

(2021) 04 KAR CK 0066
In the Karnataka High Court
Case No : Commercial Appeal No. 53 Of 2021

Capacite Infraprojects Ltd

APPELLANT

Vs

M/S Siddha Sheka Developers Llp & Others

RESPONDENT

Date of Decision : 21-04-2021

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 9

Citation : (2021) 04 KAR CK 0066

Hon'ble Judges : Abhay S. Oka, CJ; Suraj Govindaraj, J

Bench : Division Bench

Advocate : Dhyan Chinnappa, Srinandan.K, Udaya Holla, Prithvi S. Hegde

Final Decision : Dismissed

Judgement

Suraj Govindaraj, J

1. The Appellant is before this Court seeking for setting aside the order dated 12.03.2021 passed by the learned LXXXII Additional City Civil and

Sessions Judge (Commercial Judge) (CCH-83), Bangalore in Comm.A.A.No.22/2020 dismissing I.A.No.1 filed by the Appellant under Section 9 of

the Arbitration and Conciliation Act, 1996 and also seeking for allowing the said application.

2. The Appellant had filed A.A.No.22/2020 under Section 9 of the Arbitration and Conciliation Act, 1996 seeking for an injunction restraining the

respondent No.1 either by itself or through its agents, employees, officers, representatives, consultants from taking any action, steps dealing with

encashing the Bank Guarantee No.49570 IGI 0029618 as also restraining respondent No.2-Bank from honouring the Bank Guarantee and ad-interim

reliefs in respect thereto.

FACTS:

3. The Appellant, who was the applicant in A.A.No.22/2020

3.1. Appellant who is a contractor who had been awarded a contract for Rs.21,80,69,997/- by Respondent No.1 on 12th December 2015 to carry out

the civil work for the purpose of construction of an apartment building called 'Marquis' at Bull Temple Road, Basavanagudi, Bangalore.

3.2. A letter of award was issued on 13th June 2016, mobilisation advance of 10% of the contract value was agreed to be released to the applicant in

two tranches to facilitate the applicant to perform the contract.

3.3. Clause 4.1 of the Letter of Award deals with the mobilisation advance, which is reproduced hereunder for easy reference:

4.1. Mobilisation Advance: An interest-free recoverable Mobilisation Advance of 10% of the Contract Sum will be released to you in the

following tranches against submission of equal amount of Bank Guarantees from reputed private banks.

The first tranche of 5% of Contract Sum shall be released on acceptance of Letter of Award by the Contractor and on submission of Bank

Guarantee, amounting to 5% of Contract Sum i.e. Rs.1,09,03,500 valid till date of Virtual Completion.

The Second tranche of 5% of Contract Sum Rs.1,09,03,500 shall be released against submission of Bank Guarantee for equal amount and

against successful mobilisation of Plant and Machinery.

4.2. Mobilisation Advance will be recovered from 3rd Running Account (RA) Bill on prorata basis and shall be recovered in total on or

before 80% of work is completed. (emphasis supplied)

3.4. Respondent No.1 advanced a sum of Rs.1,09,03,500/- as the first tranche of mobilisation advance, which was secured by the Appellant by way of

two Bank Guarantees dated 3rd March 2016 for a sum of Rs.59,03,500/- and Rs.50,00,000/-, which were initially valid till 29th December 2016.

3.5. In October 2016, the second tranche of the mobilisation advance of Rs.1,09,03,500/- was advanced which was secured by Bank Guarantee dated

13th October 2016 for a sum of Rs.1,09,03,500/- issued by the second respondent herein.

3.6. Subsequent thereto, apart from the Bank Guarantee, independent performance Bank Guarantee was also made available by the Appellant to

Respondent No. 1 for a sum of Rs.43,60,000/-.

3.7. The Appellant commenced and continued the work under the contract and raised various Running Account Bills (RA Bills). In the said RA Bills,

a portion of the mobilisation advance was deducted, and as such, each time a Bank Guarantee was extended. The amount covered under the Bank

Guarantee was progressively reduced, taking into consideration the amount adjusted.

3.8. In December 2019, certain disputes arose between the Appellant and Respondent No. 1-employer. The parties agreed to reduce the total value of

the contract from Rs.21,80,69,997 to Rs.13,96,00,000/- and thereafter, the Appellant renewed the Bank Guarantee on 31st December 2019 only for a

sum of Rs.56,28,324/-.

