

(2018) 01 CAL CK 0128
In the Calcutta High Court
Case No : 10 of 2018

BHARAT HEAVY ELECTRICALS LTD

APPELLANT

Vs

INDIA POWER CORPORATION [HALDIA] LTD. & ANR.

RESPONDENT

Date of Decision : 12-01-2018

Acts Referred:

Constitution of India, Article 32 -
Remedies for enforcement of rights conferred by this Part
Arbitration and Conciliation Act, 1996, Section 9,
Section 7(3)(c

Citation : (2018) 01 CAL CK 0128

Hon'ble Judges : Ashis Kumar Chakraborty

Bench : Single Bench

Advocate : S.K. Kapoor, Ranjan Bachawat, Ravi Kapoor, Anubhav Sinha, Chiranjib Sinha, S. Pandya, Swaralipi Paul, Surajit Nath Mitra, Dhruba Ghosh, S. Banerjee, Goutam Chakraborty

Final Decision : Dismissed

Judgement

1. In this application under Section 9 of the Arbitration & Conciliation Act, 1996, as amended by Act 3 of 2016 (in short, "the Act of 1996") the petitioner has prayed for, inter alia, orders of injunction restraining the respondent no.2 bank from making any payment to the respondent no.1 covered by three bank guarantees, mentioned hereinafter.

2. The brief facts giving rise to the present application are that the respondent no.1 issued a letter of intent dated September 23, 2010 (hereinafter referred to as "the said letter of intent") in favour of Bharat Forge Infrastructure Limited (hereinafter referred to as "BFIL") for providing engineering, procurement, transportation, supply and installation of main plant (BTG) equipment and accessories for 3 X 150 MW coal based thermal power plant at Haldia, District-Purba Medinipore, West Bengal, (hereinafter referred to as "the said project") which was followed by a contract between the said parties containing an arbitration agreement. On September 24, 2010 BFIL issued a letter of award in

favour of the petitioner for execution of the said project between itself and the respondent no.1. Since, the respondent no. 1 had to pay all advance amount to the petitioner, who was to execute the contract relating to the said project the latter furnished two advance bank guarantees both dated September 29, 2010 of Rs. 91.60 crores and Rs. 6.90 crores, respectively and a contract performance guarantee also dated September 29, 2010 of Rs. 109.20 crores(captioned as security deposit-cum-performance guarantee) in favour of the former, through the respondent no. 2 bank. On September 29, 2010 the amount of the security deposit-cumperformance bank guarantee was enhanced by the respondent no. 2 bank at Rs. 11,13,730,000/-. Subsequently, with consent of all parties, the contract of BFIL in respect of the said project was assigned in favour of the petitioner on the similar terms and conditions. On June 2, 2015 an agreement was entered into between the petitioner and the respondent no. 1 for execution of the said project by the petitioner. As per clauses 13.2.2 and 13.2.3 the said agreement dated June 02, 2015 the petitioner was required to furnish an unconditional bank guarantee towards contract performance security in respect of 10% of contract price and a bank guarantee against the amount of advance payment in favour of the petitioner. Therefore, the petitioner kept all the three bank guarantees dated September 29, 2010 furnished by it in favour of the respondent no. 1 renewed and as mentioned hereinafter, the same remained valid till June 30, 2018.

3. In this application, the petitioner's case is that the execution of the said project involved installation of commissioning of three units and although as per the original letter of intent dated September 23, 2010 the stipulated time for completion of the said project was thirty(30) months from the effective date but, as the respondent no. 1 committed various defaults in performing its reciprocal obligations, there was no scope for completion of the said project within the stipulated time. Accordingly, the respondent no. 1 from time to time, extended the time for completion of the said project, without imposing any liquidated damages upon the petitioner. Since the petitioner continued to proceed with the progress of the work under the said project within its limits as per the agreement between the parties, the amount of the said bank guarantees dated September 29, 2010 against advance were also reduced from time to time. Although the petitioner was not responsible for the delay in execution of the work of the said project, it went on extending all the three bank guarantees till December 21, 2017. On December 20, 2017 the respondent no. 1 requested the petitioner to extend all the three bank guarantees for a further period of six months. On the same date the respondent no. 1 also issued a communication to the respondent no. 2 bank informing it of the request to the petitioner to extend all the said bank guarantees and that in the event there is any failure on the part of the petitioner to extend the said bank guarantees, the bank should remit the amount covered by the said bank guarantees to its bank account. By a letter dated December 21, 2017 issued to the respondent no.2 bank, the respondent no.1 invoked all the said three bank guarantees. Thereafter, challenging the invocation

