
(1999) 09 DEL CK 0108

In the Delhi High Court

Case No : IA 1022/98 and OMP 20/98, is 1023/98 and 21/98 and is 1024/98 and 22/98

DLF Industries Ltd.

APPELLANT

Vs

Hongkong and Shenghai Banking Corpn. and Others

RESPONDENT

Date of Decision : 01-09-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2
Contract Act, 1872 — Section 133

Citation : (1999) 2 AD 67 : (1999) 78 DLT 146 : (1999) 49 DRJ 1

Hon'ble Judges : S.N. Kapoor, J

Bench : Single Bench

Advocate : Mr. J.C. Seth, for the Appellant; Mr. Arun Jaitly and Dr. A.M. Singhvi, Mr. Rahul Gupta and Mr. S. Bharthari, for the Respondent

Judgement

S.N. Kapoor, J.—This judgment shall dispose of three OMP No. 20/98, 21/98 and 22/98 and above-mentioned IAs therein for all the three OMPs and IAs relate to one original tender/contract, requiring different bank guarantees and seek injunction against encashment of bank guarantees and as such based on similar questions of facts and law.

2.1 Relevant facts relating to these OMPs are as under:

2.2 M/s. Atul Products Limited (now known as Atul Limited since 22nd July, 1998) invited tender for expansion of power project by setting up an 18 MW steam turbine generating set at their factory situated at Valsad on a turn- key basis. The tender of the petitioner was accepted. Respondent No.3 issued a Letter of Intent dated 1/2.2.95 for a lumpsum price of Rs.10 crores. However, the parties agreed to split the said Letter of Intent into three separate agreements for the purpose of performance guarantee and other guarantee. Respondent No. 3 claims to be entitled to enforce their rights in respect of all the three agreements equally and for that purpose the three agreements were to be treated as one agreement only. The project was to be successfully commissioned

by 15th March, 1996. However, time was extended till 15th May, 1997. The contract was not completed.

3.1 In OMP No. 20 of 1998, Hongkong & Shanghai Banking Corporation Limited gave Bank Guarantee for a sum of Rs. 7.1 lakhs for advance payment in respect of a part of the same agreement, i.e. contract No. APL/P-131/5 BC/E1 dated 3rd March, 1995 - equivalent to 10% of the total value for erection and commissioning services.

3.2 In respect of OMP No. 21 of 1998 contract No. APL/P/31/5BC/D1 dated 27th February, 1995 dated 27th February, 1995 the Central Bank of India gave two bank guarantees. One is for advance payment and agreed to pay Rs. 653.01 lakhs being equivalent to 10% of the supply value for the said order. Second is also for advance payment in respect of other part of the same agreement equivalent to 10% of design and engineering value of contract No. APL/P-131/5BC/D1 dated 27th February, 1995 for a sum of Rs. 13.5 lakhs.

3.3 Similarly in OMP No. 22 of 1998 ABN Amro Bank gave performance bank guarantee for a sum of Rs. 115 lakhs in respect of another part of the same agreement being contract No. APL/P-131/5BC/D1 dated 1st March, 1995.

3.4 It is claimed by the petitioner DLF Industries Ltd. ("DLF" for short) that respondent No. 3, M/s. Atul Limited could not make the payments in time. Meetings took place between Atul Ltd. ("Atul" for short) on 17th May, 1995, 17th September 1995 and 27th March 1996 for novation of contracts in favour of State Bank of India ("SBI" for short). Ultimately Atul approached the petitioner vide letter dated 29th March 1996 forwarding letter of respondent No. 2 SBI dated 29th March 1996 to accept the novation of the three contracts between the petitioner and the respondent No. 3 as the contract between petitioner and State Bank of India respondent No. 2. Both the respondents had requested petitioner vide letter dated 29th March, 1996 to accept the novation of the actual amount in favor of respondent No. 2. The petitioner accepted the novation by letter dated 29th March, 1996 and agreed to give fresh bank guarantees in favor of SBI and asked for return of bank guarantees given to Atul for amending bank guarantees in favor of SBI. Thus, respondent No. 3 ceased to be the contracting party as "purchaser" of the equipment TG set, its design and engineering services etc. After the novation there is no privity of contract between the petitioner and respondent No. 3. Since the novation of contracts between State Bank of India and M/s. Atul Limited is without there being any consent of concerned Banks giving bank guarantees, Hongkong and Shenghai Bank, the Central Bank of India and of ABN Amro Bank stand discharged from making the payment under the bank guarantees in dispute. According to the petitioner, firstly, in terms of Section 62 of the Contract Act, the original contract could not be enforced any more and in terms of Section 133 of the Indian Contract Act, the surety stands discharged for it provides as under :

"Any variance, made without surety's consent, in the terms of contract between

the principal debtor and a creditor, discharges the surety as to the transactions subsequent to the variance".

