

(1991) 04 DEL CK 0022

In the Delhi High Court

Case No : Leave Application No. 11649 of 1990 and Suit No. 3908 of 1990

Bhasin Associates Limited

APPELLANT

Vs

Hyundai Heavy Industries Company Ltd. and Another

RESPONDENT

Date of Decision : 04-04-1991

Acts Referred:

Citation : (1991) ILR Delhi 553

Hon'ble Judges : D.P Wadhwa, J

Bench : Single Bench

Advocate : V.P. Singh, Anju Bhattacharya, Mukul Dhawan, Anil Bhatnagar, S.C. Malik, C.R. Soma Sekharan, P.B. Agarwal, Sushma Malik and Vasudha Indurkar, for the Appellant;

Judgement

D.P. Wadhwa, J.

(1) This is plaintiff's application filed under Order 39 Rules I and 2 and section 151 of the Code in a suit for permanent injunction. There are two defendants. The Bhasin Associates Limited Vs. Hyundai Heavy Industries Company Ltd. and another plaintiff in the suit has prayed that first defendant be restrained by means of permanent injunction from receiving any amount from the second defendant under two bank guarantees, the performance guarantee and the mobilisation advance guarantee, and further restraining second defendant from making any payment to the first defendant under any of these two guarantees. In the application the prayer is that till the decision of the suit, defendants be similarly restrained.

(2) The suit was filed on December 26, 1990. At that time the court stayed encashment of these two bank guarantees and that stay continues. To understand the controversy between the parties some facts may be stated.

(3) First defendant, a foreign company incorporated under the laws of Korea, entered into a contract with Northern Coalfields Limited, a subsidiary of Coal India Limited, for construction of a coal handling plant at Dudhichua which

project is located partly in the State of Madhya Pradesh and partly in the State of Uttar Pradesh, for a value over Rs. 42.75 crores. This was by an agreement dated November 19, 1987. Then the first defendant in turn entered into two subcontracts, one with the plaintiff and the other with M/s. I.C.B. Limited. The subcontract with the plaintiff is dated December 15, 1987. The value of the subcontract is Rs. 22.63,84,400.00 . The description of the subcontractor's work and the value is as under :-

1. Design & engineering Rs. 2,450,000 2. Supply of fabricated structurals shaped rebar's for crusher house, ground bunker, silo, transfer house conveyor galleries etc. complete for CHP. Rs. 57,500,000 3. Civil & structural work (including erection of above item) Rs. 66,434,400 _____ Total: Rs. 126 384,400 _____

(4) The agreement contained an arbitration clause under which the parties agreed that disputes shall be settled by arbitration in accordance with arbitration rules of International Chamber of Commerce, Paris, and that venue of the arbitration shall be London, U.K. Under the agreement the plaintiff was required to furnish a performance guarantee in favor of the first defendant for 10% of the value of the subcontract and a guarantee to cover the mobilisation advance, respectively in the sums of Rs. 1,26,38,440.00 and Rs. 63,10,220/-. The plaintiff furnished the bank guarantees through the second defendant. Performance guarantee bears the number Z/7/301 dated November 26, 1987 and mobilisation guarantee number z/7/302 dated November 26, 1987. It is an admitted case of the parties that the mobilisation advance was from time to time to be recovered from the running bills of the plaintiff and to the extent of the amount so recovered the guarantee was reduced and discharged. At the relevant time, the said guarantee for Rs. 63,19,220.00 stood reduced to Rs. 16,91,9651/-. These guarantees were valid up to February 5, 1991 and by court's orders in 1.A.. 290191 have been directed to be extended till further orders. Relevant portions of these bank guarantees are as under :- Performance Guarantee :

"IN consideration of the Hyundai Heavy Industries CO. LTD. (hereinafter referred to as the Contractor", which expression shall unless repugnant to the context or meaning thereof includes its successors, administrators and assigns") having awarded to M/s. Bhasin Associates PRIVATTILIMI- Ted with its Head Office at 58, JANPATH.. New DELHI-1.10001 (hereinafter referred to as the Sub- Contractor", which expression shall unless repugnant to the context or meaning thereof, include its successors, admistrators, executors and assigns) a Sub Contract valued at Rs. 12,63,84,400"- " for civil & structural works and the Sub-Contractor having agreed to provide a Sub-Contrast Performance Guarantee for the faithful performance of the entry Sub-Contract equivalent to 10 per cent ten"percent) of the paid value of the Sub-Contract to the Contractor. We, Banque Indo Suez, 601-603 Raheja Centre, Nariman "point. Bombay-400021 having its Head Office at 96, Boulevard Haussman, 75008 Paris (hereinafter referred to as the "Bank" which expression shall, unless repugnant to the context or meaning thereof,

