

(2000) 01 DEL CK 0056

In the Delhi High Court

Case No : AA No. 181/99 and I.A. No. 5714/99

Essel Shyam Communication Ltd.

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 06-01-2000

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 10, 11(2), 11(5), 11(6), 20

Citation : (2000) 5 AD 48 : (2000) 86 DLT 117 : (2000) 54 DRJ 431 : (2000) 4 RCR(Civil) 131

Hon'ble Judges : J.B. Goel, J

Bench : Single Bench

Advocate : Mr. Rajiv Nayar, Mr. Ramji Srinivasan and Mr. Kaviraj Singh, for the Appellant; Mr. S.B. Jaisinghani, Addl., Solicitor General and Mr. Rakesh Tikku, for the Respondent

Judgement

J.B. Goel. J.

1. This application (A.A. 181/99) u/s 11 of the Arbitration & Conciliation Act, 1996 (for short "the Act") seeks the appointment of an arbitrator under arbitration agreement (clause 15 of the agreement).

2. Briefly, the facts are that in pursuance of its policy to license private parties for providing "Value Added Service", a license Agreement dated 28.3.1995 to establish, maintain and operate Closed Users Group Domestic 64 KBPS Data Network via Insat Satellite System using V-SAT (hereinafter called the service) throughout India under the Indian Telegraph Act was entered into between the President of India and M/s. Rama Associates Limited (for short "Rama") on the terms and conditions stipulated in the Agreement. This license was on non-exclusive basis for a period of 10 years subject to being terminated earlier. The Agreement contemplated inter alias (a) Clearance for Hub Station site from Standing Advisory Committee on Radio Frequency Allocations (SACFA), Ministry of Communication, (b) Allocation of Required Space Segment in the Designated Transponder/Satellite and frequency, (c) Issuance of requisite Operational

Requirement and Qualitative Requirement, and (d) license from Wireless Planning and Coordination Wing (WPC), Department of Telecommunication permitting utilisation of appropriate radio frequency spectrum for the establishment and operation of the VSAT network. The licensee was to pay license fee (1) @ Rs. 50,000/- per V-SAT subject to a minimum of Rs. 1.00 crore per year in the first two years and Rs. 1.50 crores in the third year and thereafter to be fixed; 10% of the license fee was to be paid at the time of acceptance of Letter of Intent and for the balance 90% Financial bank Guarantee was to be given. 15% license fee was to be paid prior to the date of commission of service (2) fee for satellite space charges etc. and (3) performance bank guarantee of Rs. 50 lakhs.

3. In pursuance of the agreement, 10% license fee was paid, for 90% a financial bank guarantee of Rs. 90.00 lakhs for the first year and performance bank guarantee in the sum of Rs. 50.00 lakhs were furnished. The Licensee was to establish a Hub after getting the site clearance from SACFA. For that purpose, application was to be made within 4 weeks but the petitioner had submitted such application to SACFA on 20.7.1995 i.e. after about four months, site chosen being at Goral, Bombay. For want of Site clearance that site was abandoned by the licensee, intimation of which was given in November 1995. In the meantime, the petitioner selected another site at Noida and submitted application for clearance of Hub site to SACFA on 26.9.1995. This site clearance is alleged to have been given belatedly on 2.6.1997. In accordance with the terms of the licence, initial deposit of Rs. 22.73 lacks was also paid on 24.4.1995 towards space segment reservation fee.

4. The Licensee was required to commission the service within one year of execution of agreement which was not done and space segment remained unutilized. The Licensee did not make payments of various dues as agreed and the respondents raised demand for their dues which having not been met, bank guarantees were invoked. Against this, the licensee-M/s. Rama filed an arbitration suit (A.A. 101/96) in this Court for appointment of an arbitrator and also against invocation of bank guarantees. A settlement was arrived at and payments made. In the meantime, the Licensee M/s. Rama assigned their rights under the aforesaid agreement in favor of the petitioner by means of a tripartite agreement dated 22.9.1997. Arrears of dues accumulated. The petitioner made some part payments and also furnished two additional financial bank guarantees of Rs. 50 lakhs and Rs. 15 lakhs. Part payments were made, but the arrears still remained outstanding. And vide letter dated 17.2.1999 the respondents raised a demand of Rs.1,8750 crores towards arrears of license fee and Rs.181.84 lakhs on account of space segment charges for 1997-98 and 1998-99, and Rs. 20.00 lakhs as LD charges besides interest and it was notified that if the dues are not paid within 30 days of the receipt of the notice, the license would be terminated. The petitioners made representation dated March 4, 1999 disputing their liability and invoked arbitration clause 15. Some further part payments were also made by the petitioner. The arrears remained unclear and vide letter dated 19.4.1999,