3.5 In view of the novation original contract is no more in existence and consequently, the bank guarantee furnished by respondent No.1 had become non-operational for having outlived their utility. Secondly, the bank guarantees should have been invoked by the State Bank of India, for M/s. Atul Limited had ceased to be the purchaser in view of the novation of the contract and now the purchaser is State Bank of India. Consequently M/s. Atul Limited could not have invoked the bank guarantee. Thirdly, none of the letters invoking the bank guarantee dated 8/13-1-1998 is in accordance with the terms of the bank guarantees for none of them indicates in so many words about the loss, damage or non payment caused and further, it does not disclose that the purchaser had suffered any loss. Consequently the invocation is invalid and illegal. As such, none of the bank guarantees in three OMPs could be got encashed by the respondent No. 3 Atul being against the terms of the agreement. Fourthly, according to the petitioner, though renewal was not needed but the petitioner got all the bank guarantees renewed from time to time under terrorem as insisted by respondent No. 3 M/s. Atul Limited who threatened to encash bank guarantees though the contract was innovated. The extension under duress is illegal and ineffective.

4. Respondent No. 2-State Bank of India contends that the bank guarantees issued by the Central Bank in favor of M/s. Atul Limited, respondent No.3 are irrevocable and unconditional for the Bank has undertaken to pay "without demur merely on demand in writing" inter alias on account of non fulfilment of the performance or equipment or advance payment guarantee clauses. The guarantees further indicate that the liability of the Banks giving guarantees shall not be relieved by reason of any variation in the main contract(s). The only ground on which the invocation of the bank guarantee can be interdicted is fraud and irretrievable injustice. In relation to the deed of guarantee itself M/s. Atul Limited had entered into leasing arrangement with the State Bank of India. The said equipments has been installed in the premises of M/s. Atul Limited by the petitioner and Memorandum of Understanding was executed by the parties envisaged that "DLF would give bank guarantee in favor of Atul. Atul would be entitled to invoke the bank guarantee as provided by DLF". The said MOU has been acted upon. Thus in terms of MOU dated 19th February 1997 M/s. Atul Limited is entitled to invoke the bank guarantee. Supposing for the sake of argument the said MOU has not been acted upon, the case of the petitioner would then be much worse for in that event the original contract will continue to hold the field and accordingly M/s. Atul Limited is entitled to invoke the bank guarantees on its own terms.

5. M/s. Atul Limited, respondent No. 3 is contesting the present OMPs inter alias on the ground that the bank guarantees in question are unconditional guarantees and are payable on demand without any demur. These petitions are not

maintainable in absence of any fraud on the part of the beneficiary to the knowledge of the petitioner and there is no allegation in this regard. This Court has got no jurisdiction to adjudicate upon the matter in view of Clause 15 of the Agreement as well as Minutes of the Meeting dated 19.2.1997 between the parties whereby the parties had agreed that only the Court situated at Valsad, Gujarat will have jurisdiction. The petitioner is guilty of suppression of material facts. A beneficiary of a bank guarantee is always entitled to invoke and encash the bank guarantee and the petitioner is estopped from objecting to the privity of respondent No. 3 in view of minutes of the meeting dated 19.2.1997. The said MOU being tripartite agreement binds all the parties and as such M/s. Atul Limited have privity to the contract. The bank guarantees are related to the performance and commissioning of the plant and the petitioner has failed to commission the plant within the stipulated time. Section 133 of the Contract Act has no application in view of the terms of the bank guarantee. If the rights of surety can be varied by specific agreement, such a variation agreement would not require consent of the surety. The respondent No.1 (in all the three OMPs) issued the pay orders in favor of respondent No. 3 and the said respondent has not raised the issue of waiver, or discharge of bank guarantee or the applicability of Section 133 of the contract Act. There cannot be any stay/injunction in respect of Banker's Cheque/pay order received pursuant to the encashment. Consequently the petitioner is not entitled to any stay or any other relief.

6. In OMP 22/98 Respondent No.1 ABN Amro Bank has also filed reply and according to respondent No.1 in the bank guarantee was issued in favor of M/s. Atul Limited as the "purchaser" under the two principal contracts. The fact that M/s. Atul Limited has been substituted by the State Bank of India as the "purchaser" under the two principal contracts in question was not brought to the attention of the answering respondent nor his consent was sought for variation and novation of the two principal contracts pursuant to which the guarantee was issued. If State Bank of India in fact replaced M/s. Atul Limited as the purchaser under the two principal contracts the very foundation on which the guarantee was in terms issued, had disappeared and said novation/variation would render the guarantee unenforceable. Letter invoking the bank guarantee dated 8.1.1998 is not in conformity with the terms of the guarantee as it does not state that the amount claimed is due by way of loss or damage caused or would be caused due to non-fulfillment of the Performance Guarantee Clause or Equipment Warranty Clause of the contract. Since the bank guarantee has not been invoked in terms there- of respondent Atul Ltd. could not be permitted to get the pay order obtained by respondent No. 3 encashed.