of the said three bank guarantees by the respondent no.1, the petitioner approached the Hon"ble Supreme Court under Article 32 of the Constitution of India. By an order dated December 26, 2017 the Hon"ble Supreme Court allowed the petitioner to withdraw the writ petition and to approach the appropriate Court. On December 27, 2017 the petitioner filed an application, presently numbered as A.P. No. 1157 of 2017, under Section 9 of the Act of 1996, before a learned Single Judge of this Court, for an order of injunction restraining the respondent no.2 bank from making any payment to the respondent no.1 under any the three bank guarantees. In the said application on December 27, 2017 a learned Single Judge of this Court held that the petitioner's letter for invocation does not spell out the condition precedent for invocation contained in the instruments of bank guarantee and passed an ad interim order directing stay of the invocation process initiated by the respondent no.1 till January 11, 2018 or until further order whichever is earlier, subject to the condition that all the bank guarantees shall be extended by the petitioner. By the said order it was, however, clarified that the said interim order shall not prevent the respondent no.1 from re-invoking the said bank guarantees in accordance with the terms thereof during the pendency of the said application. On December 28, 2017 the petitioner caused all the said three bank guarantees being extended by the respondent no.2 bank upto June 30, 2018. However, on December 28, 2017 itself the respondent no.1 issued three separate letters to the respondent no.2 bank thereby, re-invoking both the said bank guarantees against advance dated September 29, 2010 and the said bank guarantee for security deposit-cum-performance guarantee dated September 29, 2010 and called upon the respondent no.2 bank to immediately remit the proceeds bank guarantees to its account within December 30, 2017. On December 29, 2017 the petitioner moved a Special Leave Petition being SLP (Civil) Diary Nos.42647/2017, before the Hon"ble Supreme Court wherein it had challenged the order dated December 27, 2017 passed by the learned Single Judge in so far as the same allowed the respondent no.1 to re-invoke the said bank guarantees, as also the subsequent re-invocation of the said bank guarantees by the respondent no.1 on December 28, 2017. However, by an order dated December 29, 2017 the Hon"ble Supreme Court did not entertain the said Special Leave Petition and granted liberty to the petitioner to mention the pending matter before the Hon"ble Acting Chief Justice of this Court if it so desired. Thereafter, the petitioner has filed this application challenging the re-invocation of the said three bank guarantees by the respondent no.1 and praying for the relief already mentioned above.

4. It was strenuously argued by Mr. S.K. Kapoor, learned Senior Advocate for the petitioner that so far as the bank guarantee for security deposit-cum-performance guarantee dated September 29, 2010 is concerned, the same is a contract of indemnity providing for the right of the respondent no.1 to be indemnified by the respondent no.2 bank against any loss or damage suffered by the respondent no.1, by reason of any breach committed by the petitioner of any term and conditions of the said letter of intent dated September 23, 2010. In

support of his contention that the said bank guarantee for security-cum-performance guarantee is a contract of indemnity, Mr. Kapur relied on the decision of the Supreme Court in the case of State Bank of India vs. Mula Sahakari Sakhar Karkhana Ltd. reported in (2006) 6 SCC 29. By referring to the various clauses of the said bank guarantee for security deposit-cum-performance guarantee, he strenuously urged that, in any event, since the said bank guarantee is a conditional bank guarantee, the respondent no.2 can entertain any claim for encashment of the same subject to the condition that in the letter of invocation the respondent no.1 mentioned the amount of loss and damage suffered by it on account of any breach of the contract committed by the petitioner and not otherwise and the bank is satisfied with such claim. It was contended that from the bare reading of the said letter of re-invocation dated December 28, 2017 relating to the said bank guarantee for security deposit-cum-performance guarantee, it is evident that the respondent no.1 has not mentioned to have suffered any loss or damage on account of any breach of the contract committed by the petitioner. Thus, according to Mr. Kapoor, in the letter of re-invocation dated December 28, 2017 the essential term of the said security deposit-cum-performance bank guarantee for invocation thereof has not been fulfilled by the respondent no. 1 and consequently, the respondent no.2 bank cannot make any payment to the respondent no.1 in terms of the said letter of re-invocation. In support of such contention, reliance was placed on a Division Bench decision of this Court in the case of The Minerals & Metals Trading Corporation of India Ltd. vs. Surajbalaram Sethi & Anr. reported in 74 CWN 991 and a Single Bench decision of this Court in the case of M/s. Banerjee & Banerjee vs. Hindusthan Steel Works Construction Ltd. & Ors. reported in AIR 1986 Cal 374. The petitioner also relied on two single Bench decisions of Delhi High Court in the cases of Mahalingam Shelly Co. vs. NPC Corporation reported in 1990 RLR 410 and Puri International (P) Ltd. vs. National Building Construction Co. Ltd. reported in (1998)94 Comp Cases 528 (Delhi).