the respondents demanded arrears of space segment charges of Rs.1,59,11,000/- with interest within 30 days failing which the space segment allotted to the petitioner would be withdrawn. The petitioner has filed this petition on 26.5.1999 for appointment of an arbitrator invoking clause 15 of the license Agreement. Along this, another application u/s 9 of the Act seeking interim protection s also filed.

5. The respondents are contesting the claim of the petitioner. It is alleged that the petitioner has failed to fulfill its commitments under the license Agreement and huge arrears are due; the agreement gives power to the respondents to terminate the license agreement and to invoke the bank guarantees and the decision of the authority in this respect is final. there is no dispute which could be referred to or needed arbitration as in view of earlier similar petition (A.A. 101/96) no disputes survive nor could be reagitated. In any case, the parties had agreed to the appointment of the designated authority as the arbitrator under the arbitration clause 15 and only that designated authority or his nominee could be appointed as arbitrator.

6. I have heard the learned Senior counsel for the petitioner and learned Additional Solicitor General for the respondents. Learned counsel for the petitioner has contended that various amounts claimed as arrears are not due and payable as the respondents did not discharge their obligations in time and for delay on their part, fees and charges are not payable and as such disputes have arisen between the parties in respect of the license Agreement and that in spite of notice for appointment of the arbitrator, the respondents failed to appoint the arbitrator and thus they have abdicated their power to appoint the arbitrator and also the designated arbitrator is not independent, but interested in the respondent and thus biased against the petitioner; an impartial and independent arbitrator be appointed u/s 11 of the Act. He has relied on *Nandyal Coop. Spinning Mills Ltd. Vs. K.V. Mohan Rao*, *G. Ramachandra Reddy and Co. Vs. Chief Engineer, Madras Zone, Military Engineering Service*, *Airtech Pvt. Ltd. Vs. New Delhi Municipal Committee and others*, and *K.C. Sharma Vs. NDMC and Another*, . Whereas learned Addl. Solicitor General has contended that the disputes raised are not contemplated to be resolved through arbitration inasmuch as the amounts as agreed in the license Agreement only are claimed which remain unpaid in spite of various opportunities and notices given and in the circumstances the competent authority has power to terminate the agreement and the exercise of that power could not be referred for arbitration and bank guarantees are being invoked in accordance with the terms and conditions of the license Agreement and in terms of bank guarantees. He has also contended that in view of settlement in earlier A.A. 101/96 on 28.2.1997, no disputes arise nor could be reagitated. He has relied on *Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works (P) Ltd.*, and another, in support of invocation of bank guarantees.

7. Clause 15 of the license Agreement which is an arbitration agreement reads as

under:

"15. ARBITRATION OF DISPUTES :

15.1.1 In the event of any question, dispute or difference arising under this licence, or in connection thereof, except as to the matter, the decision of which is specifically provided under this licence, the same shall be referred to the sole arbitration of the Director General, Telecommunications, or in case his designation changes, or his office is abolished, then, in such case, to the sole arbitration of the officer for the time being entrusted ,whether in addition to the functions of the Director General, Telecommunications or by whatever designation such officer may be called (hereinafter referred to as the said officer), and if the Director General, Telecommunications or the said officer is unable or unwilling to act as such, then some other person appointed by the Director General, communications or he said officer, will act as the sole arbitrator.

15.1.2 There will be no objection to any such appointment on the grounds that the Arbitrator is a Government servant, or he has to deal with the matter to which the license relates, or that in the course of his duties as a Government servant, he has expressed views on all, or any of the matter in disputes or in differences. The award of the arbitrator shall be final and binding on the parties. It is a terms of this licence, that in the event of such Arbitrator, to whom the matter is originally referred to, being transferred or vacating his office, or being unable to act for any reason, whatsoever, such Director General, Telecommunications or the said officer shall appoint another person to act as Arbitrator, in accordance with the terms of the license and the person so appointed shall be entitled to proceed with reference o the stage at which it was left out by his predecessor."