7. Having heard the parties at length, following points raised by the parties need consideration:

1. Whether the Delhi courts have no jurisdiction?
2. Whether any novation of the contracts has taken place in between the parties, and if so, whether the invocation of the four bank guarantees by M/s. Atul

Products Limited is fraudulent after novation of the contract in favor of State Bank of India?

3. Whether the bank guarantees have been invoked in accordance with the terms of the contract?

4. Whether the petitioners are entitled to get injunction as prayed for?

8. TERRITORIAL JURISDICTION:

8.1 Insofar as the question of territorial jurisdiction is concerned according to respondent No. 3 in view of Clause 15 of the 3 main Agreements (not the Bank guarantee agreements) as well as Minutes of the Meeting dated 19.2.1997 between the parties, the parties have agreed that only the Court situated at Valsad, Gujarat will have the jurisdiction. Clause 15 of the main Agreements reads as under :

COURT JURISDICTION

Dispute of any nature that may arise in connection with the execution of this Agreement shall be governed by the laws of India, subject to the jurisdiction of Courts situated in Valsad, Gujarat".

8.2 This condition was incorporated in agreements which were executed in between M/s. Atul Limited and DLF Industries Limited. None of the banks were party to such an agreement. Therefore none of the banks are bound by such an agreement.

9.1 Coming now to the Minutes of the Meeting dated 19.2.1997. Clause 7 of the Minutes of the Meeting held on 19.2.1997 reads as under :

"All other terms and conditions of the original contracts for design & Engineering, Manufacture & Supply of Equipment and Erection & Commissioning shall remain unaltered.".

9.2 This does not relate to the question of invocation of bank guarantee. The Minutes of the Meeting dated 19.2.1997 are just signed by the petitioner and the respondent and none of the banks were parties to it.

9.3 Learned counsel appearing on behalf of respondent No.3 in support of its contention relied upon the following cases:

1. Globe Transport Corporation Vs. Triveni Engineering Works and Another, .
2. Aligarh Muslim University v. Vinay Engineering Enterprises Ltd., (1994) 4 SCC 710 .
3. Cholamandalam Investments and Finance Co. Pvt. Ltd. Vs. Radhika Synthetics and another, .

9.4 In OMP 20 of 1998 the bank guarantee for a sum of Rs. 7,10,000/- has been executed in Delhi by the Hong Kong and Shanghai Banking Corporation, 15, K.G.

Marg, New Delhi on 8.5.1996 in favor of M/s. Atul Products Limited. The Hong Kong & Shanghai Banking Corporation has nothing to do with the original contract and the Minutes dated 17.2.1997.

9.5 Similarly, in OMP 21/98 the bank guarantees for a sum of Rs. 65,30,100/- and Rs. 13,50,000/- were executed by the Central Bank of India, Sansad Marg, New Delhi. It was executed at Delhi by the Deputy Chief officer and Chief Officer of the International Division on 13.3.1995.

9.6 In OMP 22/98 the bank guarantee for a sum of Rs. 1,15,00,000/- has been executed by ABN Amro Bank (NB) having its office at DLF Centre, Parliament Street, New Delhi in favor of M/s. Atul Limited on 1st May, 1997. In all the three OMPs all the bank guarantees have been executed in Delhi and Delhi Courts will have obviously jurisdiction unless and until two things are shown: firstly, some part of cause of action has arisen at Valsad, Gujarat State; secondly, there was agreement in between the parties including the banks giving bank guarantees to agree to the exclusive jurisdiction of Valsad Courts.

9.7 As has been mentioned earlier, part of cause of action arose in all the three cases for all the four bank guarantees have been executed in Delhi. In regard to a similar ouster clause which came to be considered in A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem, , the Supreme Court observed as under:

20. When the Court has to decide the question of jurisdiction pursuant to an ouster clause it is necessary to construe the ouster expression or clause properly. Often the stipulation is that the contract shall be deemed to have been made at a particular place. This would provide the connecting factor for jurisdiction corporation to the Courts of that place in the matter of any dispute on or arising out of that contract. It would not, however, ipso facto take away jurisdiction of other Courts. Thus in Salem Chemical Industries, a registered Firm Vs. Bird and Co. (P) Ltd., Calcutta, where the terms and conditions attached to the quotation contained an arbitration clause provided that: "any order placed against this quotation shall be deemed to be a contract made in Calcutta and any dispute arising there from shall be settled by an Arbitrator to be jointly appointed by us", it was held that it merely fixed the situs of the contract at Calcutta and it did not mean to confer an exclusive jurisdiction on the Court at Calcutta, and when a part of the cause of action had arisen at Salem, the Court there had also jurisdiction to entertain the suit u/s 20(c) of the Code of Civil Procedure.