5. While challenging the invocation of the two bank guarantees against advance both dated September 29, 2010 it was submitted on behalf of the petitioner that although the original bank guarantees against advance were issued for Rs.91.60 crores and Rs.6.90 crores, respectively but during the execution of the contract the value of the said bank guarantees were reduced to Rs.30 crores and Rs.3.45 crores, respectively. It was urged that both said bank guarantees against advance provide for issuance of semi-annual certificates/notices by the respondent no. 1 to the respondent no. 2 bank notifying the latter of the reduction of extent of the amount of the bank guarantees, but none of the purported re-invocation letters dated December 28, 2017 discloses issuance of any such notice/certificate. It was argued that once again, even the purported re-invocation of both said bank guarantees against advance is not as per terms of the said bank guarantees and the same cannot be honoured by the respondent no. 2 bank. Relying on the decision of the Supreme Court in the case of Hindustan Construction Co. Ltd. vs. State of Bihar reported in (1999)8 SCC 436

it was strongly contended that in the present case, when the respondent no. 1 has purportedly invoked all the three bank guarantees contrary to the terms thereof, this Court would pass an order of injunction restraining the respondent no. 2 to pay any money to the respondent no. 1 in terms of any of the purported letters of re-invocation dated December 28, 2017.

6. The petitioner also stressed that the re-invocation of all the three bank guarantees are also vitiated by fraud, inter alia, on the ground that on December 28, 2017 when all the bank guarantees were extended upto June 30, 2018 on the same day the respondent no. 1 issued the letters of reinvocation, that too without withdrawing their earlier letter of invocation dated December 21, 2017. It was further submitted that from the records of the case it would appear that the respondent no.1 has not only miserably failed to perform its reciprocal obligations under the contract and has wrongfully withheld payment of huge amount of the bills from the petitioner. Urging these grounds it was contended that respondent no. 1 has fraudulently invoked all the three bank guarantees with the intention to get away with the proceeds of the said bank guarantees amounting to more than Rs.144 crores and, thereafter, close its business and refer itself to National Company Law Tribunal under the Insolvency Code of 2016. Finally, the petitioner relied on the decision of a learned single Judge of the Madras High Court in the case of Gammon Vs. Chennai Metro Rail Ltd. reported in (2015) 5 CTC 278 and submitted that although the respondent no.2 bank is not a party to the arbitration agreement invoked in this application but inasmuch as, all the said bank guarantees were furnished by the petitioner for securing discharge of its obligation under the contract relating to the said project, the respondent no.2 bank has been rightly impleaded in the present application and the petitioner is entitled obtain relief against the respondent no. 2 bank restraining itself from making any payment to the respondent no. 1 under any of the three bank guarantees.

7. Urging all the above grounds Mr. Kapoor pressed for an ad-interim order of injunction be passed restraining the respondent no. 2 bank from making any payment to the respondent no. 1 under any of the three bank guarantees.

8. On the other hand, Mr. S.N. Mitra, learned Senior Advocate opposing this application on behalf of the respondent no.1 first submitted that after re-invocation of all the said three bank guarantees on December 28, 2017 the petitioner's earlier invocation letter dated December 21, 2017 has lost all its significance and the petitioner is not pressing the said letter of invocation. He, however, raised strong objection to the maintainability of this application. According to Mr. Mitra, it is well settled law that a bank guarantee is a separate contract between the bank and the beneficiary and the present application filed by the petitioner, while invoking the arbitral agreement between itself and the respondent no. 1, by impleading the respondent no.2 is not maintainable. In this regard, he referred to a single Bench decision of the Madras High Court in the case of Befesa Agua, Sau CIF and Ors. vs. IVRCL Infrastructure and Projects Ltd.

& Ors. reported in 2013(3) CTC 414.