3.9. The Appellant contends that in February 2020 instead of making payment of the balance amount due to the Appellant, Respondent No. 1 invoked

the mobilisation Bank Guarantee, which came to be informed by the Respondent No.2-Bank to the Appellant and it is in such circumstances that the

Appellant filed the above application in A.A.No.22/2020 seeking for aforesaid reliefs.

4. The Respondent No. 1-employer, on being served with notice, entered appearance and filed its objections contending that

4.1. The Respondent No. 1-employer has made payments of several amounts from time to time to the various suppliers of the Appellant, labourers,

sub-contractors, electricity dues, etc.

4.2. The Appellant, instead of completing the work by 31st March 2018, had demobilised from the site in January 2020, all the men and machinery

were removed from the site, and as such, the employer was required to engage the services of another contractor to complete the works allotted to

the Appellant.

4.3. On account of the demobilisation, the Respondent No. 1-employer was left with no option but to invoke the Bank Guarantee provided by the

Appellant towards mobilisation advance paid by the Respondent No. 1-employer.

4.4. The Respondent No.1-employer further contended that the invocation of the Bank Guarantee was proper and correct in terms of the Bank

Guarantee issued. The Respondent No. 1-employer had all rights to invoke and/or encash the Bank Guarantee and, as such, sought for dismissal of the

application filed by the Appellant.

5. The trial Court, on consideration of the matter, vide its order dated 12th March 2021,

5.1. Dismissed the application on the ground that the Bank Guarantee was unconditional and irrevocable Bank Guarantee.

5.2. No injunction could be issued restraining the invocation of the same. Though it has been contended by the Appellant that only a sum of Rs.14.17

lakhs remains to be adjusted from mobilisation advance, the Respondent No. 1 â?" employer had contended that a sum of Rs.1,43,65,390/-had been

paid by Respondent No. 1 to various suppliers and contractors of the Appellant. Therefore, the invocation could be made for the entire amount

covered under the Bank Guarantee.

5.3. There are no grounds made out by the Appellant for grant of an injunction restraining the invocation of the Bank Guarantee. The Bank Guarantee

being unconditional, no injunction order could be granted and as such, dismissed the application.

5.4. It is aggrieved by the said order that the Appellant is before this Court.

6. Sri. Dhyani Chinnappa learned Senior counsel instructed by Sri. Srinandan K., learned counsel appearing for the Appellant submitted that:

6.1. The Bank Guarantee, which has been issued in the present case, is only related to the mobilisation advance issued by Respondent No. 1-employer

and does not cover any aspect. If the Bank Guarantee had to be invoked, it could have been only invoked in respect of the balance due on the head of

account of mobilisation and nothing more.

6.2. The unadjusted mobilisation advance covered by the Bank Guarantee is only Rs.14.17 lakhs. Therefore, the entire Bank Guarantee could not have

been encashed. The contract value is for a sum of Rs.21,80,69,997/- as regards which a sum of Rs.2,18,04,000/- had been advanced towards which

the Bank Guarantee had been issued. Subsequent to the adjustment of the mobilisation advance from various RA bills, the same came to be reduced.

As such, the only Bank Guarantee which was in operation was for a sum of Rs.56,28,324/-. The unadjusted mobilisation advance being only

Rs.14,17,633/-, a Bank Guarantee for a sum of Rs.56,28,324/- could not be encashed.

6.3. The letter invoking the Bank Guarantee does not indicate the amounts due

by the Appellant to Respondent No. 1-employer. There is no mention of the amounts in the said invocation letter. As such, invoking the entire Bank Guarantee for a paltry amount due is improper and, therefore, ought to be injuncted. In this regard, he relies upon the following decisions:

6.3.1. Hindustan Construction Co. Ltd. v.State of Bihar, (1999) 8 SCC 436, more particularly, Paras 9 and 21 thereof:

9. What is important, therefore, is that the bank guarantee should be in unequivocal terms, unconditional and recite that the amount would be paid without demur or objection and irrespective of any dispute that might have cropped up or might have been pending between the beneficiary under the bank guarantee or the person on whose behalf the guarantee was furnished. The terms of the bank guarantee are, therefore, extremely material. Since the bank guarantee represents an independent contract between the Bank and the beneficiary, both the parties would be bound by the terms thereof. The invocation, therefore, will have to be in accordance with the terms of the bank guarantee, or else, the invocation itself would be bad.