include its successors, administrators, executors and assigns) do hereby guarantee and undertake to pay the Contractor, on demand any and all money payable by the Sub-Contractor to the extent of Rs- 1,26,38,440 "as aforesaid at any time up to 5-2-1989 without any demur, reservation, contest, recourse or protect and/or without any reference to the Sub-Contractor. Any such demand made by the contractor on the bank shall be conclusive and binding notwithstanding any difference between the Contractor and Sub-Contractor or any dispute pending before any Court, Tribunal, Arbitrator or any other authority. The bank undertakes not to invoke this guarantee during its currency without previous consent of the Contractor and further agrees that the guarantee herein contained shall continue to be enforceable till the Contractor discharges this guarantee."

Mobilisation Guarantee :

"IN consideration of the Hyundai Heavy Industries CO. LTD. (hereinafter referred to as the Contractor", which expression shall unless repugnant to the context or meaning thereof, include all successors, administrators and assigns) having awarded to M/s. Bhasin Associates Private Limited with its Registered Head Office at 58, JANPATH. New Delhi (hereinafter referred to as "Sub-Contractor" which expression shall unless repugnant to the context or meaning thereof, include its successors, administrators, executors, and assigns) a Sub-Contract valued at Rs. 12,63,84,400/- (Rupees Twelve crores sixty three lacs eighty four thousand four hundred only) for civil and structural works (hereinafter called the "Sub-Contract" and the "Contractor having agreed to make an advance payment to the Contractor for performance of the above Sub-Contract amounting to Rs. 63,19,220/- (Rupees Sixty three lacs nineteen thousand two hundred twenty only) as an advance against Bank Guarantee to be furnished by the Sub-Contractor. We BANQLT. INDO-SUEZ, 601-603 Raheja Centre. Nariman Point. Bombay-400021 having our Head Office at 96. Boulevard Haussman, 75008 Paris (hereinafter referred to as the "Bank" which expression shall unless respondent to the context or meaning thereof, including its successors, administrators, executors and assigns) do hereby guarantee and undertake to pay the Contractor immediately on demand any or, all money payable by the Sub-Contractor to the extent of Rs. 63,19,220.00 (Rupees Sixty three lacs nineteen thousand two hundred twenty only) at any time up to 5-2-1989 without any demur, reservation, recourse, contest or protest and/ or without any reference to the sub-contractor. Any such demand made by the Contractor on the Bank shall be conclusive and binding notwithstanding any difference between the Contractor and Sub-Contractor or any dispute pending before any Court, Tribunal, Arbitrator or any other authority. We agree that the Guarantee herein contained shall be irrevocable and shall continue to be enforceable till the Contractor discharges this Guarantee."

(5) These two Bank guarantees were invoked by the first defendant by its letters dated December 17, 1990 addressed to the second defendant. The

operative portions of these letters read as under:- Bank Guarantee No. Z/7/301 :

"OCCASION having arisen to invoke such Bank Guarantee in terms of the aforesaid Guarantee, we do hereby make a demand on you to remit the guaranteed amount of Rs. 1,26,38,440/- (Rupees : One crore twenty-six lakhs thirtyeight thousand four hundred tort only). In this connection, we are sending herewith the original Bank Guarantee No. z/7/301 dated 26-11-1987 15-2-1988 and the latest amendment dated 21-6-1990, issued by your Bank."

Bank Guarantee No. Z/7/302 :

"OCCASION having arisen to invoke such Bank Guarantee in terms of the aforesaid Guarantee, we do hereby make a demand on you to remit the guaranteed amount of Rs. 63,19,220/- (Rupees Sixty-three lakhs Nineteen thousand two hundred twenty only). In this connection, we are sending herewith the original bank Guarantee No. Z/7/302 dated 26-11-1987 15-2-1988 and the latest amendment dated 21-6-1990, Bhasin Associates Limited Vs. Hyundai Heavy Industries 559 Company Ltd. and another issued by your Bank."