8. It is not disputed that the Agreement is governed by this arbitration clause. Two questions arise: (1) If the disputes raised are covered by this Arbitration Agreement, who should be or is to be appointed Arbitrator and (2) Whether the disputes contemplated under the agreement arise between the parties

In the Agreement itself, the parties have agreed to the designated Authority or his successor or nominee as their arbitrator. Relevant clauses (2), (5) (6) and (B) of Section 11 of the Act which are relied by the learned counsel read as under :

"11. Appointment of arbitrators.

(1) x x x x x x x x

(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

(3) x x x x x x x x (4) x x x x x x x x

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the

appointment shall be made upon request of a party, by the Chief Justice or any person or institution designated by him.

(6) Where, under an appointment procedure agreed upon by the parties, -

(a) a party failed to act as required under that procedure;

or

(b) x x x x x x x x

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(7) x x x x x x x x (8) The Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to-

(a) any qualifications required of the arbitrator by the agreement of the parties; and

(b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

9. In the case of *Nandyal* (supra), the Arbitration Clause provided that an arbitrator is to be appointed by the Administrative head of the owner and the arbitration clause was specifically made subject to applicability of the provisions of Arbitration Act, 1940. Arbitrator was not appointed by the Administrative head in spite of 15 days' notice. The Supreme Court held that the Administrative head had abdicated his power to appoint the arbitrator and in view of its Arbitration Clause 65.2, Arbitration Act, 1940 applied and as such only the Court could appoint an arbitrator.

10. In the other three cases relied by the learned Senior counsel for the petitioner also, the arbitrator was to be appointed by the designated authority. *Nandyal* was followed and in the case of *G.R. Reddy*, President was required to appoint arbitrator in accordance with the arbitration agreement and in other two cases, the Courts appointed arbitrator u/s 20(4) of the Arbitration Act, 1940.

Sections 8 and 20(4) of the Arbitration Act of 1940 read as under:-

"8. Power of Court to appoint arbitrator or umpire. - (1) In any of the following cases-

(a) where an arbitration agreement provides that reference shall be to one or more arbitrators to be appointed by consent of the parties, and all the parties do not, after differences have arisen, concur in the appointment or appointments; or

(b) if any appointed arbitrator or umpire neglects or refuses to act, or is incapable

of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or the arbitrators, as the case may be, do not supply the vacancy; or

(c) where the parties or the arbitrators are require to appoint an umpire and do not appoint him;

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or appointments or in supplying the vacancy.

(2) If the appointment is not made within fifteen clear days after service of the said notice, the Court may, on the application of the party who gave the notice and after giving the other parties an opportunity of being heard, appoint an arbitrator or arbitrators or umpire, as the case may be, who shall have like power to act in the reference and to make an award as if he or they had been appointed by consent of all parties.

20. Application to file in Court arbitration agreement.-

(1) x x x x x x x (2) x x x x x x x (3) x x x x x x x

(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court."

11. Section 8(2) expressly gives power to the Court to appoint an arbitrator "if the appointment is not made [in accordance with Section 8(1)] within 15 clear days after service of the notice". Interpreting this provision in Nandyal case, it was held that if the Administrative head who was empowered to appoint an arbitrator did not make such appointment within 15 days of receipt of notice, he would be deemed to have abdicated his power to so appoint. In that case, parties themselves had not appointed an arbitrator. And Section 20(4) provides for making an order of reference to the arbitrator appointed by the parties whether in the agreement or otherwise, and where parties cannot agree upon an arbitrator, and an arbitrator is to be appointed by the Court, in case no arbitrator is agreed to be appointed by the parties.

