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(2012) 08 DEL CK 0108

In the Delhi High Court

Case No : CS (OS) No. 583 of 2010

Bharat Heavy Electricals Ltd. APPELLANT

Vs

Mass Global Investment Company and Others RESPONDENT

Date of Decision : 31-08-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 3, Order 39 Rule 1, Order 39 Rule 2, 151

Contract Act, 1872 — Section 126, 17

Citation : (2012) 7 AD 275

Hon'ble Judges : V.K. Shali, J

Bench : Single Bench

Advocate : A.S. Chandhiok, ASG with Mr. Bhagat Singh, Mr. Vidit Gupta, Mr. Akshay Patani and Ms. Harlen Singh, for the Appellant; N.K. Kaul, with Ms. Diya Kapur, for Defendant No. 1, for the Respondent

Final Decision : Dismissed

Judgement

V.K. Shali

IA No. 4049/2010

1. This order shall dispose of an application under Order XXXIX Rules 1 and 2 read with Section 151 of the Code of Civil Procedure, 1908 (hereinafter referred to as "CPC"), by virtue of which the plaintiff had originally prayed for passing an ad interim injunction restraining the defendant No. 1 from encashing Advance Payment Guarantee-1, Advance Payment Guarantee-2 and the Performance Bank Guarantee from the Defendant No. 2. It was also prayed that the defendant No. 2 be restrained from making any payment to the defendant No. 1 in pursuance to the said Guarantees. The matter had come up for hearing on 27.3.2010 when the Court had recorded the statement of the Learned Counsel for the defendant No. 1 that it shall maintain status quo vis-?-vis all the three Bank Guarantees. It was also observed that the said order shall be applicable qua the defendant No. 2 also. This status quo order was to continue till the next date of hearing unless

otherwise ordered. Although no specific order thereafter has been passed, extending the order, but the statement of the Learned Counsel for the defendant No. 1 has been treated as if the stay order was in operation till date.

2. One of the issues which is being dealt with by the present order is as to whether the said stay order or rather the statement of the Learned Counsel for defendant No. 1 prohibiting itself from encashing the Bank Guarantees is to be continued or not or in other words, whether an ad interim order restraining the defendant No. 1 from encashing the three bank guarantees and the defendant No. 2 from making any payment to the defendant No. 1 in pursuance to the said Bank Guarantees could be passed.

3. This order shall also dispose of an application bearing IA No. 2852/2011 filed by the plaintiff during the pendency of the suit, by virtue of which it has been prayed that (1) the suit itself may be disposed of in terms of the Settlement Agreement dated 22.8.2010 arrived at between the plaintiff and the defendant No. 1 and/or alternatively allow the plaintiff to withdraw the present suit in terms of the prayer (1) above.

4. Briefly stated, the facts of the case are that the plaintiff, Bharat Heavy Electricals Ltd. (hereinafter referred to as "BHEL"), is a company incorporated under the provisions of the Indian Companies Act, 1956 and is owned and controlled by the Government of India. The plaintiff company is a leading manufacturer and engineering public sector enterprise engaged in the business of design, manufacturing and installation services of power generating equipment on turnkey basis for Thermal, Hydro, Gas and Nuclear Power Plants, both in domestic and international markets. The Suit has been filed on behalf of the company through one of its authorized representatives.

5. The defendant No. 1, Mass Global Investment Company (hereinafter referred to as "MGI") is a company registered under the law of Jordan, having its Registered Office at Amman, the capital of Jordan. The defendant No. 2 is the State Bank of India (hereinafter referred to as "SBI"), having its Registered Office at Jawahar Vyapar Bhawan, 11th Floor, Tolstoy Marg, New Delhi. It is the case of the plaintiff that the defendant No. 1 was in the process of acquiring a turnkey basis power plant being 4xFr9E Gas Turbine in Sulaymaniyah Power Project, Kurdistan, Iraq (hereinafter referred to as the "Project") and it was desirous of hiring the services of a contractor who had the requisite skill, know-how and the resources for design, supply, installation, testing, starting, commissioning and operating the project of such magnitude. In pursuance to the said requirements of the defendant No. 1, it contacted the plaintiff, which was having all such requisite skills. The negotiations between the plaintiff and the defendant No. 1 resulted in signing of a contract No. 4/2007 on 4.3.2007 for turnkey execution of the Project (hereinafter referred to as the "Contract"). The contract was allegedly signed in New Delhi and thus it has been claimed that cause of action has accrued within the jurisdiction of this Court. Further, the contract was amended on 4.8.2007, so as to make certain technical annexures

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and internal orders as a part of the contract itself.

6. It has been alleged that in terms of the contract, Article 2 lays down for carrying out the obligations by the contracting parties in accordance with the principles of good faith and fair dealings. In terms of Article 4.1, the scope of the contract and the services to be rendered by the plaintiff to the defendant No. 1 was to design, supply, erect, test, commission and various other civil works on turnkey basis of the power plant under the provisions of the Contract. The details of the turnkey execution of the power plant are detailed in Article 4.2 of the Contract. It has been alleged that Articles 4.3 and 4.6 of the Contract contained the obligations to be performed by the defendant No. 1. It has also been alleged that in terms of Article 4.9 of the Contract, the defendant No. 1 was under a duty and an obligation to take all the requisite steps in order to assist the plaintiff in the performance of its obligations. It has been further alleged that Article 26, which was to be read with Schedules B and G of the Contract, provided the obligations of the defendant No. 1 as under:-

Article 26-Payment Conditions

26.1 General. Payment of the Contract price shall be made by the Employer to the Contractor in accordance with the payment conditions set out in Contract Schedules B and G. Banking charges incurred inside India shall be for the account of the Contractor, while those incurred outside India shall be borne by the Employer.

All sums duly invoiced by the Contractor shall be paid by the Employer. The amounts due other than the payments covered under L/C shall be transferred, unless otherwise agreed, by tale transmission or SWIFT to the Contractor''s bank in the Contractor''s country to the account of the Contractor, and the Employer shall be deemed to have performed its payment obligations when the respective sums due, have been received by the Contractor''s bank in immediately available funds.

26.2 Documentary Credit (L/C). The parties have agreed on payment by Documentary Credit (L/C). The employer shall arrange for Documentary Credits (L/C) to the amounts specified in Contract Schedules B and G in favour of the Contractor, to be issued by JP Morgan/Citibank/HSBC or Standard Chartered Bank or any other first class bank acceptable to the Contractor, on behalf of Trade Bank of Iraq (TBI) subject to the Uniform Customs and Practice for Documentary Credits published by the International Chamber of Commerce as in force at the date of signing the Contract.

The Documentary Credit (L/C) shall be for payment at sight with partial shipments and trans/shipments permitted.