9. With regard to the challenge thrown by the petitioner against the re-invocation of the said bank guarantees against advance, by referring to the letters dated December 28, 2017 (appearing at pages 482 and 484 of the application) Mr. Mitra submitted that in the very first paragraph of both the said letters the petitioner expressly mentioned about the present reduced amount covered by the said bank guarantees to be at Rs.30 crores and Rs.3.45 crores, respectively. He further submitted that bank guarantees dated September 29, 2010 against advance contemplates fulfilment of two conditions for invocation of the same; the first is that the petitioner would make a statement in the letter of invocation to have paid the advance amount and secondly the contractor, the respondent no.1 herein has failed to fulfil its contractual obligation stipulated in the contract. By referring to the letters of re-invocation dated December 28, 2017 it was pointed out that the petitioner has issued the same in conformity of the said conditions. He further submitted that both the said bank guarantees in clear and unambiguous terms contemplated that any notice from the respondent no.1 to the bank mentioning that the respondent no.1 had paid advance amount to the petitioner and the latter has failed to fulfil its contractual obligation would be a conclusive evidence of the breach by the petition contractor and the same shall be binding upon the bank notwithstanding any difference between the owner and contractor or any dispute pending before any Court. Therefore, according to Mr. Mitra, both the said bank guarantees against advance are unconditional bank guarantees, which have been invoked by the respondent no.1 in terms thereof and none of the contentions raised by the petitioner to challenge the re-invocation of the said bank guarantees against advance has any merit.

10. So far as the re-invocation of the security deposit-cum- performance bank guarantee is concerned, Mr. Mitra submitted that in the recital of the said instrument it is mentioned in the said guarantee that the same was issued by the respondent no.2 in lieu of cash security deposit for the due fulfillment by the contractor the terms and conditions of the letter of intent dated September 23, 2010 and the respondent no.2-bank undertook to indemnify and the keep the respondent no.1- Corporation indemnified against any loss or damage caused to or suffered by it by reason of any breach by the petitioner-contractor. However, according to Mr. Mitra, the operative portion of the said instrument in clear and unambiguous term mentioned that a written demand from the respondent no. 1 to the respondent no. 2 bank mentioning any failure on the part of the petitioner to perform any part of the contract shall be conclusive evidence of the breach by the petitioner and the respondent no. 2 bank shall make payment to the respondent no. 1, the amount mentioned in the said written demand. It was argued for the respondent no. 1 that the operative portion of the said instrument dated September 29, 2018 makes it clear, beyond any doubt, that the said instrument is an unconditional performance bank guarantee. By referring to clause 13.2.2 of the commercial conditions of the contract the learned counsel further submitted that under the contract, the petitioner was required to furnish

an unconditional bank guarantee towards contract performance security in respect of the 10% of the contract price and in paragraphs 7 and 8 of the petition it is the specific case of the petitioner that it issued the contract performance guarantee of Rs. 111,37,30,000/- under the said clause 13.2.2 of the contract. It was, therefore, urged on behalf of the respondent no. 1 that the contention raised on behalf of the petitioner that the said bank guarantee is a guarantee for indemnity is devoid of any merit and the said an unconditional performance bank guarantee has been lawfully re-invoked by the respondent no.1 by mentioning the grounds of default committed by the petitioner in performing the contract.

11. Relying on the decisions of the Supreme Court in the cases of BSES Ltd.-versus-Fenner India Ltd. & Anr. reported in (2006) 2 SCC 728 and in the case of Agri Fresh Ltd. -versus- Mahaboob Sherif & Ors. reported in (2016) 14 SCC 517 and the Division Bench decision of this Court in the case of Hisdusthan Paper Corporation Ltd. vs. Keneilhouse Angami reported in 1990(1) Cal LT(HC) 200 Mr. Mitra submitted that it is well settled law that a bank guarantee is an independent and separate contract between the bank and the beneficiary thereof, the bank is always obliged to honour an unconditional bank guarantee when called upon by the beneficiary and it is no function either of the bank or the Court to enquire as to whether the party at whose instance the bank guarantees was issued had actually perform the contract or not.