12. In Sundram Finance Ltd. Vs. NEPC India Ltd., 1996 (2) SCC 479 while interpreting the scope of Section 9 of the New Act of 1996 vis-a-vis that of Section 41 read with Schedule 2 of the old Act, it has been noticed that the Act of 1996 is very different from the Act of 1940 and its provisions have to be construed uninfluenced by the principles under lying the Act of 1940 as the Act of 1996 has been enacted after taking into account the United Nations Commission on International Commercial Trade Law (UNCITRAL), so UNCITRAL Model Law rather than 1940 Act is more relevant to refer.

13. In the present case in the arbitration clause itself, the parties have

specifically agreed that designated authority or his nominee will be the arbitrator. No power is given in this clause to the Court to appoint any third person as arbitrator. Under the old Act, the Court would have appointed the agreed arbitrator u/s 20(4) and in such case Section 8 of the old Act would not have been applicable. In Union of India (UOI) Vs. Prafulla Kumar Sanyal, construing Section 20(4) of the Act the Supreme Court in paragraph 3 held as under :-

"...if no such arbitrator had been appointed and when the parties cannot agree upon an arbitrator, the Court may proceed to appoint an arbitrator by itself. Thus if an arbitrator had been appointed whether in the agreement or otherwise the Court shall make an order of reference to him...."

14. In this case, it is further observed that "it is desirable that the Court should consider the feasibility of appointing an arbitrator according to the terms of the contract.

15. In G. Rama Chandra Reddy (supra) also, it had been laid down that the Court should endeavor that the contract should always be given effect to, though the contracted party have failed to act according to contract. It is to be seen, whether the contract provided for the appointment of a named arbitrator, and if so, the parties normally would be bound by the terms of the contract and the Court would not be justified to appoint any arbitrator unless the arbitrator refused or neglected to enter upon the reference". In M/s. Indian Drugs and Pharmaceuticals Ltd. Vs. M/s. Indo Swiss Synthetics Gem Manufacturing Co. Ltd. and others, , the arbitration clause stated that difference/disputes shall be referred "to an arbitrator appointed by the Chairman and Managing Director of IDPL." The Supreme Court held that the said provision could not be given a go by merely at the askance of one of the parties which did not challenge its binding nature in an appropriate proceeding and disallowed the parties' request for appointment of a retired High Court Judge as an arbitrator.

16. In this respect, reference may also be made to Union of India (UOI) Vs. Himco (India) Private Ltd., where Bachawat, J. observed that the arbitration agreement contained adequate and exhaustive machinery for appointment of arbitrators including substitutional appointments in case the appointed arbitrator refuses to act. The Learned Judge observed the fact that the appointed arbitrator has not yet signified his willingness to act as arbitrator does not debar the Court from making an order or reference of the dispute to him. If he subsequently refuses to act as the arbitrator, the procedure laid down in the arbitration agreement will prevail and will have to be followed.

17. In this case, Section 11 of the Act prescribes the procedure and mode of appointment of arbitrator. It replaces Sections 4, 8, 9, 10 and 20 of the old Act. In this case, the parties have agreed to the appointment of a particular person or his nominee as an arbitrator. Section 11(6) read with Section 11(2) and not Section 11(5) is attracted. Since the respondent has not referred the disputes raised to the appointed agreed arbitrator in spite of notice, the Court gets power

to take necessary measures for securing the appointment. In that view, the Court will have no power to appoint another arbitrator. Taking the "necessary measure for securing the appointment" in the circumstances would mean to appoint the agreed arbitrator, if any. The agreement between the parties have to be given effect to and cannot be given go bye.

18. Learned senior counsel for the petitioner has also contended that the agreed arbitrator (Director General, Telecommunications) is not an independent and impartial arbitrator because of his bias for the Department and moreover he must have dealt with the subject matter of the dispute so far and in that case he would have formed his own opinion and Therefore, he has prejudged the matter. He thus will not be a fit and proper person to be appointed as an arbitrator.

19. There is no doubt that justice must not only be done but seemingly appear to have been done and for that purpose it is of utmost importance that the judicial Tribunals should be honest, impartial and disinterested. However, when the parties themselves have chosen a person as arbitrator, they being the best judges of the person, the presumption is that the selection was made upon consideration of the pros and cons. Having specifically agreed to this appointment knowingly what the arbitrator is, the parties shall be deemed to have waived the objection of bias, if any. In this connection reference can be made to the following observations made in Nandyal's case (para 7) :-

"When the arbitration tribunal was chosen by the contracting parties, undoubtedly they had chosen to avail of the adjudication by that tribunal and to abide by his decision. Having so chosen and taken a decision it would no longer be open to turn around and contend that the tribunal was biased against the party...."