26.3 The Employer shall open the L/Cs within the periods and as specified in Contract Schedule B.

7. Article 27 of the Contract made a provision for the Bank Guarantees to be

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provided by the Plaintiff, which reads as under:-

Article 27 - Bank Guarantees provided by the Contractor

27.1 Advance Payment Guarantee. To secure the repayment of the advance payment specified in Contract Schedule G, the Contractor shall, within the time limit indicated therein, get issued at its cost, by JP Morgan/Citibank/HSBC or Standard Chartered Bank in the Contractor''s country, first demand bank guarantees of the same amounts, in favour of the Employer which shall be subject to the Uniform Rules for Demand Guarantees published by the International Chamber of Commerce, Pub. No. 458. The advance payment guarantee shall be valid from the date of receipt by Contractor of the advance payment into its designated bank account, until full recovery of the advance payment by the employer. The value of the guarantee shall automatically decrease pro rata with the payments made to the Contractor. Upon recovery of the whole amount of the advance payment the guarantee shall become null and void and shall be returned to the Contractor.

27.2 Performance guarantee. To secure the proper performance of the Contract the Contractor shall, upon the date stated in Contract Schedule B get issued at its cost by JP Morgan, Citibank, HSBC or Standard Chartered Bank, in the Contractor''s country, a first demand bank guarantee in favour of the Employer amounting to ten percent (10%) of the Contract Price which shall be subject to the Uniform Rules for Demand Guarantees published by the International Chamber of Commerce, Pub No. 458.

The value of this performance guarantee shall be reduced to five percent (5%) of the Contract Price upon Taking Over or Provisional Taking Over in accordance with the provisions of Article 23 against presentation of the Taking Over Certificate or the Provisional Taking Over Certificate and shall become null and void and be returned to the issuing bank upon Final Acceptance. In the event the Plaint is taken over in separate stages or sections, the performance guarantee shall be decreased in value pro rata the value of each such stage or section.

8. It has been stated that the plaintiff, in terms of Contract, furnished Bank Guarantees through the defendant No. 2, which were amended from time to time. A brief description of the Bank Guarantees, which are purported to have been furnished by the defendant No. 2 to the defendant No. 1 for and on behalf of the plaintiff, are as under:-

(i) Advance Payment Guarantee No. being 0999607FG0000699 dated 6 August, 2007 (?APGI") valid till 30 March 2010, with a reduced value of USD 2,000,000 (as amended on 29 December 2009).

(ii) Advance payment Guarantee No. being 0999607FG00001132 dated 10 December 2007 (?APG2") valid till 30 March 2010 with a reduced value of USD 2,000,000 (as amended on 29 December 2009)

(iii)

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Performance Guarantee No. being 0999607FG0000699 dated 6th August, 2007 (PBG) valid till 30 March 2010 with a reduced value of USD 117,00,000 (as amended on 29 December 2009).

9. It has been alleged in the plaint that the Contract was to be performed in relation to four units of power generation. Unit Nos.1 and 2 of the Project are stated to have been commissioned and synchronized successfully on 11.5.2009 and 4.6.2009 respectively. Unit No. 3 is stated to have been commissioned and synchronized on 19.11.2009 and Unit No. 4 was commissioned and allegedly synchronized on 26.2.2010. It has been further stated that all the four units were successfully running in their full capacity as on 10.3.2010. It has, thus, been alleged, on the basis of the aforesaid facts, that the plaintiff herein has complied with all its obligations in terms of the Contract.

10. It was alleged that the defendant No. 1 was not furnishing the Taking Over Certificate so far as the Unit Nos.1 and 2 are concerned and so far as the unit nos. 3 and 4 are concerned, the performance schedule was not given by the defendant No. 1. It was alleged that that this was being done purposely to avoid their obligations with a malafide intention and to invoke the Bank Guarantees. It has been alleged that the defendant No. 1 was constantly committing breach of its contractual obligations and was acting in an illegal, malafide and fraudulent manner and causing grave prejudice to the plaintiff. It has been alleged in the plaint that sometime in December, 2008, the defendant No. 1 requested the plaintiff to extend the APG1 and APG2. In its letter dated 27.12.2008, the defendant No. 1 is alleged to have stated as under:-

Concerning our request to extend the two bank guarantee, kindly be sure that Mr. Chaudhuri will send the extension on Monday as he promised and if he does not send it by Monday we will send Mr. Shadi to India to take the necessary action.

11. It has been alleged by the plaintiff that on 27.4.2009, it received three swift messages from the defendant No. 2 with reference to APG2, which read as under:

WE MASS GLOBAL INVESTMENT CO. P.O. BOX 546 11953 AMMAN - JORDAN HEREBY DEMAND PAYMENT OF YOUR GUARANTEE NUMBER 0999607FG0001132 DEMAND AMOUNT: USD 4,000,000.00 SAY USD FOUR MILLION ONLY. ACCORDINGLY, PLEASE REMIT DEMANDED AMOUNT TO OUR ACCOUNT NUMBER 57899 WITH JORDAN COMMERCIAL BANK.....AS AN ALTERNATIVE FOR PAYMENT, WE MAY ACCEPT AN EXTENSION TO THE GUARANTEE VALIDITY UNTIL 30 OF JUNE, 2009. HOWEVER, IF WE DON''T APPEAR TO HAVE RECEIVED SUCH EXTENSION WITHIN 3 BANKING DAYS FROM THE DATE OF THIS CLAIM, OUR CLAIM WILL STAND VALID AND YOU HAVE TO PROCEED FOR PAYMENT AS CLAIMED

12. It has been alleged by the plaintiff that a perusal of the aforesaid communication by the defendant No. 1 would clearly show that it was arbitrary, illegal and unilateral and in total breach of its contractual obligations, as it was

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compelling the plaintiff to extend the Bank Guarantees, repeatedly holding threats that in case the supply agreement is not performed, the defendant No. 1 will invoke the Bank Guarantees and it would cause grave financial harm to the plaintiff. It has been alleged that the aforesaid action on the part of the defendant No. 1 was being taken by duress. It has also been alleged by the plaintiff that as it had successfully performed all its obligations, consequently it had raised invoices for the goods supplied and the services provided. However, the defendant No. 1 failed to make payment on account of the same. On the contrary, the defendant No. 1 was holding out threats to the plaintiff that in case the plaintiff did not comply to its dictates, it will be forced to invoke the three Bank Guarantees purported to have been given by it through the defendant No. 2. It has been alleged that the defendant No. 1, without any intimation to the plaintiff and without any sufficient cause, mobilized its own agencies at the Project site in relation to Unit Nos.3 and 4 and the defendant No. 1 further, in complete violation of the provisions of Article 6.1, sought to invoke the Bank Guarantees. In a nutshell, it was feebly alleged that a fraud was being committed.

13. So far as the three parameters for grant of injunction are concerned, it was averred that the plaintiff has a prima facie good case, the balance of convenience is also in its favour and that it would suffer an irreparable loss in case an injunction restraining the defendant No. 1 from invocation of Bank Guarantees is not granted.