12. It was further submitted that the cases of the Minerals and Metals Trading India Ltd. (supra) and M/s. Banerjee and Banerjee have no bearing in this application. Mr. Mitra contended that after considering all authorities on the point of the right of a beneficiary of a bank guarantee to invoke the same, the Division Bench of this Court in the case of Larsen & Toubro Ltd. -versus- Visa Power Ltd. reported in 2013(1) CHN(Cal) 492 held that the said decision in the case of Minerals and Metals Trading (supra) is no more the good law. Citing the decision of the Division Bench of this Court in the case of Keneilhouse Angami (supra), it was pointed out that the Single Bench decision of this Court in the case of M/s. Banerjee and Banerjee (supra) was held to be no longer a good law on the ground that the learned Single Judge of this Court passed the said decision without considering the previous Division Bench decisions in the cases of Allied Resins and Chemicals Ltd. vs. Minerals and Metals Trading India Corporation Ltd. reported in AIR 1986 Cal 346 and in the case of Centax(India) Ltd. -versus- Vinmar Impex(Inc.) Ltd. reported in AIR 1986 Cal 356. The respondent no. 1 also relied on the said Division Bench decision of this Court in the case of Keneilhouse Angami (supra) for the proposition that arbitration clause in the parent contract cannot include the question as to whether the terms and conditions of the bank guarantee issued by a banker in favour of the beneficiary are enforceable or not and, as such, it was once again reiterated that the present application filed by the petitioner by impleading the respondent no. 2 bank is not maintainable.

13. It was also argued for the respondent no.1 that in the facts of the present case, the said letters of re-invocation dated December 28, 2017 were issued to the respondent no.2 bank in terms of the leave granted by this Court by the said order dated December 27, 2017 and by no means such re-invocation of the said bank guarantees on December 28, 2017 can be described to be vitiated by an fraud. It was submitted that the allegations of fraud committed by the respondent no.1 in reinvocation of the said bank guarantees by the petitioner are absolutely vague and the same are not supported by any cogent particulars.

14. With regard to the decision of the Supreme Court in the case of Hindustan Construction Co. Ltd. vs. State of Bihar (supra) the respondent no. 1 submitted that in the said case since the bank guarantee was not invoked by the person authorised under the guarantee to invoke the same and therefore, the Supreme Court held that the said bank guarantee was not invoked in terms thereof but, in the facts of the present case the said decision has no application.

15. So far as the decision of the Supreme Court in the case of Mula Sakhar Karkhana Ltd (supra) Mr. Mitra argued that the operative portion of the instrument issued by the bank, as quoted in paragraph 9.1 of the said decision clearly mentioned that the instrument issued by the bank was a contract for indemnity and, therefore, the said decision has no application in the present case, when the terms of the said security deposit-cum-performance guarantee discloses the same to be a performance bank guarantee, which is also the case of the petitioner in its petition.

16. It was next submitted that it is well settled law there are two exceptions when the Court can restrain the beneficiary of a bank guarantee from receiving the amounts covered by the bank guarantee, firstly, when there is any egregious fraud vitiating the underlying transaction and secondly, when encashment of the bank guarantees would create special equities in favour of the party who issued the bank guarantee. It was urged that in the present case, the petitioner has not been able to lay any factual foundation in support of any egregious fraud being committed by the respondent no. 1. The respondent no.1 further submitted that in this case the petitioner has not been able to create any special equity, particularly an "irretrievable injury" in its favour. If in the arbitral proceeding between the petitioner and the respondent no. 1 it is held by the arbitral Tribunal that the petitioner has not committed any breach of its obligations under the contract it shall have sufficient remedy to obtain an award against the respondent no. 1 for refund of the entire proceeds under all the three bank guarantees from the respondent no. 1.

17. Urging the above contentions, Mr. Mitra submitted that not only the present application, as framed by the petitioner is not maintainable even otherwise the petitioner cannot obtain any relief as prayed for in this application.

18. It was submitted by the respondent no. 2, bank that it does not have any say with regard to its impleadment in this application and it shall abide by any

direction passed by this Court in this application.

19. In reply Mr. Ranjan Bachawat, learned Senior advocate appearing for the petitioner, submitted that the Division Bench decision of this Court in the case Larsen & Toubro Ltd. (supra) does not record any reason to hold that the earlier Division Bench decision of this Court in Minerals & Metals Trading Corporation of India (supra) is no more a good law. He further submitted that even the Division Bench decision of this Court in the case of Hindustan Paper Corporation Ltd (supra) also does not record which part of the earlier Single Bench decision of this Court in the case of M/s. Banerjee & Banerjee (supra) is not correct. He argued that the decision of the learned Single Judge of the Madras High Court in the case of Befesa Agua (supra) was stayed by the Division Bench of the same Court and the same would be evident from the decision of the learned Single Judge of the same High Court in the case of M/s. Gammon -OJSC-Mosmetrostroy JV. Therefore, the said decision of the Single Bench of the Madras High Court in the case of Befesa Agua (supra) has no relevance in this case. According to Mr. Bachawat, in the present case, the impleadment of the respondent no.2 bank is absolutely correct. In this regard, he relied on the provisions contained in Sections 7(3)(c) of the Act of 1996 and submitted that in the arbitral proceeding if the bank does not raise any objection to its impleadment, it should be deemed that the bank is a party to the original arbitration agreement between the petitioner and the respondent no.1. Therefore, the Division Bench decision of this Court in the case of Hindustan Paper Corporation Ltd. (supra) rendered under the Arbitration Act, 1940 cannot be applied in this case.