20. The agreed designated arbitrator is a high ranking officer. The parties must have satisfied about the suitability, independence and impartiality of the arbitrator. In the present case except the ground of assumed bias of the arbitrator, there is no valid ground not to bind the parties to their agreed arbitrator and to appoint another arbitrator in supersession of the agreed arbitrator.

This application is allowed.

21. It is accordingly directed that the Director General, Telecommunication shall be the arbitrator in accordance with clause 15 of the license Agreement dated 28.3.1995 for adjudication of the disputes between the parties and in case the designation of the Director General, Telecommunication has changed or his office is abolished, in that case the officer entrusted with or discharging the functions of such Director General shall act under said Clause 15. The arbitration clause is wide and the arbitrator shall decide such disputes as arise under or in connection with the license Agreement dated 28.3.1995. The arbitrator shall made his award as far as possible within six months of receipt of this order.

22. This is an application u/s 9 of the Act seeking following injunctions by way of interim measures, restraining the respondents:-

- (1) From withdrawing the space segment on the transponder allotted to the petitioner in pursuance letter dated 19.4.1999;
- (2) from terminating the license Agreement;
- (3) from invoking the three financial bank guarantees (a) 12/97 for Rs.1 Crore, (b) 915/98 for Rs. 50 lakhs (c) 20/98 for Rs.15 lakhs and performance bank guarantee No.17/97 for Rs. 50 lakhs;
- (4) from recovering any amounts towards license fees, transponder charges, liquidated damages, penalty or interest except reckoning the effective date from 31.3.1998; and
- (5) from excluding the petitioner while considering the allotment of fresh transponder/space segment.

The license Agreement dated 28.3.1995 was subject to the terms and conditions mentioned in Schedule C and was for a period of 10 years on non-exclusive basis but revocable by giving requisite notice on breach of any of its terms and conditions including default of payment of any consideration payable thereunder. For termination, the decision of the "Authority" will be final. Under the license Agreement, license fee of Rs.50,000/- from per V-SAT subject to a minimum of Rs.1 crore per year for first two years and Rs.1.5 crores for the 3rd year and thereafter to be reviewed was agreed to be paid. Minimum license fee is payable in advance but could be paid in equal quarterly installments and the license fee in excess of the agreed minimum is payable at the end of the year. The year for the purpose of charging the license fee is reckoned as 12 months from the date of signing of the license Agreement. Clause 5 provided for interest on overdue payments and in case of default dues could be recovered through bank guarantee .For payment of license fee escrow account was to be opened and till it became sufficiently healthy, the licensee was to give financial bank guarantee to the extent of 90% of the license fee for first year and 10% to be paid in advance and another 15% to be paid 15 days prior to the date of commencement/operation of the service. Besides license fee, other charges mentioned in Schedule C were also payable.

23. Under clause 1 (d) of Schedule C, the license Agreement came into force on 28.3.1995 when it was signed, 10% license fee was paid and financial bank guarantee was furnished .Under clause 3.6 the Licensee was to provide the service within 12 months. Clause 4 provided for liquidated damages in case the service is not provided within the prescribed period for which time was of the essence. Clause 8 provided for termination of the licence, inter alia, in case of defaults as provided. Clause 18 provided for furnishing performance bank guarantee for the license period and for financial guarantee for financial

liability .Clause 20 provided that required space segment shall be reserved from the date of signing of the license Agreement in the transponder Nos. 13 and 14 on INSAT II satellite on pre-emptive basis for which the licensee shall pay in advance reservation charges equal to 25% of the annual space segment charge from the date of the signing of the license Agreement till the service is commissioned and if 12 months period lapses prior to the start of the service after initial 12 months, full segment charges are payable. Under clause 21, a license was required from the WPC (Wireless Planning and Coordination Wing of Ministry of Communications) for utilisation of appropriate audio frequency spectrum for operation of the V-SAT network. Under Clause 21.2. site clearance in respect of HUB Station/V-SAT shall be obtained for which an application was to be submitted to SACFA (Standing Advisory Committee on Frequency Allocations) in the prescribed form. In clause 21.3, other license fee and royalty was payable.