21. As pointed out above, bank guarantee constitutes a separate, distinct and independent contract. This contract is between the Bank and

the defendants. It is independent of the main contract between HCCL and the defendants. Since the bank guarantee was furnished to the

Chief Engineer and there is no definition of 'Chief Engineer' in the bank guarantee nor is it provided therein that 'Chief

Engineer' would also include Executive Engineer, the bank guarantee could be invoked by none except the Chief Engineer. The

invocation was thus wholly wrong and the Bank was under no obligation to pay the amount covered by the 'performance guarantee' to

the Executive Engineer.

6.3.2. Standard Chartered Bank v. Heavy Engg. Corpn. Ltd., (2020) 13 SCC 574

23. The settled position in law that emerges from the precedents of this Court is that the bank guarantee is an independent contract between

Bank and the beneficiary and 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 is of no consequence.

There are, however, exceptions to this rule when there is a clear case of fraud, irretrievable injustice or special equities. The Court

ordinarily should not interfere with the invocation or encashment of the bank guarantee so long as the invocation is in terms of the bank guarantee.

6.4. Though copies of several other decisions have been produced, they have not been relied on by the learned Senior counsel. He limits his reliance on the aforesaid decisions.

6.5. On the above basis, he submits that the trial Court ought to have enjoined Respondent No. 1-employer from invoking the Bank Guarantee and second respondent " Bank from honouring any such invocation.

7. Sri. Udaya Holla learned Senior counsel instructed by Sri. Sanjay H.Sethiya, learned counsel appearing for Respondent No. 1" employer would submit that

7.1. The Bank Guarantee which has been issued is an unconditional Bank Guarantee. Admittedly, there are disputes between the parties as regards which the Appellant has invoked the arbitration clause.

7.2. The Appellant has not completed the works awarded to the Appellant; instead demobilised its men and machinery from the worksite. Hence,

Respondent No. 1- employer was constrained to make payment of various amounts of monies to the suppliers/sub-contractors of the Appellant, which

Respondent No. 1-employer is entitled to recover.

7.3. It is in this background that the Bank Guarantee has been invoked by Respondent No. 1-employer.

7.4. The entire reading of either the application under Section 9 as also the present memorandum of appeal would not indicate any allegation of fraud

as against the employer-Respondent No. 1, and as such, there is no embargo on the Respondent No. 1-employer from invoking the Bank Guarantee.

The Bank Guarantee being a commercial instrument executed in favour of Respondent No. 1-employer, Respondent No. 1 could invoke the same

which cannot be enjoined by a Court of law. In this regard, he relies upon the following decisions:

7.4.1. U.P. Cooperative Federation Ltd., vs. Singh Consultants and Engineers (P) Ltd., (1988) 1 SCC 17,4 more particularly, Paras 21 and 35

thereof, which are reproduced hereunder for easy reference:

21. In the instant case, the learned Judge has proceeded on the basis that this was not an injunction sought against the Bank but this was

the injunction sought against the Appellant. But the net effect of the injunction is to restrain the Bank from performing the bank guarantee.

That cannot be done. One cannot do indirectly what one is not free to do directly. But a maltreated man in such circumstances is not

remedyless. The respondent was not to suffer any injustice which was irretrievable. The respondent can sue the Appellant for damages. In

this case, there cannot be any basis for apprehension that irretrievable damages would be caused if any. I am of the opinion that this is not

a case in which injunction should be granted. An irrevocable commitment either in the form of confirmed bank guarantee or irrevocable

letter of credit cannot be interfered with except in case of fraud or in case of question of apprehension of irretrievable injustice has been

made out. This is the well settled principle of the law in England. This is also a well settled principle of law in India, as I shall presently

notice from some of the decisions of the High Court and decisions of this Court.

35. Mr. Tarkunde submitted before us that in this case the grievance of the Appellant was that there was delay in performance and defective

machinery had been supplied. He submitted that if at this stage Appellant was allowed to enforce the bank guarantee, damage would be

done. He submitted before us that Appellant could not be permitted to take advantage of illegality by invoking the bank guarantee. But in

my opinion these contentions cannot deter us â?" in view of the principle well settled that there should not be interference in trade. This is

not a case where irretrievable injustice would be done by enforcement of bank guarantee. This is also not a case where a strong prima

facie case of fraud in entering into a transaction was made out. If that is the position, then the High Court should not have interfered with

the bank guarantee.