14. In view of the above said contentions, the Plaintiff has prayed for an ad interim injunction restraining the Defendant No. 1 from encashing the two advance payment guarantees and one performance guarantee and the defendant No. 2 from making any payment in respect of such guarantees.

15. The defendant had filed its written statement and reply to the application and contested the claim of the plaintiff. So far as the question of issue of three bank guarantees by the plaintiff in favour of the defendant No. 1 to be invoked through the defendant No. 2 is concerned, that is not in dispute. As regards the breaches, which are allegedly attributed to the defendant No. 1, the same have been denied. It has been averred by the defendant No. 1 that the plaintiff has approached the High Court with unclean hands and has suppressed the correct facts. The plaintiff, at all times, has not complied with its contractual obligations and completed the works in relation to the project in terms of milestone which were agreed to between the parties. In this regard, the defendant No. 1 has also denied the commissioning and synchronization of all the four units on the touchstone of milestones agreed. The defendant No. 1 has stated that below given is the comparison of the details of the four power units which were to be executed by the plaintiff on turnkey basis, which will show that they have not been within the stipulated time:

Sl.No.

Stipulated dates of completion of the contract

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Dates of commissioning and synchronization(not taken over by the defendant no.1)

Unit 1

31.5.2008

11.5.2009

Unit 2

10.6.2008

4.6.2009

Unit 3

20.9.2008

19.1.2009

Unit 4

5.10.2008

26.2.2010

16. It has been stated by the defendant that there is no fraud committed by the defendant No. 1 in invocation of the Bank Guarantees. On the contrary, despite repeated intimations to the plaintiff, bringing to its notice the breaches committed by it on account of non-discharge of its duties, it was warned that the defendant No. 1 will be forced to invoke the three Bank Guarantees. Still the work having not been completed within the stipulated time, the defendant No. 1 was well within its rights to invoke the three Bank Guarantees in accordance with the terms and conditions of the Settlement Agreement. The defendant No. 1 has also stated that the plaintiff, in its rejoinder, has admitted that the liquidated fuels system, fire fighting system and the water system are not essential for running the units on fuel gas. This admission in rejoinder by the plaintiff in itself shows that the work is not complete.

17. So far as the invocation of three Bank Guarantees is concerned, the defendant No. 1 has stated that the Bank Guarantee is an independent contract between the guarantor and the beneficiary and the same has to be honoured in order to give commercial credibility to the unconditional Bank Guarantees and that no injunction to invoke the Bank Guarantees can be given, except in two cases, which are exceptional in nature. It is stated that the Apex Court has repeatedly held that such an injunction can be given only in case of fraud or irretrievable injury. It was stated that both these contingencies were not available in the instant case to the plaintiff and therefore, the application under Order XXXIX Rules 1 and 2 be dismissed.

18. The Learned Counsel for the plaintiff, in the instant case, though had taken

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the plea of fraud for the grant of injunction at the time of filing of the suit, however, this plea of fraud, or for that matter even the plea of irretrievable injury to the plaintiff, was not canvassed during the course of submission by the learned ASG.

19. The Learned Counsel for the defendant No. 1 has stated that as per the contract between the Plaintiff and the Defendant No. 1, to guarantee the proper performance of the Plaintiff''s obligations, the Defendant No. 2 had provided one unconditional demand guarantee of $ 11.7 million and in order to guarantee the advance paid under the contract to the Plaintiff, the Defendant No. 2 had provided two unconditional demand guarantees of $ 2 million each to the defendant No. 1, payable upon a written demand by the defendant No. 1. It has further been alleged that the plaintiff failed to perform its obligations within the contractually stipulated period and the defendant No. 1, thus became entitled to encash the bank guarantees. The defendant No. 1 later agreed to extend the bank guarantees for further periods from time to time in order to provide the plaintiff an opportunity to cure its breaches of nonperformance and non-delivery of equipment and services for which advances had already been paid.

20. The Learned Counsel for the defendant No. 1 has contended that the plaintiff is not entitled to Injunction. It has been stated by the Learned Counsel that as per the settled law, unconditional bank guarantees are independent and separate contracts between Defendant No. 1 and Defendant No. 2 which are absolute in nature and therefore, the Plaintiff is not entitled to seek an injunction preventing encashment of the bank guarantees. To support this contention, reliance has been placed upon the following judgments:

(i) U.P. State Sugar Corporation vs. Sumac International Ltd., (1997) 1 SCC 569

(ii) Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Company,

(iii) The State Trading Corporation of India Ltd. Vs. Jainsons Clothing Corporation and another,

21. It is well settled that the bank guarantee is an independent contract, the invocation of which, especially if it is unconditional guarantee, ought not and cannot be stayed by the Court. This principle admits only two exceptions in allowing an application for injunction i.e. fraud and irretrievable injury and there is no third exception. Illegality in invocation, breach of faith, misuse of guarantee by failing to act in accordance with the purpose for which it was given, failure of consideration of contract, threatened call for unconscionable ulterior motive, lack of honest or bona fide belief by the beneficiary that the circumstances such as poor performance against which performance bond provided actually exists have all been rejected as grounds for injunction. Reliance in this regard has been placed upon the following judgments:

(i) BSES Ltd. (Now Reliance Energy Ltd.) Vs. Fenner India Ltd. and Another,

(ii)U.P. State Sugar Corporation vs. Sumac International (supra)

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(iii) U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd.,

22. The Bank Guarantees in the present case are unconditional demand guarantees explicitly stated to be governed by the ICC Uniform Rules on Demand Guarantees (URDG), payable upon the signed statements in the form set out in the guarantees. It has been contended that the demand guarantees of this nature are unconditional bank guarantees. Reliance in this regard has been placed upon:-

(i) General Electric Technical Services Company Inc. Vs. M/s. Punj Sons (P) Ltd. and another,

(ii) National Thermal Power Corporation Ltd. Vs. M/s. Flowmore Private Ltd. and another,

(iii) Reliance Salt -vs- Cosmos Enterprises, (2006) 13 SCC 599

(iv) The State Trading Corporation of India Ltd. Vs. Jainsons Clothing Corporation and another,

(v) Sikkim Subba -vs- Union Bank of India & Anr., 1993(2) Arb. LR 140

(vi) Chola Turbo -vs- Development Credit, 2008 VI AD (Del) 408

23. There is no fraud in either the issuance or invocation of the bank guarantees or otherwise in connection with the bank guarantees. The Learned Counsel for the defendant No. 1 has brought to the notice of the Court that such a fraud must be (a) in connection with the bank guarantee, (b) of an egregious nature that shocks the conscience of the Court and vitiates the entire guarantee (c) it is proved by clear evidence in the bank''s knowledge, (d) it is primarily for the bank to plead a case of fraud, a bank guarantee being an independent contract between the banker and the beneficiary, (e) wrongful termination of the contract cannot make the invocation fraudulent, (f) fraud must have nexus prior to entering into the contract and (g) bald averments of fraud are not sufficient, there must be clear evidence. Such conditions have not been satisfied by the plaintiff.

