum performance security was accepted by the respondent No. 2. The contract was also changed after taking consent from the appellant and the agreed terms of the amendment were mutually discussed and decided by both the parties to expedite the execution of the work. Hence, no fraud was committed by the respondent No. 2 either at the time of execution of bank guarantee or at the time of invocation of such bank guarantee.

29. For the purpose of considering the rival contentions of the parties in their true perspectives, it is necessary to have a close look at the bank guarantee dated 22.12.2006. The very title of the bank guarantee indicates that it is the Bank Guarantee for mobilization advance cum performance security. The respondent No. 1 Bank understood that the appellant is providing the said bank guarantee seeking release of mobilization advance cum performance security in connection with the sub contract agreement dated 14.12.2006, entered into between the beneficiary i.e. the respondent No. 2 and the obligee i.e. the appellant. It is also understood that such an agreement as amended and supplemented from time to time, is the sub-contract. The Bank has irrevocably and unconditionally undertaken on behalf of the appellant to pay immediately to the respondent No. 2, on first demand, any sum or sums not exceeding Rs. 3.10 Crores, if the respondent No. 2 notifies the Bank that the appellant has failed to perform any of its obligations regarding mobilization advance in accordance with the terms and conditions of the sub-contract. The Bank has also agreed that it has no duty or right to inquire as to the basis upon which the respondent No. 2 has determined to present to the Bank the said guarantee. The bank is entitled

to rely solely upon the guarantee and the Bank is not under any duty nor the Bank is supposed to inquire under any circumstances into the terms of the sub-contract agreement or any other circumstances, matters or documents. Thus, the terms of the bank guarantee clearly indicate that the bank guarantee is irrevocable and unconditional. Immediately on invocation by the respondent No. 2, the Bank is supposed to make the payment of Rs. 3.10 Crores to the respondent No. 2. The respondent No. 2 has to only inform the Bank that the appellant has failed to perform any of its obligations regarding mobilization advance. Initially, the respondent No. 2 has invoked the bank guarantee vide letter dated 18.10.2008. Since it was not in accordance with the terms of the bank guarantee, the Bank has informed the respondent No. 2 that it is not a valid invocation and hence, the respondent No. 2 wrote another letter on 25.10.2008 stating therein that the appellant has failed to perform its obligations as per the terms and conditions of the agreement. Before the Bank acts upon such invocation, the appellant approached the City Civil Court, Ahmedabad and obtained ex-parte ad-interim injunction, which was ultimately vacated after by-parte hearing. However, by virtue of interim protection granted by this Court, the said Bank Guarantee is still not encashed.

30. The law in respect of invocation of bank guarantee is well settled. There is no dispute about the proposition that the Bank guarantee is an independent contract between the Bank and the beneficiary thereof. 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. It is true 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 beneficiary and the obligee. The Bank is also not concerned with the question as to whether any of them have failed in their contractual obligations. In other words, the Bank must pay according to the tenor of its guarantee, on demand, without proof or condition. As per the terms of the bank guarantee, as indicated above, the Court has no hesitation in holding that the Bank guarantee is invoked by the respondent No. 2 in accordance with the terms of the bank guarantee. Looking to the entire facts and circumstances of the case and considering the background of the case, under which the bank guarantee is furnished, it cannot be said that the Bank guarantee is only against mobilization advance. It is a composite bank guarantee against mobilization advance as well as performance security. The respondent No. 2 has, therefore, rightly invoked the bank guarantee in question on appellant's failure to perform its obligations under the agreement.