7.4.2. *Vinitech Electronics Private Ltd vs. HCL Infosystems Ltd.*, (2008) 1 SCC 544 more particularly, Paras 11 and 12 thereof, which are

reproduced hereunder for easy reference:

11. The law relating to invocation of bank guarantees is by now well settled by a

catena of decisions of this Court. The bank guarantees which provided that they are payable by the guarantor on demand is considered to be an unconditional bank guarantee. When in the course of commercial dealings, unconditional guarantees have been given or accepted the beneficiary is entitled to realise such a bank guarantee in terms thereof irrespective of any pending disputes. In U.P. State Sugar Corpn. v. Sumac International Ltd. this Court observed that: (SCC p. 574, para 12)

12. 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 realise 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 injunction to restrain the realisation 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 override 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.

12. It is equally well settled in law that bank guarantee is an independent contract between 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. In *BSES Ltd. v. Fenner India Ltd.* this Court

held: (SCC pp. 733-34, para 10)

“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 this Court, correctly declared that the law was “settled”.

7.4.3. *BSES Ltd (Now Reliance Energy Ltd.) vs. Fenner India Ltd and Another* (2006) 2 SCC 728 Paras 9 and 10 thereof, which are

reproduced hereunder for easy reference:

The rule and its exceptions

9. Mr Rohatgi, learned Senior Counsel for the Appellant, urged that the settled law in this country is that a bank guarantee is an

independent contract between the Bank and the beneficiary thereof. Accordingly, irrespective of any dispute between the beneficiary and

the party at whose instance the Bank has given the guarantee, the Bank is obliged to honour its guarantee, as long as the guarantee is

unconditional and irrevocable. Our attention was drawn to the judgment of this Court in *U.P. Coop. Federation Ltd. v. Singh Consultants*

and *Engineers (P) Ltd.*. It was pointed out in that case that a bank guarantee must be honoured in accordance with its terms as the Bank,

which gives the guarantee, is not concerned with the relations between the supplier and the customer. Neither is the Bank concerned with

the question whether any of them have failed in their contractual obligations or not. In other words, the Bank must pay according to the

tenor of its guarantee, on demand, without proof or condition.

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 â?? special equitiesâ? in favour of injunction, such as when

â??irretrievable injuryâ? or â??irretrievable injusticeâ? 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 U.P. State Sugar Corpn. v. Sumac International Ltd., this Court,

correctly declared that the law was â??settledâ??

7.4.4. U.P.State Sugar Corporation vs. Sumac International Ltd, (1997)1 SCC 568. Paras 12 and 16 thereof, which are reproduced

hereunder for easy reference:

12. 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 realise 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 injunction to restrain the realisation 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

override 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. In the case of U.P. Coop. Federation Ltd. v. Singh Consultants and

Engineers (P) Ltd. which was the case of a works contract where the performance guarantee given under the contract was sought to be

invoked, this Court, after referring extensively to English and Indian cases on the subject, said that the guarantee must be honoured in

accordance with its terms. The Bank which gives the guarantee 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 obligation or not, nor with the question whether the

supplier is in default or not. The Bank must pay according to the tenor of its guarantee on demand without proof or condition. There are

only two exceptions to this rule. The first exception is a case when there is a clear fraud of which the Bank has notice. The fraud must be of

an egregious nature such as to vitiate the entire underlying transaction. Explaining the kind of fraud that may absolve a bank from

honouring its guarantee, this Court in the above case quoted with approval the observations of Sir John Donaldson, M.R. in *Bolivinter Oil*

SA v. Chase Manhattan Bank (All ER at p. 352): (at SCC p. 197)

“The wholly exceptional case where an injunction may be granted is where it is proved that the Bank knows that any demand for

payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear both as to the fact of

fraud and as to the Bank’s knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of

the customer, for irreparable damage can be done to a bank’s credit in the relatively brief time which must elapse between the granting

of such an injunction and an application by the Bank to have it charged.”

This Court set aside an injunction granted by the High Court to restrain the realisation of the bank guarantee.