24. It has further been submitted that the invocation of the bank guarantees was bonafide and far from fraudulent as the plaintiff had clearly committed the breach of the performance of its obligations under the turnkey contract entered into between the plaintiff and the defendant No. 1. To support this contention, the Learned Counsel has pointed out that there was delay in the completion of the project and it could not be finished within the time schedule. The defendant No. 1 had to complete civil construction of Units 1 and 2 and complete Units 3 and 4 because the plaintiff had failed to complete civil construction and erection works due to disputes with its sub-contractors, Al-Bilal. Further, it has been contended that the plaintiff had failed to deliver the key components of the plant and also had failed to remedy the defects in the power plant.

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25. It has been stated by the Learned Counsel that the notices of breach were sent by the defendant No. 1 to the plaintiff vide letters dated 16.11.2008, 26.5.2009 and 27.7.2009. Communications stating the defects in respect of the Units and asking the plaintiff to cure the same were also sent to the plaintiff via various e-mails.

26. It has been contended by the Learned Counsel that this is not a case where any irretrievable harm or injustice of the kind contemplated by the Itek Corporation v. The First National Bank of Boston etc. (566 Fed Supp. 1210) would be caused to the plaintiff if the bank guarantees are encashed. The Itek case test, as stated by the Learned Counsel, has been reiterated by the Supreme Court in U.P. State Sugar Corporation''s case (supra), Himadri Chemicals case (supra) which lays down that an exceptional circumstance must be made out which would make it impossible for the guarantor to reimburse himself if he ultimately succeeds, akin to the Itek case (supra). In the case of Himadri Chemicals, the Supreme Court rejected the application for interim injunction made by the plaintiff wherein it had pleaded that it would be unable to recover the money, if it ultimately succeeds as the respondent was a foreign company in Iran, having no assets in India. In this case, it was held that mere apprehension was not enough but the plaintiff needs to establish an exceptional circumstance that would make it impossible to recover. Likewise, it has been contended that in the present case, no such exceptional circumstance exists.

27. It has further been submitted by the Learned Counsel that there is no difficulty in recovery of monies if the plaintiff ultimately succeeds. Also, there is an ICC Arbitration Clause in the contract between the plaintiff and the defendant No. 1 and Jordan is signatory to the New York Convention on Enforcement of Foreign Awards and it has enacted a law for the enforcement of foreign awards and such a law would provide adequate remedy and opportunity to the plaintiff to recover the monies.

28. In the light of the above mentioned submissions, it has been contended by the Learned Counsel for the Defendant No. 1 that the Plaintiff is not entitled to the grant of injunction against encashment of the bank guarantees and has also prayed that the application under Order 39 Rules 1 and 2 of the CPC made by the Plaintiff be dismissed and exemplary costs be imposed upon them.

29. The law relating to invocation of bank guarantees is by now well settled by a catena of judgments. In AIR 1997 1644 (SC) , the Apex Court observed that:

The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an

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injunction to restrain the realization of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would over ride the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country. The two grounds are not necessarily connected, though both may coexist in some cases.

30. It is equally well settled in law that bank guarantee is an independent contract between the bank and the beneficiary thereof. The bank is always obliged to honour its guarantee as long as it is an unconditional and irrevocable one. The dispute between the beneficiary and the party at whose instance the bank has given the guarantee is immaterial and of no consequence.

31. In BSES Ltd. (Now Reliance Energy Ltd.) Vs. Fenner India Ltd. and Another, , the Supreme Court held as under:

10. There are, however, two exceptions to this Rule. The first 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 an egregious nature as to vitiate the entire underlying transaction. 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. The general rule and its exceptions has been reiterated in so many judgments of this Court, that in AIR 1997 1644 (SC) (hereinafter ''U.P. State Sugar Corpn'') this Court, correctly declare that the law was ''settled.

32. In Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Company, , the Apex Court summarized the principles for grant of injunction to restrain the enforcement of a bank guarantee or a letter of credit in the following manner:

14(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 realize 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

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realization 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.

33. In Mahatma Gandhi Sahakra Sakkare Karkhane Vs. National Heavy Engg. Coop. Ltd. and Another, , the Supreme Court observed:

22. 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 the 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 the 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.

28. What is relevant are the terms incorporated in the guarantee executed by the bank. On careful analysis of the terms and conditions of the guarantee in the present case, it is found that the guarantee is an unconditional one. The respondent, therefore, cannot be allowed to raise any dispute and prevent the appellant from encashing the bank guarantee. The mere fact that the bank guarantee refers to the principal agreement without referring to any specific clause in the preamble of the deed of guarantee does not make the guarantee furnished by the bank to be a conditional one.

(Emphasis supplied)

34. The question, which arises for consideration to decide this application for interim injunction, is whether the present case falls under any or both the exceptions as laid down in U.P. State Sugar Corporation vs. Sumac International Ltd. (Supra). The court needs to consider both the exceptions namely (i) fraud of an egregious nature (ii) irretrievable injury on invocation of the bank guarantee.

35. With regard to the exception of fraud, the judgment of the Apex Court in STC -vs- Jainsons (supra) mentions the definition of fraud in a contractual agreement. The relevant portion of the judgment states:

5. The question, therefore, is whether there is any fraud committed by the

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respondent as regards the contract of guarantee which the appellant was entitled to invoke. u/s 126 of the Indian Contract Act 1872 a contract of guarantee is a distinct separate contract to discharge the liability of a third person in case of his default. Section 17 of the Contract Act postulates fraud that:

17. "Fraud" defined. - "Fraud" means and includes any of the following acts committed by. a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract.

(1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

(2) the active concealment of a fact by one having knowledge or belief of the fact;

(3) a promise made without any intention of performing it;

(4) any other act fitted to deceive;

(5) any such act or omission as the law specially declares to be fraudulent.

36. The essential question which arises is whether the present case comes within the purview of the definition of fraud as stated above. The Apex Court in more than one decision took the view that fraud, if any, must be of an egregious nature as to vitiate the underlying transaction. On a thorough perusal of the pleadings, neither there are any specific allegations made by the Plaintiff which can be attributed as a fraudulent conduct on the part of the Defendant No. 1 nor any conditions laid down in the definition of fraud as postulated in Section 17 of the Indian Contract Act are made out. Only vague allegations and submissions have been made in the plaint, which do not establish the element of fraud in the invocation of bank guarantees by the Defendant No. 1. In the absence of any specific allegation of fraud much less the fraud of an egregious nature so as to vitiate the entire transaction, the first exception is not made out in the instant case.