(6) Before, however, invoking these bank guarantees, the first defendant terminated the contract with the plaintiff by invoking Clause 16 of the Subcontract agreement. This was again by letter dated December 17, 1990. This letter reads as under : -

"In spite of repeated advice and persuasions from to complete the entire work by March, 1990. "In spite of repeated advice and persuasions from time to time to improve upon your progress of work, you have failed to do so. The original completion schedule, as you are aware, was shifted a number of times and in spite of this you have not been able to stick to any programme of progress and you are still lagging behind the schedule by more than an year. You are well aware that the other related work to be carried out by Icb and ourselves can be taken up only on your completing your portion of the work and failure to do so has adversely effected the overall completion schedule apart from incurring heavy financial losses. It may not be out of place to mention later by that at your request we even went to the extent of providing you with refundable advance of Rs- 200 lakhs through Citibank with the sole object of achieving the progress and completing the work, even though we were not obliged to do so under the terms of the Contract. Despite every efforts from our side, the progress of work instead of showing any sign of improvement continues to de-trio rate further. This inordinate delay on your part in the execution of the work has considerably delayed the completion of the project which is of national importance and this state of affairs cannot be allowed to continue any further." In the circumstances we are left with no other options but to invoke clause No. 16 of title Sub-Contract Agreement and terminate your Sub-Contract with immediate effect. You are advised to vacate site immediately. This is Without prejudice to our right to claim against you the enormous losses and damages suffered and likely to be incurred by us."

(7) It was submitted before me that the amount of advance mentioned in the above letter was not Rs. 200 lakhs but Rs. 246 lakhs.

(8) Dispute, thus, arose between the parties and they lay blame at the door of each other. The plaintiff, however, did not proceed to refer the disputes to arbitration and instead filed this suit for permanent injunction against invocation of the two bank guarantees. The case of the plaintiff is that the invocation of the bank guarantees is malafide and fraudulent attempt at unjust enrichment and that invocation is also not in accordance with the terms of the bank guarantees. plaintiff says that the performance guarantee is a conditional one and in order to invoke the same the first defendant must state as to in what manner the breach had been committed by the plaintiff and what was the loss or damage suffered by the first defendant on account of the said breach entitling it to invoke the guarantee. plaintiff further says that invoking the other guarantee to cover mobilisation advance for whole of the amount of Rs. 63,19,2201/- is again illegal as the value of the guarantee as exists would be Rs. 16,91,965]- in view of the recoveries made by the first defendant from the running bills of the plaintiff from time to time. According to the plaintiff this also establishes the malafides of the first defendant audits attempt at unjust enrichment.

(9) First defendant contends that the plaintiff is guilty of delay in execution of the subcontract and apart from the mobilisation advance, it advanced a further sum of Rs. 250 lakhs to the plaintiff to give financial assistance to it though first defendant was not bound to provide any such assistance. It is agreed that the plaintiff has utilised Rs. 246 lakhs out of this advance. To this the plaintiff has answered by saying that the tender price quoted by it was though Rs. 12,63,84,400.00 but that was on deemed export basis and a higher price of Rs. 13,76,90,0001/- was quoted for non-deemed export. It says that Government of India by their letter dated June 28, 1989 refused to grant special imprest license for import of required quantity of steel for execution of the work to the plaintiff, thus making the value of the contract as Rs. 13,76,90,000.00 . plaintiff says it was on this account an extra cost which it had to incur to procure steel from indigenous sources that the first defendant agreed to advance amount up to Rs. 250 lakhs. It says that it lodged a claim with the first defendant by its letter dated September 6, 1989 for an amount of Rs. 2,17,0001/ Receipt of this letter the first defendant denies. Company Ltd. and another

(10) First defendant contends that the plaintiff has no intention to complete the work and has already obtained an amount of Rs. 12,32,67,220.20 against total value of the work of Rs. 12,63,84,4001/- when work of the value of Rs. 3,24,98,942.43 still remains to be done by the plaintiff. The first defendant has denied that the advance of Rs. 250 lakhs has anything to do with. the rejection of the case of the plaintiff by the Government of India for grant of special wimpiest lice lice to the plaultiff. It has referred to the Memorandum of Understanding dated November 9, 1989 between the parties wherein it is stated that plaintiff explained its fund. flow problem for working capital to purchase raw

material and requested the first defendant to arrange financial reliefs towards its procurement of material to the tune of Rs. 200 lakhs. In this Mou there is no mention of any rejection by the Government of India of their letter dated June 28, 1989 refusing to the grant of special imprest license to the plaintiff. The advance of Rs. 200 lakhs by the first defendant to the plaintiff has been agreed to on certain terms and conditions as mentioned in the MOU. It is specifically mentioned in this Mou that the plaintiff agreed to pursue any contractual claims only after completion of the plant, and then clause 7 of the Mou reads as under :-

"7.BAPL (plaintiff) agrees to keep Hhi (first defendant) indemnified and hold Hhi harmless against all claims, actions, proceedings, suits, demands, expenses, loss and damage of whatever nature which may arise out of or in connection with the subject financial arrangement as well as any contractual claim such as Deemed Export Benefit, statutory variation, etc."