16. Clearly, therefore, the existence of any dispute between the parties to the contract is not a ground for issuing an injunction to restrain

the enforcement of bank guarantees. There must be a fraud in connection with the bank guarantee. In the present case we fail to see any

such fraud. The High Court seems to have come to the conclusion that the termination of the contract by the Appellant and his claim that

time was of the essence of the contract, are not based on the terms of the

contract and, therefore, there is a fraud in the invocation of the bank guarantee. This is an erroneous view. The disputes between the parties relating to the termination of the contract cannot make invocation of the Bank guarantees fraudulent. The High Court has also referred to the conduct of the Appellant in invoking the bank guarantees on an earlier occasion on 12-4-1992 and subsequently withdrawing such invocation. The Court has used this circumstance in aid of its view that the time was not of the essence of the contract. We fail to see how an earlier invocation of the bank guarantees and subsequent withdrawal of this invocation make the bank guarantees or their invocation tainted with fraud in any manner. Under the terms of the contract it is stipulated that the respondent is required to give unconditional bank guarantees against advance payments as also a similar bank guarantee for due delivery of the contracted plant within the stipulated period. In the absence of any fraud the Appellant is entitled to realise the bank guarantees.

7.4.5. Himadri Chemicals Industries Limited vs. Coal Tar Refining Co., (2007) 8 SCC 110 more particularly, Paras 11 and 13 thereof, which are reproduced hereunder for easy reference:

11. Except under these circumstances, the courts should not readily issue injunction to restrain the realisation of a bank guarantee or a letter of credit. So far as the first exception is concerned i.e. of fraud, one has to satisfy the Court that the fraud in connection with the bank guarantee or letter of credit would vitiate the very foundation of such a bank guarantee or letter of credit. So far as the second exception is concerned, this Court has held in that decision that it relates to cases where allowing encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. While dealing with the case of fraud, this Court in

U.P. Coop. Federation Ltd. v. Singh Consultants and Engineers (P) Ltd. held as follows: (SCC p. 197, para 53)

The fraud must be of an egregious nature such as to vitiate the entire underlying transaction.

(emphasis supplied)

While coming to a conclusion as to what constitutes fraud, this Court in the

above case quoted (at SCC p. 197, para 54) with approval the observations of Sir John Donaldson, M.R. in *Bolivinter Oil SA v. Chase Manhattan Bank*, All ER at p. 352g-h which is as follows:

“The wholly exceptional case where an injunction may be granted is where it is proved that the Bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear, both as to the fact of fraud and as to the Bank’s knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank’s credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the Bank to have it discharged.” (emphasis supplied)

13. So far as the second exception is concerned, this Court in *U.P. State Sugar Corpn. v. Sumac International Ltd.* as considered herein

earlier, at SCC para 14 on pp. 575-76 observed as follows:

“14. On the question of irretrievable injury which is the second exception to the rule against granting of injunctions when unconditional bank guarantees are sought to be realised the Court said in the above case that the irretrievable injury must be of the kind which was the

subject-matter of the decision in *Itek Corpn. case*. In that case an exporter in USA 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 US 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 realisation of the bank guarantee/letters of credit would cause irreparable harm 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 Itek case 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.â?? (emphasis supplied)

7.4.6. Daewoo Motors India Ltd. v. Union of India (2003) 4 SCC 690 more particularly, Paras 10 and 13 thereof, which are reproduced hereunder for easy reference:

10. It is too well settled a proposition to admit of detailed reasoning that for encashment of bank guarantee, the Bank cannot have any valid

resistance, except, of course, in a case of fraud. The clause in the bank guarantee, on which Mr Chidambaram relies, reads as under:

â??We, Times Bank Ltd., PTI Building, Parliament Street, New Delhi 110 001 do hereby unconditionally and irrevocably agree to pay the

President of India on demand without any demur or protest the amount due and payable under the abovesaid bond not exceeding Rs

4,80,00,000 (Rupees four crores eighty lakhs only) by way of loss or damage caused or suffered by the President of India by reason of

non-fulfilment of the export obligation under the abovesaid notification or by reason of any breach of any of the terms and conditions of

the abovesaid bond by M/s daewoo motors india limited.â??

13. From a perusal of the above clauses, it is abundantly clear that the bank guarantee furnished by the Bank is an unconditional and

absolute bank guarantee. The Bank has rendered itself liable to pay the cash on demand by the President of India â??notwithstanding any

dispute raised by M/s Daewoo Motors India Limited in any proceeding before any court or tribunalâ?. It is worth noticing that the clause in

the bank guarantee specifically provides that the demand made by the President of India shall be conclusive as regards the amount due and

payable by the Bank under this guarantee and the liability under the guarantee is absolute and unequivocal. In the face of the clear

averments, it is trite to contend that the bank guarantee is a conditional bank guarantee. Therefore, the Bank has no case to resist the

encashment of the bank guarantee. Inasmuch as we have held that the bank guarantee is an unconditional bank guarantee, the case of

Hindustan Construction Co. Ltd. v. State of Bihar is of no avail to the Appellant.