24. The service did not start within the period of 12 months and even thereafter for some time. Various charges became due and remained unpaid in spite of demands. First licensee M/s. Rama had filed a petition u/s 11 of the Act on 31.8.1996 being A.A. 101/96 for appointment of an arbitrator invoking the arbitration Clause 15 and also separate application u/s 9 of the Act for interim protection against invocation of bank guarantees disputing liability and seeking adjudication of the disputes which substantially are the same raised now.

25. This Court on 28th February, 1997 passed consent order, the parties agreeing that Rs.97,79,590/- including penal interest up to January 23, 1997 and interest thereafter were due from the petitioner up to March, 1997 on account of license fee. Against these dues, Rs. 43.00 lakhs by easy of FDR and two pay orders of Rs.25 lakhs each i.e. Rs.93 lakhs were paid to the respondent on 28th February, 1997 and for the balance amount due including interest up to March 1997, the petitioner could approach the respondent for waiver of interest which, if not accepted, would not be disputed and was to be paid on receipt of demand from the respondent. As regards the space segment charges it was agreed that petitioner would pay dues amounting to Rs.1,04,62,634/- by March 1997.

It was stated at the Bar by the learned Additional Solicitor General on 28.5.1999 that this request for waiver was made but rejected.

26. The license was assigned by M/s. Rama to the petitioner by a tripartite license agreement dated 22.9.1997 whereby the petitioner as assignee took over rights, obligations and liabilities of M/s. Rama arising out of the license Agreement dated 28.3.1995. On payment of the dues then due, various clearances from Government authorities required under the license were released. The petitioner then made a representation dated March, 23, 1998 giving the background and the reasons for delays in commissioning of the service in time and sought "for waiver of license fee and transponder charges for the period of 30 months from 28.3.1995 to 22.9.1997 and also waiver of the liquidated damages for delayed commissioning of services". This was not accepted and as the dues were not paid, the respondent vide their letter dated

17.7.1998 invoked the Financial Bank Guarantee of Rs.1 crore notifying that license fee dues amounts to over R. 1.5 crores excluding interest on over due payments had remained unpaid. Another demand of Rs.1,81,84,000/- as arrears of space segment charges for the years 1997-98 and 1998-99 with interest at the rate of 18% per annum was also made on 22.7.1998. The petitioner offered renewal of the financial bank guarantee (FBG) and to furnish additional bank guarantee of Rs.50 lakhs and to pay Rs. 25 lakhs, out of which Rs.15 lakhs was remitted by means of demand draft. On this, invocation of FBG was withdrawn on 30.7.1998 subject to compliance of those conditions. Rs.10 lakhs were paid on 17.8.1998 and other conditions were also complied. The respondent vide letter dated 14.9.1998 again made further demand of Rs.1,81,84,000/- as arrears of space segment charges due up to 31.3.1998 with interest, which having not been cleared, the respondent again vide their letter dated 18.11.1998 invoked the bank guarantees of Rs. 1 crore and Rs. 50 lakhs. On some payments being made, the invocation of the bank guarantee was again withdrawn on 20.11.1998. On 17.2.1999, the following demand of the arrears was made:-

(a) license fee dues for 28.9.97 to 28.12.98 Rs.1.8750 crores (b) space segment charges Rs.181.84 lakhs 1997-98, 1998-99 (c) LD charges (liquidated Rs.20 lakhs damages) (d) Interest on these dues.

27. It was notified that if these dues were not paid within 30 days the license shall be terminated. The petitioner in reply dated March 4, 1999 again disputed their liability and invoked arbitration clause 15, and requested not to invoke the bank guarantees. Some more payments were also made in the meantime. The respondent then vide letter dated 9.4.1999 demanded payment of Rs.1,59,11,000/- on account of arrears of space segment charges within thirty days failing which it was notified that allocated space segment will be withdrawn. Yet some more payments were made but not all the dues claimed. And thus these proceedings have been instituted.