20. I have carefully considered the materials on record and the arguments advanced by the learned counsel appearing for the respective parties. From the ratio of the aforementioned decision of the Division Bench of this Court in the case of Keneilhouse Angami(supra), as well as the decisions of the Supreme Court in the cases of BSES Ltd.(supra) and Adani Agri Fresh Ltd. (supra), it is clear that the law relating to invocation of bank guarantee is well settled. A bank guarantee is an independent contract between the bank and the beneficiary thereof and in case of an unconditional bank guarantee, the bank is always obliged to honour its guarantee. The bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. When an unconditional bank guarantee is invoked by the beneficiary, it is no function either of the bank or the Court to enquire as to whether due performance of the contract had actually been done by the beneficiary or not. The necessary corollary of such well settled principle of law is that the bank which issues an unconditional bank guarantee cannot be bound by any arbitration agreement between the beneficiary of the bank guarantee and the party at whose instance the bank guarantee is issued. Thus, I find that the respondent no. 1 is correct in its contention that the present application as framed by the petitioner by impleading the respondent no. 2 bank is not maintainable and the petitioner cannot obtain relief against the respondent no. 2 bank restraining it from making the amount claimed by the petitioner under the

bank guarantees involved herein. Accordingly, I am unable to convince myself to accept the decision of a learned Single Judge of the Madras High Court in the case of Messrs Gammon - OJSC Mosmetoostroy JV (supra), nor do I find any merit in the contention raised on behalf of the petitioner that the arbitration agreement between itself and the respondent no. 1 is also binding upon the respondent no.2 bank. This is more so, in view of the Division Bench decision of this Court in the case of Hindusthan Paper Corporation Ltd. (supra). Although the said Division Bench decision was rendered under the Arbitration Act, 1940, but in view of the well settled principle of law relating to invocation of unconditional bank guarantee by the Supreme Court even in the cases of BSES Ltd.(supra) and Adani Agri Fresh Ltd., as discussed above I do not find any reason to hold that the enactment of the Act of 1996 renders the said Division Bench decision of this Court no more applicable. Therefore, I find that in this application the petitioner is not entitled to obtain any order of injunction as against the respondent no.2 bank.

21. With regard to the ground of challenge to the re-invocation of all the said three bank guarantees on the ground of fraud as contended by the petitioner, I find that by the said order dated December 27, 2018 passed in A.P. No.1157 of 2017 leave was granted to the respondent no.1 to reinvoke the said three bank guarantees in accordance with the terms thereof, during the pendency of the said application. Thus, I am unable to accept the contention of the petitioner that re-invocation of the said bank guarantee is either fraudulent or illegal only on the ground that the same was done without withdrawing the earlier invocation dated December 21, 2017 and after all the bank guarantees were renewed on December 28, 2017.

22. In the instant case, the learned senior counsel for the petitioner did not make out any case disputing that the said bank guarantees against advance dated September 29, 2010 are unconditional bank guarantees. The only ground urged by the petitioner to challenge invocations of the said bank guarantees against advance was that the same are not in terms of the said instruments. According to the petitioner, the invocations of the said bank guarantees against advance are fraudulent and not in terms of the said bank guarantees as the respondent no.1 did not issue the semi-annual certificate/notification to the bank of the reduction of the original bank guarantee from time to time.

23. From a reading of the said bank guarantees against advance it is clear that for a valid letter of invocation of the same the respondent no.1 must mention two facts, first that it has made paid the advance amount to the petitioner and second that the petitioner has failed to fulfil its contractual obligations stipulated in the said contract and any notice issued by the respondent no.1 with such statements shall be a conclusive evidence of the breach of the petitioner and with the receipt of such notice the respondent no.2 bank is obliged to make payment of the amount claimed by the respondent no.1 in the letter of invocation. Both the said bank guarantees against advance in clear and