7.5. In the case of *Hindustan Construction* (supra), the Bank Guarantee was not an unconditional Bank Guarantee whereas in the present

case, it is unconditional Bank Guarantee and as such, he submits that the dicta of the Apex Court in *Hindustan Construction* (supra) would

not be applicable to the present facts and circumstances.

7.6. On the above grounds, he submits that the order passed by the trial Court is just and proper and does not require any interference.

8. Heard Sri. Dhyan Chinnappa learned Senior counsel instructed by Sri. Srinandan K., learned counsel appearing for the Appellant and Sri. Udaya

Holla learned Senior counsel instructed by Sri. Sanjay H. Sethiya learned counsel appearing for the Respondent No. 1 *â*" employer. Respondent No.2

being a formal party, notice has been dispensed with.

9. On the basis of the submission made by both the counsel and the documents on record, the points that would arise for our determination are:

9.1. Whether the Appellant had made out a case for grant of injunction restraining the invocation of the mobilisation advance Bank

Guarantee?

9.2. Whether the order of the trial court suffers from any infirmity requiring interference by this Court?

9.3. What order?

10. Answer to Point No.1: Whether the Appellant had made out a case for grant of injunction restraining the invocation of the

mobilisation advance Bank Guarantee?

10.1. The facts and contentions of the Appellant are stated hereinabove. Suffice it to say that according to the Appellant, mobilisation advance

remaining to be adjusted was only a sum of Rs.14,17 lakhs and Bank Guarantee for a sum of Rs.56,28,324/- could not be encashed. It is further

contended that mobilisation Bank Guarantee could only be invoked insofar as remaining unadjusted mobilisation advance and therefore, invocation

ought to have been only restricted to the said amount.

10.2. Admittedly, the contract as initially awarded was for a sum of Rs.21,80,69,997/- as regards which the mobilisation advance for a sum of

Rs.2,18,04,000/- had been advanced which had been secured by the Bank Guarantees. Subsequent thereto, under various RA bills, the amounts

advanced as mobilisation advance was deducted in RA bills, and as such, on 13.12.2019, the Bank Guarantee was renewed only for a sum of

Rs.56,28,324/-.

10.3. The Bank Guarantee as issued in the year 2016 continues to be in force, and no particular amount has been adjusted. The only dispute now

remaining is that according to the Appellant, the amount due is only Rs.14,17,633/- on account of mobilisation advance, whereas Respondent No. 1-

employer contends that the entire Bank Guarantee could be encashed by Respondent No. 1.

10.4. The contention of the Appellant is that as of the date of the invocation, only an amount of Rs.14.17 lakhs remains to be adjusted, and the entire

Bank Guarantee could not have been invoked and encashed.

10.5. Per contra, the contention of Sri. Udaya Holla, learned Senior Counsel appearing for Respondent No. 1, is that the Bank Guarantee had been

invoked in a proper and required manner, and neither the Bank nor the Appellant can contend that the Bank Guarantee cannot be invoked. The Bank

Guarantee being a commercial document, has to be given a commercial meaning. The purpose of issuance of a Bank Guarantee will be defeated if an

injunction is granted restraining the invocation of the Bank Guarantee.

10.6. Sri. Dhyan Chinnappa, learned Senior counsel, has relied upon the Hindustan Construction's case (supra) to contend that invocation of the

Bank Guarantee has to be made in a manner provided under the Bank Guarantee. If the same is not done in that particular manner, then the

invocation is held to be bad and requires to be set aside. He has also relied upon the decision of the Apex Court in the case of Standard Chartered

Bank (supra) to contend that even as regards invocation of Bank Guarantee, an injunction order could be granted.

10.7. Sri. Udaya Holla learned Senior counsel by relying upon the decision in the case of Daewoo Motors (supra) has contended that the Hindustan

Construction's case is not applicable to the present facts since, in Hindustan

Construction's case, the Bank Guarantee was not an unconditional Bank Guarantee whereas in the present case is an unconditional Bank Guarantee. Be that as it may, he submits that the respondent has invoked the Bank Guarantee in terms of the said Bank Guarantee. Therefore, even on facts, the Hindustan Construction case is not applicable to the present facts. He has also relied upon several other decisions extracted hereinabove that there cannot be an injunction restraining the invocation of the Bank Guarantee. It is in the above facts that the present point needs to be considered.