21. From the foregoing decisions, it can be reasonably deduced that where such an ouster clause occurs, it is pertinent to see whether there is ouster of jurisdiction of other Courts. When the clause is clear, unambiguous and specific accepted notice of contract would bind the parties and unless the absence of ad idem can be shown, the other Courts should avoid exercising jurisdiction. As regards construction of the ouster clause when words like "alone", "only", "exclusive", and the like have been used there may be no difficulty. Even without such word in appropriate cases the maxim "expressio unius est exclusio alterius"

- expression of one thing may imply exclusion of another. When certain jurisdiction is specified in contract an intention to exclude all other from its operation may in such cases be inferred. It has Therefore to be properly construed."

9.8 It may be noticed that clause 15 does not use the word "alone" or "exclusively" and the like. Supposing for the sake of argument it is accepted that maxim "expressio unius est exclusio alterius" - expression of one thing may imply exclusion of another, is applied in this case then this exclusion would apply only between the petitioner and respondent No.3 in relation to enforcement of the main agreements and not the enforcement of Bank Guarantees, for none of the banks are bound.

9.9 Consequently, firstly, there is no such agreement in between the parties and the concerned banks clause(s) (15)(5) in the original contract(s) in between the petitioner and respondent No. 3 are of no consequence; secondly, none of the banks is bound by such an agreement; and thirdly, the above-mentioned clause 15 does not debar the institution of the case in any court in whose jurisdiction any part of cause of action arose/arises.

NOVATION OF CONTRACTS

10.1 The next point to be considered is of novation of the main contracts. The petitioner in all these cases claims that there was novation of contracts on 29th March, 1996 in favor of State Bank of India/respondent No. 2 in all these cases. It is claimed that bank guarantees given and extended mentioned the original contract. Consequently, in the light of the provisions of 62 and 132 of the Contract Act, the said M/s. Atul/respondent No. 3 ceased to be purchaser and State Bank of India stepped in its shoes. It is submitted that effect of novation u/s 62 of the Contract Act is that the original contract with Atul is not to be performed and consequently u/s 134 of the Contract Act the bank guarantees automatically stand discharged. Therefore, M/s. Atul could not invoke and enforce the bank guarantees.

10.2 In all the bank guarantees given by the respondent Banks in all the three OMPs more or less similar language has been used. In OMP No. 21, following paras of the bank guarantee are noteworthy :

"We the Bank, do hereby undertake to pay the amounts due and payable under this guarantee without any demur, merely on a demand in writing from the Purchaser stating that amount claimed due by way of loss or damage or non-payment caused to or would be caused to or suffered by the Purchaser by reason of any breach by the Supplier of any of the terms and conditions contained in the said order or by reason of the said supplier's failure to perform the said order. Any such demand on the Bank by the purchaser shall be conclusive as regards the amount due and payable by the Bank under this guarantee. However, our liability under this guarantee shall be restricted to an amount not exceeding Rs. 65,30,100.00 (Rupees sixty five lacs thirty thousand one hundred only). Our

liability under this guarantee is valid only up to 15.06.1996 only.

We, the Bank, further agree with the purchaser that the purchaser shall have the fullest liberty without our consent and without affecting in any manner our obligations hereunder to vary any of the terms and conditions of the said Contracts or to extend time of performance by the said Supplier from time to time or to postpone for any time or from time to time any of the powers exercisable by the Purchaser against the said Supplier and to forbear or enforce any of the terms and conditions relating to the said Supplier and we shall not be relieved from our liability by reasons of any such variation or extension being granted to the said Supplier or for any forbearance, act or omission on the part of the Purchaser to the said Supplier or by any such matter or thing whatsoever which under the law relating to sureties would but for this provisions have the effect of so relieving us.

The guarantee hereinbefore contained shall not be affected by any change in the constitution of the bank or of the said Supplier.

We, the Bank, lastly undertake not to revoke this guarantee during its currency except with the previous consent of the Purchaser in writing..."

10.3 In all the bank guarantees there is similar variance clause whereunder the purchaser had the fullest liberty to vary any of the terms and conditions of the said order or to extend time of performance by the said supplier from time to time or to postpone for any time or from time to time any of the powers exercisable by the purchaser against the said supplier without the consent of the bank and without affecting in any manner their plan hereunder and to forebear or enforce any of the terms relating to the said supplier and the bank shall not be relieved from their liability by reasons of any such variation.