(11) An agreement dated January 25, 1990 is duly entered into between the parties on the basis of the aforesaid MOU. There is yet another agreement called supplemental agreement dated August 10, 1990 between parties for further finance to the extent of Rs. 50 lakhs by the first defendant to the plaintiff. If is mentioned in this letter that this is obey and above the amount of Rs. 200 lakhs already financed in terms of agreement dated January 25,1990.

(12) The first defendant has also brought on record a statement showing the amount of work done by the plaintiff as on November 30, 1998 and the payment released to It. This state- ment has not been dilated by the plaintiff fact referred to during the course of arguments. reference is made to this statement the plaintiff has done work of the value of Rs. 9,38,35,457.57. There are as many as 23 items of work mentioned in the statement, but the principal works being St Steel Straightening Measuring, Cutting, Bending, etc; Fabrication; and Erection still remains to be done and the balance work under these heads is respectively 35%, 51.6% and 91.2%. There are letters on record from the other subcontractor I.C.B. Ltd. that fronts are not being made available to it by the plaintiff for it to complete its work. The first defendant has also complained about this. There are various letters on record by the first defendant to the plaintiff for expediting the work and these letters show that the plaintiff appeared to have in fact abandoned the work- The following amounts have been received by the plaintiff under the subcontract:--

1. Amount released on the basis Rs. P. of the work done. 9,38,85,457.57 2. Loan of Rs. 200 lacs + interest + draft charges. 2,09,65,933.66 3. 2nd Loan arranged. 46,43,435.00 4. Charges on the same- 5,80,429.00 5. Cement etc. supplied. 6,00,000.00 6. Amount paid to labour. 9,00,000.00 7. Mobilisation amount not paid by the plaintiff. 16,91,965.00 _____ Total : 12,32,67,220.20

(13) Considering the total value of the work under the sub-contract an amount of Rs. 31,17,179.80 would, Therefore, appear to be due to the plaintiff from the

first defendant and, as noted above, while the work of the value of about Rs. 3.25 crores remains to be done by the plaintiff. I may note that the plaintiff has contended that material worth Rs. 80 lakhs is lying at the site. It has been contended by the plaintiff that the National Coalfields Ltd. had extended the date of completion of the contract up to March 31, 1991, but that would appear to be for whole of the contract. On. the day when the present subcontract was terminated it is not difficult to foresee that the plaintiff would not be completing its work even by March 31, 1991. The fact remains that only after the work by the plaintiff had been completed particularly of fabrication and erection, only then the work by the other subcontractor Icb Ltd. and the first defendant could be Company Ltd. and another taken at hand and completed. Prima facie it does appear to me that the plaintiff is in breach. There has been a failure on the part of the plaintiff in performing the contract. It is not that first defendant must wait up to March 31, 1991 when it is obvious that contract cannot be completed by that date. It may be noticed that while the first defendant had been repeatedly writing the plaintiff to take up in hand expeditious completion of the work and impressing upon the plaintiff urgency of the matter, there is no letter from the plaintiff since September 1989 except the one dated November 15, 1989, which the first defendant denies having received the same. There is force in the submission of the first defendant that the plaintiff was then interestedly only to take maximum monetary benefit from the first defendant without intending to complete the contract. First defendant has given full indulgence to the plaintiff to complete its work even to the extent of grant of financial assistance to the extent of over Rs. 246 lakhs which it was not obliged to do. It would appear that extreme step of termination of the subcontract was taken when first defendant found that there could not be any other alternative. I will not, however, go into the merits of the controversy lest it prejudiced the case of either of the parties when the disputes are referred to arbitration or there are any other legal proceedings. I have merely noted the circumstances which led to the invocation of the two bank guarantees in question. It must also be noted that the time for execution of the subcontract had otherwise long since expired. The questions which arise for consideration are if in the circumstances of the case the invocation of the bank guarantees by the first defendant is proper, and If so, should it be restrained from encashing the same.