37. On the question of irretrievable injury, it has to be of the nature noticed in the Itek case (supra). In that case an exporter in the U.S.A. entered into an agreement with the Imperial Government of Iran and sought an order terminating its liability on stand by letters of credit issued by an American bank in favour of an Iranian Bank as part of the contract. The relief was sought on account of the situation created after the Iranian revolution when the American Government cancelled the export licences in relation to Iran and the Iranian Government had forcibly taken 52 American citizens as hostages. The U.S. Government had blocked all Iranian assets under the jurisdiction of United States and had cancelled the export contract. The court upheld the contention of the exporter that any claim for damages against the purchaser if decreed by the American Courts would not be executable in Iran under these circumstances and realization of the bank guarantee/Letters of credit would cause irreparable harm

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to the plaintiff. This contention was upheld. To avail of this exception, therefore, exceptional circumstances which make it impossible for the guarantor to reimburse himself if he ultimately succeeds, will have to be decisively established. Clearly, a mere apprehension that the other party will not be able to pay, is not enough. In the Itek case (supra), there was a certainty on this issue. Secondly, there was good reason, in that case for the court to be prima facie satisfied that the guarantors i.e. the bank and its customer would be found entitled to receive the amount paid under the guarantee. The Supreme Court in U.P. State Sugar Corporation''s case (supra), Himadri Chemicals''s case (supra) has reiterated the principles applicable in the Itek case (supra) that an exceptional circumstance must be made out which would make it impossible for the guarantor to reimburse himself if he ultimately succeeds.

38. On a meticulous examination of the facts of the present case, the plaintiff has failed to plead or establish any exceptional circumstance where it cannot recover any monies if it ultimately succeeds. All the pleas taken by the Plaintiff regarding irretrievable injury seem to be vague and not supported by any evidence.

39. In my considered opinion, the plaintiff has not been able to show any of the contingencies, namely, that any fraud has been committed in encashing the 3 Bank Guarantees from the defendant No. 1 or that there is an irreparable injury which will be caused to the plaintiff in case the 3 Bank Guarantees are invoked and accordingly, the plaintiff is not entitled to any injunction on that score. It is also not the case where the conditions which were contemplated in Itek case (supra) were available to the plaintiff which may warrant the grant of interim order in favour of the plaintiff, restraining the defendant from invoking 3 Bank Guarantees, two of which are Advance Payment Guarantees and the third one is the Performance Bank Guarantee. No doubt, the defendant No. 1 is a foreign company registered in Jordan and the plaintiff is a public sector undertaking in India. Nevertheless, it cannot be said that as on date, with the conditions prevailing in the Middle East, either domestically or internationally, where the company is registered, is in turmoil so as to prevent the retrieval of the amount by the plaintiff, in case the need so arises. On the contrary, the defendant No. 1 has admitted that it is a signatory to the Charter which warrants adjudication of the International Arbitration Disputes with the venue in London which clearly shows that ultimately it is a country which believes in adjudication of disputes through the processes of law and, therefore, restraining the defendant from realization of the proceeds of the three Bank Guarantees, with regard to which they had maintained status quo vide statement made by their counsel on 27.3.2010, cannot be permitted to continue. Accordingly, to that extent, the application bearing IA No. 4049/2010 of the plaintiff deserves to be dismissed.

IA No. 2852/2011 in CS(OS) No. 583/2010

40. The second application is now taken up which the plaintiff has filed during the pendency of the petition, wherein the plaintiff has prayed for decreetal of its

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suit in terms of the settlement purported to have been arrived at by it with the defendant No. 1. A brief overview of the context in which this application was filed is also required to be given.

41. After the statement made by the defendant No. 1 that it shall not invoke the three Bank Guarantees, the matter was adjourned on a couple of dates and ultimately, on 19.8.2010, Mr. Gopal Subramanium, the learned Solicitor General and Mr. A.S. Chandhiok, the learned Additional Solicitor General made a submission that the parties are exploring the possibility of a settlement. This fact was not denied by Mr. N.K. Kaul, the learned Senior Counsel appearing for the defendant No. 1. The suit kept on being adjourned on the ground of settlement and ultimately it is alleged by the plaintiff that the settlement was arrived at between the plaintiff and the defendant No. 1. It is in this context that the present application was filed.

42. The plaintiff, in this application, has stated that the discussions were held in the meetings between the parties, namely, BHEL and MGI. The parties mutually agreed to resolve their disputes and arrived at a settlement dated 22.8.2010, which was purported to be final, signed, executed and irrevocable. The Settlement Agreement is alleged to have superseded all previous negotiations and the contract between the parties. It is stated that in terms of the settlement/ agreement, each of the parties had agreed to irrevocably relinquish and waive all its claims and demands and release the other party from all its liabilities and amounts under the contract. Under the Supply Agreement, the amount of USD 13 million was agreed to be settled by way of supply of 2XFr6B Turbines and Power Generation Equipments to MGI by BHEL. Under the Settlement Agreement, the MGI agreed to pay to the BHEL USD 25 million as price for the supply of 2XFr6B turbines and power generation equipments. The Settlement Agreement is alleged to have constituted 52% of the contract value and the remaining 48% of the contract value of Supply Agreement was to be paid by MGI. It was stated that under the Settlement Agreement, it was also agreed between the BHEL and the MGI that a detailed "Supply Agreement" would be entered into between the parties. Subsequent to the execution of the Settlement Agreement, the following events are stated to have taken place in furtherance of signing of the Supply Agreement:-

(i) BHEL requested MGI to send plot plan and site data for evaluation and incorporation in contract of performance guarantee figures of the GTGs.

(ii) BHEL and MGI exchanged their comments on the draft supply agreement.

(iii) In the meeting held from 6-15 October, 2010 in Amman, BHEL submitted Performance Guarantee figures of GTG to MGI.

(iv) After BHEL sent its revised Performance Guarantee figures, MGI on 6.1.2011, had sent revision of the site data for recalculation by BHEL of Performance Guarantee figures of GTGs.

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43. It was averred that although the formal Supply Agreement was yet to be signed, however, in anticipation of the signing of the said Agreement and in good faith, the plaintiff had started performing its obligations as per Settlement Agreement. It was averred that 35% to 40% of the work relating to engineering procurement, manufacture and assembly of two turbines was done. It is stated that on 20.1.2011, the plaintiff received a letter from the defendant No. 1, terminating the Agreement unilaterally on account of non-signing of the Supply Agreement. The plaintiff sent the reply dated 28.1.2011, giving reasons for not signing the Supply Agreement. A part of the fault for such non-signing was attributed to the defendant No. 1/MGI.

44. Accordingly, it was prayed that the suit itself be disposed of in terms of the Settlement Agreement dated 22.8.2010 and allow the plaintiff to withdraw the suit in terms of prayer (1) of the application.