10.4 It may be mentioned that while the purchase order was admittedly placed by respondent No. 3 it is apparent that on account of some financial problem the respondent No.3/Atul and DLF agreed to novate the contracts. In terms of Minutes of the Meeting dated 27th March 1996 between Atul Products Ltd. and DLF, the novation had to be tripartite for the minutes provide that

(1) "M/s. DLF Industries Limited will novate the said three contracts in favor of SBI Bombay and will give three letters confirming the novation in favor of SBI which will be handed over to Mr. S. Ramanathan today."

(2) "DLF have also agreed to sign tri-partite agreements between ATUL, SBI and DLF covering terms of the original agreements namely APL/P131/5BC/D1, APL/P131/5BC/S1 and APL/E1."

10.5 It is also apparent that the DLF agreed as per letter dated 29th March 1996 to the said proposal of novation in favor of SBI.

10.6 However, the same letter written by DLF to M/s. Atul Limited dated 29th March 1996 also provides in para 3 as under :

"The bank guarantees provided by DLF are to be in favor of SBI. In this connection, it is requested further that "the bank guarantee (BGs) already provided to M/s Atul may please be returned to us so that we can furnish necessary bank guarantees novated and modified in SBI's favour".

But neither the bank guarantees were returned for modification nor any bank guarantee has ever been executed in favor of SBI in terms of understanding reached in the meeting on 27th March 1996 despite request vide Atul's letter dated June 22, 1996. Between 1st April 1996 to 22nd July 1996, DLF received following payments from SBI "on account of M/s Atul Products Ltd" vide receipts mentioned below:

Date of	Amount receipt	1.4.96	61,00,000	13.5.96	63,37,500	15.5.96	10,36,875
28.6.96	82,07,793	22.7.96	23,46,991	TOTAL 2,40,29,159			

These receipts do not show SBI as the purchaser for the payment has been received on account of M/s Atul Products Ltd. There is another receipt of 1st August, 1996 of Rs.23,13,640/-. This receipt indicates that the payment had been received "on account of M/s Atul Ltd.". These receipts indicate that M/s. Atul Products Ltd. (now M/s Atul Ltd.) continued to be purchaser.

10.7 The Memo of Understanding dated 5th June 1996 indicates that the DLF agreed that

"...in view of the lease arrangement entered into by ATUL with the bank the said agreement was sought to be novated between the parties hereto keeping/retaining all terms and conditions unaltered" and the "shall give bank guarantees in favor of ATUL. ATUL will be at liberty to invoke bank guarantees provided by DLF and further ATUL shall be entitled to call upon the bank to pursue and enforce the terms and conditions of the original agreement under novation. In addition, ATUL is hereby authorised to pursue the original agreement in favor of DLF".

A copy of this is signed by both the parties but not by any representative of State Bank of India the lesser (pp. 159-162).

10.8 After the above-said understanding, while the payment of Rs. 2.38 crores was made to M/s. DLF Industries on June 22, 1996 vide Annex. 14, the bank guarantees were not executed in favor of State Bank of India. It has also been pointed out that subsequent to the alleged date of novation of 29th March 1996, the Bank Guarantee No. 1290 dated 1st May 1997 was issued for the first time in favor of respondent No. 3 M/s. Atul Ltd. As such, it is rightly submitted by the learned counsel for the respondent that the privity with respondent No. 3 remained at all times in terms of Minutes of Meeting dated 19th February 1997 whereunder "DLF agreed to enhance the equipment performance guarantee value to Rs.115 lakhs as per the original contract". However, on 17th January, 1998 vide Annex. 20 after having received the payment they wanted to resile from the understanding of MOU dated 5th June, 1996 by saying that "M/s Atul

Limited acted in an over- powering manner by withholding our invoices for large payments" but SBI rightly did not sign the above MOU.

11. The above facts indicate that while the petitioner and respondent No. 3 agreed to novate, neither the SBI signed the same nor the petitioner executed the bank guarantee(s) in favor of State Bank of India. It is also apparent that the petitioner and respondent No. 3 started playing on the nerves of each other and later the petitioner agreed to extend and to keep the bank guarantees alive in the name of ATUL/respondent No. 3 intact.

12. So far as bank guarantee(s) are concerned, there is no novation and there appears partial novation of the main agreements wherein for practical purposes the purchaser has been mentioned as lessee and SBI as a purchaser. Atul Products changed their character to lessee instead of being the owner of the machine, equipment and services which was being purchased by and for ATUL though financed by State Bank of India. Since the novations in regard to bank guarantees were neither acted upon by DLF nor by ATUL by exchanging the bank guarantees in favor of State Bank of India with earlier bank guarantees, the contracts of bank guarantees remained untouched and uneffected.