31. It is also important to appreciate the second limb of argument of Mr. Joshi that there are certain exceptions to the settled principle of law with regard to invocation of bank guarantee and that is when there is a clear fraud of which the Bank has notice and a fraud of the beneficiary from which it seeks to benefit, the fraud must be of egregious in nature as to vitiate the underlying transactions. The second exception to the general rule of non-intervention is when there are

special equities in favour of injunction, such as when irretrievable injury or irretrievable injustice would occur, if such an injunction were not granted. While pleading fraud before the Court, Mr. Joshi has submitted that initially, the appellant was induced to enter into a 100% back to back contract. The contract was agreed to be entered into on turnkey basis. However, the appellant was compelled to agree to a changed contract under compulsion and the contract was converted into a labour contract. The initial representation made to the appellant by the respondent No. 2 is, therefore, based on falsity and when the appellant acted upon it and incurred substantial liability, the appellant was thereafter asked to agree to a changed contract. It was, therefore, clearly a case of fraud. Even at the time of invocation of the bank guarantee, dishonest and fraudulent attempt was made by the respondent No. 2 especially when substantial part of the mobilization advance was recovered and the appellant has to recover a large sum of amount against its running bills. There is no substance in this argument. The agreed terms of the amendment were mutually discussed and decided by both the parties to expedite the execution of the work. There was no compulsion on the appellant. The appellant could have said no to a changed contract. There is no material on record to suggest even remotely that the appellant has raised any objection at the time of entering into a new contract. Even the facts indicated that as per the original contract, the appellant started committing defaults and hence, it was necessary to enter into a new contract and hence, it cannot be said that the changed contract was entered into under any threat or compulsion.

32. Reliance placed by Mr. Joshi on the decision of this Court in the case of Wires and Cables India Private Limited v. Voltamp Transformers Private Limited, (supra), in no way takes the case of the appellant any further as in that case, the Court on facts has come to the conclusion that the terms of bank guarantee stipulated invocation in a specified manner whereas the petitioner has failed to abide by the terms of contract. Since invocation of bank guarantee was not in conformity with the manner laid down in contract, the Bank was justified in not making payment and in the meantime, the bank guarantees have expired.

33. The decision of the Apex Court in the case of National Highway Authority of India v. Ganga Enterprises and Anr. (Supra) would not render any assistance to the appellant. The proposition of law made therein is universally accepted and there is no dispute about it. It is settled law that a contract of guarantee is a complete and separate contract by itself. The law regarding enforcement of bank guarantee is very clear. If the enforcement is in terms of the guarantee, the Courts must not interfere with the enforcement of a bank guarantee. The Court can only interfere if the invocation is against terms of the guarantee or if there is any fraud. Courts cannot restrain invocation of an on demand bank guarantee in accordance with its terms by looking at the terms of the underlying contract. The existence or non-existence of an underlying contract become irrelevant when the invocation is in terms of the bank guarantee. This Court, on facts, and on plain reading of the bank guarantee, has come to the conclusion that the said bank guarantee is invoked in terms of the bank guarantee and no fraud is played by

the respondent No. 2. The Court has also found that the bank guarantee is absolutely irrevocable and unconditional and the bank is not under any obligation to inquire as to the basis upon which the appellant has determined to present the bank guarantee for its invocation before the Bank.

34. The decision of this Court in the case of Prem Conductors Private Limited v. State Bank of India and Anr. (Supra) also does not render any assistance to the appellant. The proposition made therein is no longer a good law in view of the decision of the Apex Court in the case of BSES Limited (Now Reliance Energy Limited) v. Fenner India Limited and Anr. (supra). This Court in Prem Conductors Private Limited's case has held that it is an admitted position that second defendant failed to import and consequently failed to supply the plaintiff with the necessary raw material, nor that the plaintiff could manufacture the same under the terms of the contract. Under the circumstances, therefore, it could not legitimately be said that it was the supplier (the plaintiff) who has not challenged the provisions of the contract. Since in the absence of the raw material, it could not possibly have manufactured any goods. This Court, therefore, held that this is a case on the particular facts where special equities constitute a relevant consideration. In BSES Limited's case (Supra), an attempt was made to expand upon the settled exceptions to the rule and certain propositions were placed for the consideration of the Court. A breach of faith can arise in certain situations such as a failure by the beneficiary to provide an essential element of the underlying contract of which the bond depends, a misuse by the beneficiary of the guarantee by availing to act in accordance with the purpose for which it was given, a total failure of consideration in the underlying contract, a threatened call by the beneficiary for an unassignable ulterior motive, or a lack of an honest or bonafide belief by the beneficiary that the circumstances, such as the poor performance, against which the performance bond had been provided, actually exist. A proposition was also canvassed before the Court that calling a performance guarantee for an oblique purpose is not permissible. Specifically, using it as a "bargaining chip", as a "deterrent" or in an "abusive" manner, would invite an injunction from the Court. The Court has not accepted the wide proposition of law laid down in the foreign judgments and held that whatever may be the law, as to the encashment of bank guarantees in other jurisdictions, when the law in India is clear, settled and without any deviation whatsoever, there is no occasion to rely upon foreign case law. The Court has also negated the arguments 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 obligee. The Court took the view that the bank guarantees were not given only for the purpose of security as against the advance paid to the obligee. Similarly, in the present case also, the bank guarantee was not given only against the mobilization advance but it was also given towards performance security.