(14) Various decisions of the Supreme Court, or the High Courts and this Court have been cited. A division bench- of this Court in *M/s. Punj Sons (P) Ltd. v. Hong Kong & Shanghai Banking Corporation & another*, 1991 (1) Del L 61 after examining some judgments, this Court, one of the Andhra Pradesh High Court and of the Supreme Court observed that "basic principles that emerge on a resume of the case law on the subject are : firstly, that in any given case, what is of relevance is terms of the bank guarantee, and that in fact constitutes the only guiding factor; and secondly, the next determining point would be the manner in which the bank guarantee had been invoked by the beneficiary, and in that context the terms of the demand letter assume great importance as well as

significance." The bench noticed a decision of the single bench of this Court in Nangia Construction (India) Pvt-Ltd. vs. rational Building Construction Corporation Ltd. (NBCC Ltd.), 1990 (2) D L 403 and also of the Supreme Court in Punjab National Bank Ltd. Vs. Shri Vikram Cotton Mills and Another, , which had been referred to in that case. After considering the arguments of the parties the bench made the observations noted above. In Nangia Construction (India) Pvt. Ltd. the contention of the petitioners who wanted stay of the bank guarantees was that the contract of guarantee was vitiated by misrepresentation and/or fraud committed by the N.B.C.C. Ltd. Upon the petitioners and the N.B.C.C. Ltd. was not entitled to the benefit of the two guarantees subject-matter of the case (see para 37 of the judgment). Then in a long and somewhat tenacious judgment, if I may say so with respect, the learned Single Judge examined the question if a bank guarantee was an independent contract and held it was not so. He relied on a decision of the Supreme Court in the Punjab National Bank Ltd. case but then that was not a case of bank guarantee and is clearly distinguishable. Supreme Court in number of cases has held that a bank guarantee is an independent contract and it is not for any High Court to say otherwise.

(15) In Ballabhadas Mathurdas Lakhani and Others Vs. Municipal Committee, Malkapur, , the Supreme Court held that its decision was binding on High court and its decision could not be ignored on the ground that relevant provision was not brought to the notice of the Supreme court. The appeal arose out of a decision of the Bombay High Court which had dismissed the suit of the plaintiff-appellant for recovery Of certain amount of tax collected by the municipality and seeking permanent injunction re-starting the municipality from recovering the tax. The suit had been decreed by the trial court but the High Court upset the decree with the following Observation :-

"WE are bound to follow the decision in Bharat Kala Bhandar Ltd. Vs. Municipal Committee, Dhamangaon, but in view Of the fact that the relevant provisions were not brought to the notice of the Court and in view of the fact that the decision in Firm Seth Radha Kishan (Deceased) Represented by Hari Kishan and Others Vs. The Administrator, Municipal Committee, Ludhiana, holds that the remedy provide by similar provisions is adequate and a suit does not lie, we are constrained to hold that under the Act the suit is incompetent."

(16) This was adversely commented upon by the Supreme Court and the high Court was held bound to follow the decision of the Supreme Court.

(17) That a bank guarantee is an independent contract is settled law. In U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd., ; the Supreme Court has again in terms said so. The court observed that an elaborate commercial system had been built up on the footing that a confirmed letter of credit constituted a bargain between the banker and the vendor of the goods, which "imposed upon the banker an absolute obligations to pay, irrespective of any dispute there might be between the parties whether or not the goods were

up to contract. The principle is that commercial trading must go on the solemn guarantee either by the Letter of credit or by bank guarantee irrespective of any dispute between contracting parties whether or not the goods were up to contract.. The banks cannot be absolved of their responsibility to meet the obligation. In this case the Supreme Court examined its earlier judgments, that of the High Courts and of English Courts and laid some of the principles which can be culled as under:-

1.A confirmed letter of credit and the bank guarantee stand on the same footing. The obligations assumed by the bank in bank guarantee are irrevocable. Bank must honour its commitments according to the terms of the bank guarantee. A bank guarantee constitutes a bargain between the banker and the creditor (seller in the case of letter of credit) which imposes on the banker an absolute obligation to pay. 2.An irrevocable letter of credit has a definite implication. It is independent of and unqualified by the contract of sale or other underlying transactions. These observation a fortiori apply to a bank guarantee because on the bank guarantees revolve many of the internal trade and transaction in a country. Otherwise the very purpose of bank guarantees would be negated and the fabric of trading operation will get jeopardised.

3.The contractual duty owed by an issuing of confirming bank to the buyer to honour the credit notified by him on presentation of apparently conforming documents by the seller is matched by a corresponding contractual liability on the part of the bank to the seller to pay him the amount of the credit on presentation of the documents. This principle is same in the case of bank guarantee.