13. In this regard, it may be mentioned that the liability of surety is co-extensive with the principal debtor in terms of Section 128. In view of Memo of Understanding, the liability of DLF as principal debtor was accepted under the Bank guarantee. It is only at a later stage that they wanted to resile from MOU in 1998 after taking huge payments under the Memo of Understanding. Regarding contention of the old bank guarantees in favor of M/s. Atul, the learned counsel for the petitioner submits that Section 133 of the Contract Act specifically provides that any variance made without surety's consent in the terms of the contract between the principal debtor and the creditor discharges the surety as to transactions subsequent to the variance. Accordingly, the three banks stand discharged under the original contract with ATUL, and as the original contract is rescinded, the bank guarantee(s) in favor of ATUL is/are automatically stand discharged.

14. However, one cannot be oblivious to the provisions of Section 133 of the Contract Act provides that any variance made without the surety's, consent in the contract between principal debtor and the creditor discharges the surety as to transactions subsequent to the variance. The surety like any contracting party obviously cannot be held bound to do something for which he has not contracted. But here in this case variance is permissible under the bank guarantees themselves. The variance clauses in the bank guarantees provide that "the purchaser shall have the fullest liberty without their consent to vary any of the terms and conditions of the said contracts without affecting in any manner the obligations of the bank". Such a variation need not be referred to the banks for their consents. It also provides that the banks "shall not be relieved from our liability by reasons of any such variation or extension being granted to the said supplier or for the for-bearance and/or omission on the part of the purchaser to

the said supplier or by any such matter whatsoever which under the law relating to sureties would but for these provisions have the effect of so relieving us".

15. Now the question arises whether by alleged novation the principal debtor i.e. DLF stands released, and as a consequence thereof three banks also stood discharged. Firstly, novation has not been fully implemented by both the parties for the bank guarantees were never executed by DLF in favour of SBI, the petitioner the principal debtor under the bank guarantee could not be said to be discharged by any contract either by M/s. Atul or by the State Bank of India. Besides, the bank guarantees have been extended subsequently in favor of ATUL. As such, it is not possible to accept the submission that the Bank Guarantees would not be operative any more.

16. Section 133 of the contract has no application here for all the three banks who have given bank guarantees have allowed variance without any reference to them, and thus given virtual "carte blanche" to the parties. Submission of the learned counsel for the petitioner also suffers from one basic fallacy for the petitioner ignores the MOU reached in between the parties to keep the bank guarantees in favor of respondent No. 3 and giving respondent No. 3 right to invoke the bank guarantee. The fact that the petitioner wanted to resile from even that understanding indicates that the petitioner never honestly acted on the earlier novation nor wanted to act on the subsequent novation which was reached by Memo of Understanding. Therefore Section 133 is of no help to the petitioner and the variation neither discharges the principal debtor the petitioner No.1 nor the banks giving bank guarantees. Consequently, neither Section 133 nor Section 134 could help the petitioner.

ENCASHMENT OF THE BANK GUARANTEE UNDER THE TERMS OF CONTRACT

17.1 It is contended by the learned counsel for the petitioner Shri J.C. Seth that SBI is the purchaser who had made all the payments. In this respect, first time one of the arguments of the learned counsel for the petitioner is that "M/s. ATUL has ceased to be the purchaser. The term purchaser is not defined under the Sale of Goods Act. He submits that in general terms "purchaser" means the person buying the goods sold or "one who acquires title". He further submits that the term "Buyer" defined in Section 2(3) of the Sale of Goods Act means "a person who buys or agrees to buy the goods. But he submits that the Sale of Goods Act does not apply to turn key projects for T.G. Set is embedded to earth and is not goods as defined under Sale of Goods Act.

17.2 But this submission appears to be devoid of any force. The term "purchaser" covers respondent No. 3 as well as the bank as will be evident from the meaning of the word given to term "purchaser" in Black's Law Dictionary. It reads as under:

"The term "purchaser" means a person who, for adequate and full consideration in money or money's worth, acquires an interest (other than a lien or security interest) in property which is valid under local law against subsequent purchasers

without actual notice.

Transferee or a voluntary transfer, and includes immediate or mediate transferee of such a transferee."

Since in the case in hand while the respondent No. 3 are the actual purchasers and the State bank of India had just secured a loan for money advanced on those purchases had thus just a security interest, M/s. ATUL respondent No. 3 remains purchaser and consequently by the alleged variation, M/s. Atul does not cease to be the purchaser. Supply of an equipment plant, before it is embedded in earth, is goods for the purpose of Sales of Goods Act. Learned counsel for the petitioner referred to Carl Still G.m.b.H & Another Vs. State of Bihar AIR 1961 SC 1961. But that judgment related to the question of sale for the purposes of Bihar Sales Tax Act. This judgment did not relate to the definition of "purchaser". Consequently, one has to prefer the definition of the term "purchaser" and not the "sale" for the purpose of Bihar Sales Tax Act.

In view of these facts and the Memo of Understanding M/s Atul could invoke the bank guarantees.