45. The defendant No. 1 filed reply to the application and did not deny the signing of the Settlement Agreement dated 22.8.2010. However, it was denied that the said Settlement Agreement, in any way, resolves the disputes between the parties. It was stated that the Settlement Agreement is irrelevant for the purpose of the present suit and cannot be made as a basis for preventing the encashment of the Bank Guarantees, which is an independent contract. It was stated that under the Settlement Agreement, signed on 22.8.2010, a Supply Agreement was to be signed by 27.9.2010 or such extended date as may be agreed between the parties. But, this Supply Agreement was neither signed between the parties nor the date was extended. Consequently, under the Settlement Agreement itself, it was envisaged that the same would be void in case the Supply Agreement is not signed. It is alleged that the defendant No. 1 wrote to the plaintiff on 20.1.2011, explicitly stating that the Settlement Agreement was null and void and in any event, the Agreement stood terminated. It was also contended that in any case, assuming, though not admitting, that the Settlement Agreement was binding, the said Settlement Agreement would not confer any jurisdiction on this Court to entertain the application involving determination of issues regarding Settlement Agreement as it was signed by the parties in Jordan and is governed by English law. It was averred that under the Settlement Agreement, the Supply Agreement was to be executed and it was specifically laid down that in case the Supply Agreement was not signed, it would render the Settlement Agreement null and void without prejudice to the stand taken by the defendant No. 1. It was further alleged that the only relevance of the Settlement Agreement is the admission made by the plaintiff that the plaintiff himself had delayed the performance of its obligations under the contract and that the plaintiff had agreed to pay to the defendant No. 1 an amount of USD 13 million on account of the untimely performance. It was also contended that even if the Settlement Agreement is taken into account, it cannot form the basis of staying the invocation of the Bank Guarantees because that was an independent contract between the defendant No. 1 and the defendant No. 2.

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46. On the basis of these allegations, the defendant No. 1 denied that either the application for decreeing the suit was maintainable or that the decree should be passed in terms of the Settlement as urged by the plaintiff in the application.

47. I have heard Mr. A.S. Chandhiok, the learned ASG and Mr. N.K. Kaul, the learned Senior Counsel for the defendant No. 1 on the application.

48. Mr.A.S.Chandhiok, the learned ASG has contended that once the Settlement/ Agreement dated 22.8.2010 was signed between the plaintiff and the defendant No. 1, it resulted in novation between the parties and the three Bank Guarantees which are purported to have been furnished by the defendant No. 2 to the defendant No. 1 for and on behalf of the plaintiff cannot be encashed because the Settlement/Agreement supersedes all other agreements as under the Settlement Agreement, the defendant No. 1 had relinquished all the rights qua the Bank Guarantees or it can be said that it had discharged the Bank Guarantees. It was contended that even if the submission of Mr. N.K. Kaul, the learned Senior Counsel for the defendant No. 1 that in terms of the Settlement Agreement dated 22.8.2010, a Supply Agreement was to be signed is accepted, even then the non-signing of the Supply Agreement would not impinge on the Settlement Agreement. For this purpose, Mr. Chandhiok, the learned ASG has referred to Clause 9 of the Settlement Agreement and has contended that the said Clause envisaged severability between the Settlement Agreement and the Supply Agreement. It was urged that even if the Supply Agreement was not signed and it became invalid, illegal, unenforceable or is declared so by any court of competent jurisdiction, then only that part of the Settlement Agreement would become invalid, as is held so. On the basis of the same analogy, it was sought to be urged that assuming that the Supply Agreement has not been signed, the defendant No. 1 could have appropriate remedy for the same. But, it will not result in abrogation of the Settlement Agreement dated 22.8.2010 in complete and will not revive the status quo ante so as to permit the defendant No. 1 to seek encashment of the three Bank Guarantees.

49. Mr. Chandhiok, the learned ASG has next urged that in terms of the application, the plaintiff is only seeking a decree in terms of the Settlement Agreement in the instant case, though this was not the original prayer. For this purpose, the learned ASG has relied on Order XXIII Rule 3 CPC, which lays down as under:

3. Compromise of suit.- Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the parties to the suit, whether or not the subject-matter of the agreement, compromise or satisfaction is the same as the subject-matter of the suit:

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Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded, thinks fit to grant such adjournment.

On the basis of Order XXIII Rule 3 CPC, it was contended by Mr. A.S. Chandhiok since the plaintiff has now performed its part of the obligation in terms of the Settlement Agreement to the extent of 35% to 40% and this being the valid Settlement Agreement, under which the defendant No. 1 has discharged, relinquished or abrogated its right to invoke the Bank Guarantees, therefore, the said Bank Guarantees cannot be invoked and the restraint order passed on the basis of the statement made by the Learned Counsel for the defendant No. 1 on 27.3.2010 be made absolute and the suit itself be decreed in terms of the Settlement Agreement.

50. Mr. N.K.Kaul, the learned Senior Counsel for the defendant No. 1, has vehemently contested this submission of the learned ASG. It was contended that the Settlement Agreement clearly envisages the signing of the Supply Agreement and it was specifically laid down that the Supply Agreement is to be signed by 27.9.2010 and in the event of the same not being signed by the plaintiff, the Settlement Agreement was to be treated as invalid and void ab initio. Attention in this regard was drawn to the relevant Clauses of the Agreement. It was further contended that the defendant No. 1 had sent a letter dated 21.1.2011 to the plaintiff, intimating that as the Supply Agreement was not signed, therefore, the Settlement Agreement had become void ab initio and obviously, the status quo ante was restored in terms of the relationship of the parties or, in other words, relationship of the parties was to be governed as no new agreement was in existence. It was contended that there was no impediment in seeking to invoke the three Bank Guarantees furnished by the defendant No. 2 to the defendant No. 1. It was also contended that even if the contention of the learned ASG that the non-signing of the Supply Agreement will not render the Settlement Agreement void, is assumed to be correct, it will not result in doctrine of severability coming into operation. It was stated that the signing of the Supply Agreement was the basis of the complete transaction between the parties, therefore, the submission of the learned ASG does not have any merit.

51. Alternatively, it was contended that assuming, though not admitting, that the Settlement Agreement was having any defect, the said Agreement would still not impinge on the encashing of the Bank Guarantees for the simple reason that it is the settled legal position that the Bank Guarantees have to be treated as an independent contract de hors the basic contract between the parties. It was contended that this Settlement Agreement has no effect on the invocation of the Bank Guarantees. It was contended that the prayer of the plaintiff for decreeing the suit in terms of the Settlement Agreement having been arrived at between the parties under Order XXIII Rule 3 CPC is bereft of any merit because the

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defendant No. 2 is not a party to the said Agreement.

52. I have carefully considered the submissions and gone through the records.

53. Before dealing with the submission of the learned ASG for and on behalf of the plaintiff, it would be better to reproduce the relevant provisions of the Settlement Agreement dated 22.8.2010, which are as under:-

THIS SETTLEMENT AGREEMENT is executed on this 22nd day of August 2010

BY AND BETWEEN:

(1) MASS GLOBAL INVESTMENT CO a company duly incorporated under the laws of Jordan, and having its registered office at Aman-Jordan, Wasfi A1 Tal Street, Building No. 94, fifth floor, Post Code 11953, (hereinafter "MGI" WHJICH EXPRESSION SHALL INCLUDE ITS SUCCESSORS AND PERMITED ASSIGNS); and (2) BHARAT HEAVY ELECTRICALS LTD. a company duly incorporated under the provisions of the (Indian) Companies At, 1956, owned and controlled by the government of India and having its registered office at BHEL House, Siri Fort, New Delhi - 110049, (hereinafter "BHEL" which expression shall include its successors and permitted assigns).