10.8. Admittedly, there was a contract entered into between the Appellant as the Contractor and the respondent as an employer for a value of

Rs.21,80,69,997/-. In the said contract, an amount equivalent to 10% of the contract value was released as mobilisation advance to the Appellant

amounting to Rs.2,18,04,000/-. Thereafter, a portion of the mobilisation advance was adjusted from time to time under various Running Account bills.

Though initially Bank Guarantee had been issued for a sum of Rs.2,18,04,000/-, subsequently on 31st December 2019, an amount under the Bank

Guarantee was reduced to Rs.56,28,324/-. It is only thereafter the disputes commenced between the Appellant and the respondent and the Bank

Guarantee was invoked by the respondent.

10.9. In view of the above, it is clear that until the date of issuance of the Bank Guarantee, the amount adjusted have already been taken into

consideration while issuing the Bank Guarantee. Though it is contended that the amounts due as on the date of the invocation of the Bank Guarantee

on account of the mobilisation advance is less than that covered by the Bank Guarantee, the same cannot be adjudicated by a Court of law at the

interlocutory stage. The same can only be adjudicated after trial. Even if the Bank Guarantee is invoked for a higher amount than what is due, the

same could always be adjudicated and appropriate orders can be passed after trial.

10.10. It is not the case of the Appellant that fraud is played by the respondent. The only case of the Appellant is that the amount actually due is less

than that covered by the Bank Guarantee. The issuance of the Bank Guarantee is also not in dispute.

10.11. We are of the considered opinion that the Bank Guarantee is required to

be paid on demand, it being the foundation of the commercial dealings and/or commercial contracts, any injunction restraining the invocation of the Bank Guarantee would have a cascading negative effect on business transactions. The purpose of issuance of a Bank Guarantee is that the same may be invoked by the person to whom it is issued and the Bank is required to honour the same. Any dispute as such between the parties can neither be decided by the Bank nor by any Court in interlocutory proceedings.

10.12. In the present case, admittedly, the disputes between the parties are being referred to Arbitration, Arbitration clause already having been invoked. Any and all contentions of the Appellant as regards the wrongful or improper invocation of the Bank Guarantee can be adjudicated by the Arbitrator as and when appointed.

10.13. The only exception for invocation of the Bank Guarantee being fraud and the same not even having been raised in the present matter, we find no reason to injunct the invocation of the Bank Guarantee.

10.14. Hence, we answer Point No.1 by holding that the Appellant has not made out a case for grant of injunction restraining the invocation of the mobilisation advance Bank Guarantee.

11. Answer to Point No.2: Whether the order of the trial court suffers from any infirmity requiring interference by this Court?

11.1.The trial Court has considered all the above aspects in its well-reasoned order. The trial Court having taken into consideration that the Bank

Guarantee was unconditional one, there being amounts due on the part of the Appellant to the respondent, as on the date of the invocation of the Bank

Guarantee, the Bank Guarantee was valid and subsisting has refused the order of injunction as sought for by the Appellant.

11.2.We find no reason to interfere with the well-reasoned order passed by the trial Court.

11.3.Hence, we answer Point No.2 by holding that the order passed by the trial Court does not suffer from any infirmity requiring interference by this Court.

12. Answer to Point No.3: What order?

12.1.In the result, the above appeal stands dismissed. No costs.

ORDER

1. After the judgment was pronounced in open Court, the learned counsel appearing for the appellant submitted that the appellant is ready to deposit the entire amount covered by the Bank Guarantee and prays for extension of the interim order passed earlier to enable the appellant to approach the Apex Court.
2. In view of the said submission made, the operation of the interim order passed earlier is extended by a period of four weeks from today subject to deposit being made by the appellant of the entire amount covered by the Bank Guarantee within one week from today.
3. Needless to state that if the amount is not deposited within one week from today, this order of extension of the interim order will stand automatically vacated.
4. As and when the amount is deposited, the Registry to deposit the same in a Fixed Deposit in any of the Nationalised Banks in the name of the Court and renew it from time to time until further orders.
5. Since this order has been passed in the presence of both the learned counsel, there is no need for receipt of certified copy of the order for due compliance.