35. The decision of this Court in the case of Centurion Bank Limited v. Larsen & Toubro Limited and Anr. (Supra) also does not render any assistance to the

appellant as in that case, admittedly, as per the term of the bank guarantee, the bank agreed that the bank guarantee in question during its currency and any extension thereof, shall remain in force and continue to have full effect until the said advance payment remains unadjusted against progressive bills of payment for supply of the equipment. The bank guarantee further stipulates that notwithstanding anything contained therein, date on which the advance amount is entirely adjusted against the progressive bills for payment furnished by the vendor, this guarantee shall stand cancelled forthwith. Considering the said clause in the bank guarantee, the Court came to the conclusion that at such adjustments being made, the liability under the suit agreement would diminish to that extent. Thus the suit guarantee cannot be said to be an absolute guarantee under which the defendant should make payment of the amount guaranteed on demand. In the present case, there is no such clause in the bank guarantee. It is indeed an absolute irrevocable and unconditional bank guarantee. It is not merely a bank guarantee against security against mobilization advance but it is also against performance security. Even otherwise, in *General Electrical Technical Services Company INC, v. Punj Sons (P) Limited and Anr.*, (Supra), it is held that the bank is not concerned with the outstanding amount payable by the beneficiary 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 in tact irrespective of the recovery of mobilization advance or the non-payment under the running bills. The 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.

36. Taking any view of the matter and since the Bank guarantee is invoked by the respondent No. 2 in terms of the bank guarantee and no fraud is played by the respondent No. 2, the learned City Civil Judge is justified in refusing to grant any injunction against invocation of the bank guarantee. The impugned order, therefore, does not call for any interference by this Court while exercising its appellate jurisdiction under Order 43, Rule 1(r) of the Code of Civil Procedure. There is no prima facie case nor any balance of convenience in favour of the appellant. There is also no irretrievable injury or injustice if the injunction as prayed for by the appellant is not granted in its favour.

37. The appeal, therefore, fails without any order as to costs.

38. Since the appeal is dismissed, Civil Application does not survive and it is accordingly disposed of.

38. On pronouncement of the judgment, Mr. Mitul Shelat, learned advocate appearing for the appellant prays for stay against the implementation of the order. He also prays for extension of interim relief which is in existence till this date, atleast for one week. Mr. Unwala, learned advocate appearing for the respondent No. 2 on the other hand, objected to grant of interim relief. He submitted that Bank guarantee is about to expire on 22.12.2009. Mr. Shelat

further submits that in case the said Bank Guarantee expires, the appellant undertakes to extend the period of bank guarantee.

39. Having heard learned advocates with regard to extension of interim relief and having considered submissions made with regard to extension of bank guarantee in case the time expires, the Court extends the interim relief which is already in existence till this date, against invocation of the bank guarantee, for the period of one week from today i.e. upto 18.11.2009, on condition that necessary undertaking to the above effect shall be filed before the Court within three days from today.