(Collectively hereinafter referred to as "parties" and individually as "Party")

WHEREAS, MGI and BHEL have entered into a Contract dated 4th March, 2007 and subsequently Contract Amendment dated 4th August, 2007 for the turnkey execution of 4xFr 9E Gas Turbine Power Plant in Sulaymaniah, Kurdistan, Iraq by BHEL to MGI on a turnkey basis in Kurdistan region, Iraq, (hereinafter the "Turnkey Contract")

WHEREAS, during execution of the Tunkey Contract, certain disputes had arisen between the parties in respect of the execution of the Power Plant and parts thereof (all such disputes hereinafter referred to as the "Disputed Matters")

Whereas, pursuant to the said Disputed Matters MGI purported to invoke the three Bank Guarantees provided to MGI on behalf of BHEL under the terms of the Turnkey Contract, such guarantee being (1) Advance Payment Bank Guarantee number 0999607FG0001132, in its current amount of USD 2,000,000.00 (Two Million United States Dollars) (2) Advance Payment Bank Guarantee number 0999607FG000699 in its current amount of USD 2,000,000.00 (Two Million United States Dollars) and (3) Performance Bank Guarantee number 0999607FG0000700 in an amount of USD 11,7000,000.00 (Eleven Million, Seven Hundred Thousands United States Dollars) (hereinafter collectively the ?Bank Guarantees)

WHEREAS, BHEL vide a suit filed in the Delhi High Court (bearing No. CS(OS) 583/2010) obtained an interim injunction on the said invocation of the three Bank Guarantees against MGI and State Bank of India, however, the final judgment for the above has not yet been issued as on date; WHEREAS, Now, in pursuance of the meetings dated 19th to 21st June 2010; 31st July, 2010 to 4th

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August, 2010; 18th to 21st August, 2010 at Amman and 18th to 24th July, 2010 at Sulymaniyh site between the parties, the parties have accordingly agreed to settle all disputes and differences on the terms and conditions more particularly described and stated hereinafter, (minutes of the Amman meeting from 18th to 21st August, 2010 signed by the parties are enclosed herewith as Schedule [1] of this Settlement Agreement, which shall be considered an integral part and parcel of this Settlement Agreement);

And Whereas, now, the Parties through their authorized representatives have mutually negotiated a settlement and have accordingly agreed to amicably resolve the Disputed Matters in good faith by entering into the Settlement Agreement, which shall, upon implementation of its terms and conditions as stated herein below, constitute a final and irrevocable settlement of all claims and demands of the parties in respect thereof in connection with the Turnkey Contract.

NOW THIS AGREEMENT WITNESSETH AS HEREIN UNDER FOLLOWS:

1. THE SETTLEMENT

The parties agree that this Settlement Agreement and the terms set out herein shall be in full, unconditional, irrevocable, comprehensive and final settlement in connection with the Disputed Matters and all claims arising pursuant to the Turnkey Contract, from the date of the commencement of the parties'' commercial relationship until the date of this Settlement Agreement

Upon execution of this Settlement Agreement in accordance with the terms and conditions stated below, each party irrevocably and unconditionally relinquishes and waives all claims and demand, and further releases the other party from all liabilities and amounts whether known or unknown in connection with the Turnkey Contract in perpetuity.

2. TERMS OF SETTLEMENT

In full, unconditional, irrevocable, comprehensive and final settlement of all claims and demands in respect of the Disputed Matters and the Turnkey Contract, the parties agree as follows:-

Accordingly, BHEL hereby irrevocably acknowledges that it owes MGI, and hereby irrevocably undertakes to settle to MGI, an amount of USD13 million (Thirteen Million United States Dollars) (hereinafter the Settlement Agreement).

3. MANNER OF SETTLEMENT

Upon signature of the Supply Agreement and the provision of the advance payment bank guarantee referred to above under paragraph (c), MGI undertakes to discharge the Bank Guarantees in full by issuing the necessary instructions to State Bank of India and simultaneously making a joint application to the Delhi High Court for dissolution of all pending claims.

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4. RELEASE, WAIVER, DISCHARGE

Release by MGI Upon: (i) signing of the Supply Agreement, (ii) issuance of the advance payment bank guarantee referred to under clause 3(c) above, and (iii) fulfillment by BHEL of its obligations stated herein including clause (5), MGI holds BHEL free of any responsibility and waives its rights against BHEL as regards the Disputed Matters and any obligations, claims, compensations, liabilities or any other arising out of or in connection with the Turnkey Contract and the Disputed Matters and such release conferred herein shall be considered final and irrevocable.

In relation to any claims/counter claims, upon fulfillment of all the terms and conditions of this Settlement Agreement, the parties agree to fully and finally release, waive and forever discharge each other and any of its affiliated companies, directors, officers, counsels, agents or other representatives from:

All claims, demands, debts, accounts, expenses, costs, liens, actions and proceedings of any and every kind, nature and description and under any legal theory be it contract, misrepresentation, fraud etc. whether known or unknown, which the parties has or might have or might assert in relation to the Disputed Matters and Turnkey Contract; and

Any legal liability arising, directly or indirectly, out of or in any way connected way connected hereto, in relation to the Disputed Matters and Turnkey Contract.

The parties hereby agree that the current injunction proceedings being deliberated by the High Court of New Delhi shall temporarily be put on hold until the signing of the Supply Agreement. To that end, the parties agree to jointly request the High Court of New Delhi to adjourn the proceedings until the parties move a joint application (if any) in CS(OS) No. 583/2010 pending before the Delhi High Court to record the terms of this Settlement Agreement so that a compromise decree can be passed by the Delhi High Court in accordance with this Settlement Agreement. For the avoidance of doubt the joint application referred to above will be made only following signature of the Supply Agreement.

5.

6.

7. CONFIDENTIALITY AND VALIDITY

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Furthermore, if the Supply Agreement is not signed by 27 September 2010 or such other extended date agreed in writing, this Settlement Agreement and Schedule (1) shall be considered null and void.

8.

9.SEVERABILITY

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If for any reason whatsoever any provision of the Settlement Agreement is or becomes invalid, illegal or unenforceable or is declared by any court of competent jurisdiction or any other instrumentality to be invalid, illegal or unenforceable, the validity, legality or enforceability of the remaining provisions shall not be affected in any manner, and the parties shall negotiate in good faith with a view to agreeing upon one or more provisions which may be substituted for such invalid, illegal or unenforceable provisions, as nearly as its practicable.

10.

11

12. GOVERNING LAW

This Agreement is governed by the laws of England.