unambiguous terms further mentioned that the statement made by the respondent no. 1, as mentioned above shall be conclusive and that any such demand made by the respondent no.1 on the bank shall also be conclusive and binding notwithstanding any difference between the owner and the contractor or any dispute pending before any Court, Tribunal, Arbitrator or any other authority. Therefore, there is no scope for any doubt that both bank guarantees against advance are unconditional bank guarantees. In the letters of re-invocation both dated December 28, 2017, the respondent no.1 in clear terms mentioned the reduced amount of the said bank guarantees, as also that it has made payment of the advance money to the petitioner and the petitioner has failed to fulfil its obligations under the contract. Under these circumstances, I do not find any merit in the contention raised by the petitioner that any of the letters of re-invocation dated December 28, 2017 invoking the bank guarantees against advance is either fraudulent or not in terms of the said guarantees. Accordingly, the petitioner's prayer for an ad interim order of injunction restraining the respondent no.1 to receive the proceeds of the said bank guarantees against advance fails.

24. In order to consider the challenge of the petitioner against the re-invocation of the said security-cum-performance bank guarantee dated September 29, 2010, it is necessary to have a closure look at the said bank guarantee. In this regard, the relevant portion of the said security deposit-cum-performance guarantee is extracted hereinbelow.

"BANK GUARANTEE FOR SECURITY

DEPOSIT-CUM-PERFORMANCE GUARANTEE

Bank Guarantee No.140GOPG102720005 DT. 29.9.2010

..... we Canara Bank Prime Corporate Branch II, 2nd Floor World Trade Tower Bara Khamba Lane, New Delhi-110001 a body constituted under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, having Head Office at 112, J.C. Road, Bangalore (hereinafter called "the Guarantor") do hereby undertake to indemnify and keep indemnified the Corporation to the extent of Rs.109.20 crores (Rupees One Hundred Nine crores Twenty Lacs) only against any loss or damage caused to or suffered by the Corporation by reason of any breach by the Contractor of any of the terms and conditions contained in the said Letter of Intent of which breach the opinion of the Corporation shall be final and conclusive.

AND (1) WE, Canara Bank Prime Corporation Branch II, 2nd Floor World Trade Tower Bara Khamba Lane, New Delhi - 110001 a body constituted under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, having Head Office 112,J.C. Road, Bangalore DO HEREBY Guarantee and undertake to pay forthwith within three working days on written demand to the Corporation such sum not exceeding the said sum of Rs.109.20 crores (Rupees One Hundred Nine crores Twenty Lacs) only as may be specified in such demand in the event

of the Contractor failing or neglecting to execute fully efficiently and satisfactorily the order for engineering, procurement, transportation and supply to site of main plant (BTG) equipments and accessories for 3x150MW thermal power plant at Haldia PLACED WITH IT (the work tendered for by it) within the period stipulated in the said Letter of Intent in accordance with terms and conditions contained or referred to in the said Letter of Intent or in the event of the Contractor refusing or neglecting to maintain satisfactory operation of the equipment or work or to make good any defect therein or otherwise to comply with and conform to the design, specification or other terms and conditions contained referred to in the said Letter of Intent. The said written demand shall be treated by us as conclusive evidence of breach by the Contractor of any of the terms and or conditions contained in the said Contract entitling to make a claim hereunder....."

25. From a reading of the instrument of the said security deposit-cum-performance guarantee dated September 29, 2010 as quoted above, it is evident that in the recital portion of the said guarantee the bank mentioned that it undertook to indemnify the respondent no.1 and to keep it indemnified against any loss or damage caused to or suffered by the latter by reason of any breach by the petitioner of any terms and conditions of the said Letter of Intent. However, from the operative portion of the said bank guarantee it is clear that by issuing the said bank guarantee the bank undertook to the respondent no.1 to forthwith pay, within three working days of the written demand issued by the latter, that the petitioner contractor has failed and/or neglected to perform the said letter of intent dated September 29, 2010 and such written demand shall be treated by the bank as conclusive evidence of breach committed by the petitioner contractor of any terms and conditions contained in the said contract entitling the respondent no. 1 to make a claim thereunder. Thus, it is clear that the said guarantee is an unconditional bank guarantee performance bank guarantee and not a contract of indemnity. Even, otherwise, as pointed out by the respondent no.1 clause 13.2.2 of the contract provides for the obligation of the petitioner to furnish an unconditional bank guarantee towards contract performance security in respect of 10% of the contract price and in the petition it is the petitioner's own case in terms of the contract it furnish the said security deposit-cum-performance guarantee as contract performance guarantee. Therefore, I am unable to accept the contention raised by the petitioner that the said security deposit-cum-performance guarantee dated September 29, 2010 is not a performance guarantee and the same is a deed of indemnity. When the said security deposit-cum-performance guarantee dated September 29, 2010 expressly contemplated that the written demand made by the respondent no.1 to the bank with a statement that the petitioner has failed to perform its obligations relating to the contract of the said project shall be treated as a conclusive evidence of breach by the petitioner of any of the terms and conditions contained in the contract, I am unable to accept the contention of the petitioner that the said security deposit-cum-performance guarantee is a conditional bank

guarantee.