4.Bank is not concerned in the least with the relations between the supplier and the customer, nor with the question whether the supplier has performed his contractual obligations or not; nor with the question whether supplier is in default or not. The bank must pay according to its guarantee, on demand, if so stipulated, without proof or conditions. The only exceptions being (1) when there is a clear fraud by one of the parties of which the bank has notice or the bank guarantee has been obtained by misrepresentation or concealment of material facts, and (2) injunction can be granted to prevent irretrievable injustice but only in very special and exceptional cases and, of course, depending upon the facts of that case.

5.Also a bank guarantee providing for payment on demand without proof or conditions is in the nature of a promissory note payable on demand and where the plaintiff has not established fraud on the part of the defendant, the bank is required to honour the bank guarantee on demand made by the defendant.

6.It is not material if the injunction sought is against the bank or the party invoking the bank guarantee as the net effect would be restraining the bank from performing the bank guarantee. That cannot be done. One cannot do indirectly what one is not free to do directly. Frame of the suit by not impleading the bank

cannot make any difference in the position of law.

7.If the bank guarantee is invoked and on that account the person giving the bank guarantee is ruined he is not without remedy. He is not to suffer any injustice which is irretrievable. He can sue the party invoking wrongly the bank guarantee for damages.

8.When it is said that in the presence of "special equities" arising from a particular situation which might entitle the party on whose behalf bank guarantee is given to an injunction restraining the bank in performance of bank guarantee, the words "special equities" only mean a situation where the injunction is sought to prevent injustice which is irretrievable.

9.The view that in a given case the matter will still be referred to arbitration and in those circumstances if bank guarantee was permitted to be encashed, it would be improper, cannot be sustained in view of the well settled principles on which the bank guarantees are operated.

10.It is not the rule. there should be a prima facie case In order to restrain the operation either of irrecoverable letter of credit or of bank guarantee, there should be serious dispute and there should be a good prima facie case of fraud and special equities to prevent irretrievable injustice between the parties. The courts usually refrain from granting injunction to restrain the performance of the contractual obligations arising out of a letter of credit or an bank guarantee.

11.The Supreme Court also observed that sound banking system might, however, require more caution in the issuance of irrevocable documentary credits or the bank guarantees. It would be for the bank to safeguard themselves by other means and generally it, not for the courts to come to their rescue with injunctions unless conditions for the grant of the same exist.

12.In U.P. Cooperative Federation Ltd. case there were also two bank guarantees-one performance guarantee and the other mobilisation advance guarantee- The language was somewhat same as of the two bank guarantees in the present case. The court in that case held that it was not a case for grant of injunction restraining the appellant from invoking the bank guarantees. In National Thermal Power Corporation Ltd. Vs. Hind Galvanizing and Engineering Co. Ltd. and another, , the language of the bank guarantees was similar to the ones before me. In that case also the court refused" to grant injunction restraining encashment of the bank guarantees. If I apply the principles laid by the Supreme Court for invoking the bank guarantees, I find that it is not a case where it can be said that there is any fraud involved in the case, or that the plaintiff would suffer any irretrievable injustice in case the bank guarantees are allowed to be encashed. On the facts of the Case the first defendant appears to be quite right in exercising its right to invoke the bank guarantees- I also find that the bank guarantees have been invoked as per their terms. Nothing more was required to be stated in the letters invoking the guarantees. I am, however, further of the view that the mobilisation advance guarantee cannot be invoked for whole of the

amount. It can" be invoked only to the extent of Rs. 16,91,965.00 which amount still remains to be realised from the bills of the plaintiff. Providing of financial assistance to the extent of Rs. 246 lakhs by the first defendant to the plaintiff was not by way of any mobilisation advance. It was independent of that. This bank guarantee was only to secure the mobilisation advance. Once having held that the bank guarantee is an independent contract, parties have to be bound by the terms thereof. First defendant cannot invoke the mobilisation advance guarantee for whole of the amount even though under the agreements giving loan assistance the loan to the extent of Rs. 246 lakhs was to be recovered by it from the plaintiff. For that it may have other remedy.

13. Because of the view which I have taken, it is not necessary for me to refer to other judgments cited at the Bar.

14. Accordingly, the application is partly allowed. While there will be no stay for invoking the performance bank guarantee, there will be stay for invoking the mobilisation advance guarantee for an amount over and above Rs. 16,91,965.00 . Since the plaintiff partly succeeds, there will be no order as to costs.