Sd/-

Sd/-

54. A perusal of the Settlement Agreement clearly shows that the signing of the Supply Agreement between the parties was an integral part of the Settlement and this Supply Agreement was to be signed by a specified date, which was fixed as 27.9.2010 or such extended date as may be agreed between the parties. The sanction for the purpose of adherence to this date was contained in the Settlement Agreement itself and it was specifically laid down that in case the Supply Agreement is not signed by that date, the Settlement Agreement would be treated as void ab initio. There is no denial of the fact that the Supply Agreement between the plaintiff and the defendant No. 1 has neither been signed by 27.9.2010 nor the date has been extended. As a matter of fact, till the submission of the arguments before this Court, the said Agreement was not signed between the parties, therefore, so far as the non-signing of the Supply Agreement is concerned, that is not in dispute. There is no doubt that the plaintiff in the application has made an averment, although the Supply Agreement has not been signed, but it has already performed 35% to 40% of its obligation in terms of the Settlement Agreement. I think this oral averment made by the plaintiff in its application regarding performance of its obligation in terms of the Settlement Agreement is totally inconsequential in the absence of signing of Supply Agreement. In the absence of signing of the Supply Agreement, obviously the sanction would come into operation and the sanction which was envisaged between the parties was that the Settlement Agreement itself would be treated as void ab initio. If the Settlement Agreement itself becomes void ab initio, then obviously the parties get their rights and obligations revived under the regime with which they were governed when the Supply Agreement was not signed by them. Under the said regime, the defendants were entitled to invoke the Bank Guarantees in terms of the language of the Bank Guarantees, which were unconditional. Moreover, the Bank Guarantees are held repeatedly by the Courts to be independent contracts and even if there is a dispute about the basic

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agreement, still the invocation could not be stopped in favour of the beneficiary. The only two exceptions visualized by the Apex Court is fraud and irretrievable injustice which contingencies are not available in the instant case.

55. Another submission, which has been raised by the learned ASG, is regarding the severability of the Settlement Agreement from the Supply Agreement and the submission that in case a part of the agreement is severable and it gives right to any occasion to the defendant No. 1, he can sue for breach of contract does not convince me. It is not the case where such a clause would come into operation. The question of severability of a clause from a part of the agreement would arise only when the transaction itself was complete between the parties. The transaction between the parties in the instant case was to settle their disputes in two phases - firstly by signing the Settlement Agreement and secondly by signing the Supply Agreement. Since the Supply Agreement itself has not been signed, therefore this transaction of Settlement itself being incomplete, in my view, would not bring the question of severability into operation. Therefore, this submission made by the learned ASG does not persuade me to accept his plea so as to prevent the defendant No. 1 from seeking encashment of the Bank Guarantees.

56. There is another reason for this Court to discard the submission made by the learned ASG for preventing the defendant No. 1 from encashing the Bank Guarantees and it is that the settled legal position is that the Bank Guarantees is an independent contract between the beneficiary and the guarantor and it is only these two parties who are to be governed by the terms and conditions of the Bank Guarantees. In the instant case, one of the Bank Guarantees is a Performance Bank Guarantee and the other two are Advance Bank Guarantees. All these three Bank Guarantees are not in dispute so far as their language or the factum of their being unconditional Bank Guarantees is concerned. The invocation of the Bank Guarantees by the defendant No. 1 is also not faulted by the defendant No. 2. The original case, which was set-up by the plaintiff for preventing the invocation of the Bank Guarantees by the defendant No. 1 against the defendant No. 2, was fraud, which had come up in the course of time by filing an application u/s 151 CPC read with Order XXIII Rule 3 CPC for decreetal of the suit in terms of the Settlement Agreement. Therefore, this plea of fraud or irretrievable injustice having been caused to the plaintiff on account of invocation of the Bank Guarantees has already been rejected by me earlier while dealing with the application under Order XXXIX Rules 1 and 2 CPC. The present plea has been set-up by the plaintiff by way of subsequent developments inasmuch as a fresh Agreement between the plaintiff and the defendant No. 1 is sought to be a ground for preventing the invocation of the Bank Guarantees. Admittedly, this Agreement is between the plaintiff and the defendant No. 1, i.e., a party on whose behalf the Bank Guarantees were given and the party for whose benefit the Bank Guarantees were given. The party which has given these Bank Guarantees is not a party to the signing of this subsequent Agreement, which is called as the Settlement Agreement. That being so, the Agreement, to which the

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defendant No. 2 is not a party or a signatory, could not be made as a basis for preventing the defendant No. 2 from making the payment to the defendant No. 1 on account of such Bank Guarantees on their invocation. Therefore, I feel that this is something which goes to the very root of the matter because of which the invocation of the Bank Guarantees by the defendant No. 1 from the defendant No. 2 cannot be prevented. Moreover, the defendant No. 1 himself has denied the validity of the enforceability of the Settlement Agreement on account of non-signing of the Supply Agreement. This being the factual matrix, if one sees the plain language of Order XXIII Rule 3 CPC for decreeing the suit, then it envisages the satisfaction of the Court in the first instance. Obviously, this satisfaction would arise only when the parties are at ad idem and not at variance. This portion gets further reinforced by the proviso which lays that in case one party denies adjustment or the satisfaction, the Court shall decide this question. Therefore, for deciding this question, evidence may have to be recorded but certainly the decree, as prayed for by the plaintiff, cannot be passed. The defendant No. 1 has also placed reliance on judgment titled Jaywantraj Punamiya and Others Vs. H. Choksi and Co. Pvt. Ltd., to contend that the Settlement Agreement being contingent on signing of the Supply Agreement could not be relied upon. To that extent, the submission of Mr. N.K. Kaul, the learned Senior Counsel is accepted.

57. Further, if the Settlement Agreement itself is not valid, there is no question of discharge or relinquishment of rights qua the Bank Guarantees. Similarly, the Agreement envisaged filing of a joint application for keeping the restraint orders against the invocation of the Bank Guarantees in suspension, which was not done in the present case. This shows that the parties are not unanimous on the resolution of their disputes or the modalities thereof.

58. For the abovementioned reasons, I am of the considered opinion that the suit of the plaintiff cannot be decreed in terms of Order XXIII Rule 3 CPC, as the application of the plaintiff is totally misconceived and accordingly the application of the plaintiff bearing No. 2852/2011 is dismissed.

59. The net result of dismissal of both these applications bearing Nos. 4049/10 and 2852/11 is that the statement, which was made by the Learned Counsel for the defendant No. 1 on 27.3.10 before this Court, stating that the status quo with regard to all the three Bank Guarantees shall be maintained, which status quo has been maintained by the defendant No. 1 till date, although the same has not been specifically recorded in the order subsequent thereto, the defendant No. 1 is not bound to continue with the said statement and I feel that the plaintiff is not entitled to any ad interim injunction. Accordingly, the applications of the plaintiff, bearing IA No. 4049/10 under Order XXXIX Rules 1 and 2 CPC as well as IA No. 2852/11 are dismissed. DASTI.

CS(OS) No. 583/2010

List the matter on 28.9.2012 before the Joint Registrar for further proceedings.

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