17.2 The second limb of the argument of the learned counsel for the petitioner in this regard is that further para 6 of the bank guarantee provides that the beneficiary has to state in letters invoking bank guarantees that "the amount claimed is due by way of loss or damage or non-payment caused". None of the invocation letters dated 8th to 13th January 1998 of M/s. Atul, disclosed any loss or damage or non-payment costs.

17.3 OMP 20/98

Literally speaking, it appears that this bank guarantee has not been invoked in terms of bank guarantee for it does not disclose that any amount was due by way of loss or damage or non-payment caused to or would be caused to or suffered by the purchaser by reason of any breach of the supply or any of the terms and conditions contained in the said order or by reason of failure of the said supplier to notify the said order. It appears from the terms of the bank guarantee that ordinarily at the time of invoking the bank guarantee the person invoking the bank guarantee should disclose his mind by stating the specified amount and the reason of the claim which would be either actual loss suffered or estimated loss likely to be suffered. The submission is that on account of failure of respondent No. 3 to specify its claim, simple claim of the entire amount would not be sufficient under the bank guarantee in view of its term. The letter invoking bank guarantee dated January 8, 1998 in OMP No. 20/98 reads as under:

"We hereby invoke the captioned Guarantee and lodge our claim for the amount of Rs. 7,10,000/- against your Guarantee No. BG/96 NDH 245 dated 08.05.1996 which is valid up to February 5, 1998, as the supplier has failed to perform the relevant order"

17.4 In OMP 21/98 two bank guarantees have been invoked - one of

Rs.65,30,100 and another of Rs.13,50,000 were revoked by using similar language except with a change of the amount. The invocation letters (at p.20 and 21) both dated January 8, 1998 read as under:

"We hereby invoke the captioned Guarantee and lodge our claim for the amount of Rs. 65,30,100/- against your Guarantee No. 37/84 dated 13.3.1995 which is valid up to March 31, 1998, as the supplier has failed to perform the relevant order."

"We hereby invoke the captioned Guarantee and lodge our claim for the amount of Rs.13,50,000/- against your Guarantee No. 37/85 dated 13.3.1995 which is valid up to March 31, 1998, as the supplier has failed to perform the relevant order."

17.5 In OMP 22/98 the bank guarantee has been invoked vide letter dated January 8, 1998 (at p.15) in following words:

"We hereby invoke the captioned guarantee and lodge our claim for the amount of Rs.115 lakhs against your Guarantee No. 1290 dated 1st May 1997 as the supplier has failed to perform the performance guarantee clause and equipment warranty clauses contained in the said contracts".

It is submitted that the amount has to be claimed either on the basis of (i) loss or damage caused; or (ii) on the basis of loss or damage that would be caused due to non-fulfilment of the performance guarantee and equipment warranty clause contained. Here there is no reference to any loss or damage caused, or would be caused due to non-fulfilment of performance. It is also submitted that the parties intended to give the bank guarantee to cover the loss which is likely to be suffered by the respondent Atul Ltd. and not to cause unjust enrichment.

18.1 Though, it is apparent that, technically speaking, the bank guarantees have not been invoked strictly in terms of the bank guarantee, yet it is required to be seen as to how far this would defeat the claim of the respondent No. 3.

18.2 In OMP No. 21/98, it is claimed by the petitioner that in respect of bank guarantee of Rs.13.50 lakhs, advance has been fully adjusted and only Rs.1.88 lakhs is outstanding against advance in B.G. of Rs.65.30 lakhs for the amount had been deducted from the running bills and thus bank guarantee stood adjusted to that extent. Consequently, the encashment of these bank guarantees beyond Rs.1.88 lakhs in any case would amount to fraud as well as unjust enrichment. It may be mentioned that the deduction of the amount from the running bills and adjustment of the said amount has not been disputed before this court. Consequently, if the payment of the entire amount beyond Rs.1.88 lakhs against these bank guarantees, is made by the Central Bank of India would be double payment against the bank guarantees which has not been rightly invoked for no loss beyond Rs.1.88 lakhs appears to have been caused. As such, encashment of the bank guarantees beyond Rs 1.88 lakhs could not be allowed on account of fraud and irretrievable injury which is likely to be caused to the

petitioner. Accordingly, the bank guarantees of the Central Bank of India could not be invoked beyond Rs.1.88 lakhs.

19.1 With regard to OMP No. 20/98, an objection relating to adjustment by deduction has also been raised in addition to the above grounds. It is claimed that the total advance released against the bank guarantee of Rs. 7.10 lakhs in OMP 20/98 has been fully adjusted by deductions. This is in addition to the fact that technically, it has not been invoked in terms of the bank guarantee and substantially the bank guarantee has outlived its utility. Since the matter is being referred to arbitration also, it is felt that this bank guarantee should also not be allowed to be encashed.