26. As discussed above, as per the decision of the Division Bench of this Court in the case of Keneilhouse Angami (supra) and the decisions of the Supreme Court in the case of BSES Ltd. and Adani Agri Fresh Ltd. (supra) that a bank guarantee is an independent contract between the bank and the beneficiary thereof and the bank is always obliged to honour unconditional, irrevocable guarantee issued by it in favour of the beneficiary and the dispute between the beneficiary and the party at whose instance the bank has given the guarantee is immaterial and of no consequence. In view of the said subsequent decisions, the Division Bench of this Court in the case of M & M Trading Corporation (supra), or the Single Bench decision in the case of M/s Banerjee & Banerjee is not binding upon this Court, more so, when in the case of Larsen & Toubro Ltd. (supra) the subsequent Division Bench of this Court has held that the decision in M & M Trading Corporation (supra) is no longer a good law particularly in a case where the performance guarantee is given unconditionally. For the same reason, I am unable to accept the ratio of the single Bench decisions of the Delhi High Court and the Madras High Court in the cases of Shelly Co. (supra) or Puri International (P) Ltd. (supra).

27. It is well settled law that there are two exceptions when the Court can pass an order restraining encashment of an unconditional bank guarantee by a beneficiary, namely, when the underlying contract is vitiated by any fraud of an egregious nature or when encashment of the bank guarantee would create special equities in favour of the party issuing the bank guarantee, that is, if the latter suffers an irretrievable injury. Having considered the averments made in the petition, I find the respondent no. 1 is correct in its contention that the petitioner has not been able to substantiate that in the present case the contract is vitiated by any fraud of an egregious nature. Further, in the arbitral proceeding between the petitioner and the respondent no. 1, the petitioner shall have the remedy to prove that the delay in completion of the contract is attributable to it and to obtain refund from the respondent no. 1, the entire proceeds of all the three bank guarantees. Therefore, it cannot be said that the petitioner has any special equity in its favour to obtain an order of injunction restraining the respondent no. 1 from receiving the amounts covered by the said all the said three bank guarantees from the bank.

28. In the case of Hindusthan Construction Co. Ltd. vs. State of Bihar (supra) the Supreme Court held that when the bank guarantee was not invoked by the person specifically mentioned therein such invocation was not in terms of the bank guarantee and the bank is not liable to honour the bank guarantee as per the letter of invocation. In the present case, I find that the said decision of the Supreme Court in the case of Hindusthan Construction Ltd. (supra) does not render any assistance to the petitioner.

29. From a reading of the decision of the Supreme Court in the case of Mula Sahakari Sakhar Karkhana Ltd. (supra), particularly paragraph 9.1 thereof, it is clear that operative portion of the instrument in the said case and the terms of

the said security deposit-cum-performance guarantee dated September 29, 2010 issued by the bank in the present case are totally different and in the said case the guarantee which was issued by the bank was a Deed of Indemnity. Therefore, the said decision of Mula Sahakari Sakhar Karkhana Ltd. (supra) has no application in the present case.

30. For all the reasons as aforesaid, I do not find any merit in the contentions raised by the petitioner to challenge even the reinvocation of the said security deposit-cum-performance guarantee dated September 29, 2010.

31. In the facts of the present case as discussed above, I find that the petitioner has not been able to make out any prima facie case to obtain any ad interim order in this application. Even the balance of convenience is also not in favour of the petitioner. Accordingly, the prayer of the petitioner for any ad-interim order restraining the respondent no. 1 from receiving any amount under the said bank guarantees against advance both dated September 29, 2010 or under the said security deposit- cum- performance guarantee dated September 29, 2010 is rejected. As prayed for by Mr. Mitra let the respondent no. 1 file its affidavit-in-opposition to this application within two weeks from date; reply, if any, thereto be filed within a week thereafter.

32. Let, this application appear under the heading "Adjourned Motion" after four weeks.

33. Urgent certified photostat copies of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.