19.2 In OMP 22/98, relating to a performance guarantee of Rs.115 lakhs no such claim of any adjustment has been made. The fact that the application for arbitration has also been filed, cannot be a ground not to allow the encashment of this bank guarantee. It may further be mentioned that so far as the loss is concerned, it is undisputed fact that there has been delay in installation of the T.G. set. This guarantee has been given on 1st May, 1997 in favor of Atul. All the arguments relating to novation etc. will not have any substantial bearing on this bank guarantee as compared to the bank guarantees in other two cases. In OMP No. 22/98, the bank guarantee has been executed in accordance with the Memorandum of Understanding reached in between the parties to increase the amount of the performance guarantee to Rs.115 lakhs, after a meeting of 19th February, 1997. The minutes specifically provided that the TG set shall be commissioned by 15th May, 1997 and the liquidated damage clause shall be applicable for any delay in commissioning beyond 30th May 1997. DLF agreed to enhance the equipment performance guarantee value to Rs.115 lakhs and bank guarantee was to be furnished as per the original terms. The bank giving guarantee undertook to pay the amount due merely on demand in writing taking it to be conclusive. The argument that it has been given under duress is frivolous for the petitioner could give up the contract at that stage also. This bank guarantee is neither in tune with the own conduct of the petitioner for petitioner had received over Rs. two crores in terms of earlier MOU of 1996 accepting Atul as purchaser and a person entitled to involve bank guarantees. The conduct of the petitioner does not appear to be equitable and he who seeks equity must do equity. It is notable that in so far as this bank guarantee of Rs.115 lakhs is concerned, no fraud could be alleged nor there is any possibility of irretrievable injury to the petitioner. There is neither prima facie case nor balance of convenience nor the petitioner is likely to suffer any irreparable loss which could not be recovered back specially in view of the alleged arbitration agreement and steps taken for arbitration. The fact that the invocation letter did not reproduce all the words like parrot alone is not sufficient to stop the encashment of bank guarantee in the absence of any allegation of fraud or irretrievable injury to the petitioner.

19.3 In this connection it is also contended that the bank guarantee is a matter

of contract and not of equity and, Therefore, the court must insist on the form in which the bank guarantee could be invoked. It may be mentioned here that the relief which could be granted u/s 9 of the Arbitration and Conciliation Act is of interim nature and the relief sought relates to securing the amount in dispute in arbitration. The court may grant such other interim measure of protection "as may appear to the court to be just and convenient" and "the court shall have the same power for making orders it has for the purpose of, and in relation to any proceedings before it". Thus, these proceedings are of the nature of Order 38, 39 and 41 CPC etc. Consequently, not only contractual obligation relating to form but equitable obligations have an equal role to play while granting or refusing such reliefs. For the sake of the form, substantial justice could not be denied. In every performance guarantee when the contract has not been completed in time and the purchaser/beneficiary under the guarantee claims the amount, then his estimate of loss cannot be questioned by the bank or anybody else at this stage. It is not the case of adjustment of payment. From the bank guarantee, it is apparent that the payment was to be made on demand without any demur. It appears to be implied in such case that the beneficiary of the bank guarantee has suffered the loss to this extent. We will have to keep in mind the distinction between the performance and advance payment guarantees. While in the case of advance payment guarantee where the payment had already been deducted from the running bills, there may be irretrievable injury to the petitioner but in performance guarantee, there is no such possibility for it relates to due performance within a specified time. The delay in such project costs a lot and the beneficiary of such a bank guarantee is supposed to suffer the loss of liquidated amount agreed to and stipulated by such bank guarantees. The encashment of such bank guarantee can be stayed only on two grounds of fraud and irretrievable injury and not on the ground of lack of repetition of few words used in the bank guarantee alone. Accordingly, from the foregoing, it appears that in so far as the bank guarantee of Rs.115 lakhs is concerned, there is no justification to stop the encashment of the bank guarantee.

19.4 Accordingly, OMP 22/98 is dismissed along with is No. 1024/98. OMP 20/98 and is 1022/98 is allowed and the respondents therein are hereby restrained from encashing the bank guarantee.

20. Insofar as OMP 21/98 and is 1023/98 are concerned, on the admission of the petitioners themselves, a sum of Rs.1.88 lakhs is still outstanding and the rest of the amount has already been adjusted by deductions from the bills. Consequently, the respondents are entitled to encash bank guarantee only to the extent of Rs.1.88 lakhs and not beyond that amount. The is 1023/98 and OMP 21/98 are decided accordingly.

21. In the peculiar facts and circumstances, parties are left to bear their own costs.

22. Copies of this judgment be placed on the files of OMP 20/98 and OMP 22/98.

23. As prayed by the parties, certified copy of the judgment may be given within two days.