28. By means of interim order dated 28-5-99 subject to payment of 25% of the amount claimed towards license fee and space segment charges including interest being paid within 15 days, invocation of the bank guarantee and termination of license was stayed.

29. Three financial bank guarantees of Rs.1.00 crore, Rs.50.00 lakhs and Rs.15.00 lakhs which are in identical language furnished by the Canara Bank provided:-

"2. We, the bank, hereby undertake to pay to the Authority an amount not exceeding Rs. 1,00,00,000/- (Rupees Hundred lacs only) against any loss or damage caused to or suffered or would be caused to or suffered by the Authority by reason of any failure of the licensee to pay all the above mentioned fees, dues and charges or any part Therefore within the period stipulated in the licence.

3. We, the bank hereby further undertake take to pay as obligor and not merely as surety to pay such sum not exceeding Rs.1,00,00,000/- (Rupees Hundred lacs

only) to the Authority immediately on demand and without demur stating that the amount claimed is due by way of failure of the licensee to pay any fees or charges or any part Therefore in terms of the said licence.

4. We, the Bank, DO HEREBY DECLARE AND AGREE that the decision of the Authority as to whether licensee has failed to pay the said license fees or any other fees of charge of any part thereof payable under the said license Agreement and as to the amount payable to the Authority by the Bank hereunder shall be final and binding on us."

And the performance bank guarantee provides:-

"2. We, the bank hereby undertake to pay to the Authority an amount not exceeding Rs. 50,00,000/- (Rupees Fifty Lakhs only) against any loss or damage caused to or suffered or would be caused to or suffered by the Authority by reason of any breach by the said Licensee of any of the terms and conditions contained in the said license Agreement.

3. We, the bank hereby, pursuance of the terms of the said license agreement, absolutely, irrevocably and unconditionally guarantee as primary obligor and not merely as surety the payment of an amount of Rs. 50,00,000/- (Rupees Fifty Lakhs only) to the Authority to secure due and faithfully performance by the Licensee of all his/their obligations under the said license Agreement.

4. We the bank hereby also undertake to pay the amounts due and payable under this guarantee without any demur, merely on a demand from the Authority stating that the amount claimed is due by way of loss or damage caused or would be caused to or suffered by the Authority by reason of breach by the said Licensee for any f the terms or conditions contained in the said license Agreement or by reasons of the Licensee's failure to perform any of its obligations under the said license Agreement."

30. The petitioner in the statements of account filed in these proceedings has admitted that towards segment charges for the period 28.3.1995 to 28.3.1999, against total dues amounting to Rs. 3,86,41,000/- only Rs. 2,95,49,000/- have been paid. This means balance amount of Rs.90,92,000/- due as on 28.3.1999 still remains unpaid. Similarly towards license fee for the period 28.3.1995 to 31.6.1999, against total dues amounting to s.3,69,58,333/-, only Rs.2,27,50,000/- have been paid leaving a balance of Rs.1,42,08,33/- . Other dues like liquidated damages, overdue interest would also be due. This liability exceeds the amounts of the bank guarantees.

31. The principles of law against invocation of bank guarantee are well established. Recently a three Judges Bench of the Supreme Court in Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works (P) Ltd., and another, after referring to the relevant case law has referred to with approval the general principles as laid down in the case of AIR 1997 1644 (SC) where it has been laid down as under:-

"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 the advantage, he can he 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 case payment of money under such a bank guarantee would adversely affect the bank and its customer at whose in stance the guarantee is given, the harm or injustice contemplate 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."

32. It has been held that fraud has to be an established fraud and has iterated with approval the following observations made in *Bolivinter Oil SA Vs. Chase Manhattan Bank* 1984 (1) All E.R. 351: -

"...The wholly exceptional case where an injunction may be granted is 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 n the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it discharged."

And as regards the second exception of irretrievable injury, it has been reiterated as under:-

"The second exception to the rule of granting injunction, i.e., the resulting of irretrievable injury, has to be such a circumstance which would made it impossible for the guarantor to reimburse himself, if he ultimately succeeds. This will have to be decisively established and it must be proved to the satisfaction of the Court that there would be no possibility whatsoever of the recovery of the amount from the beneficiary, by way of restitution."

33. Both these conditions are not attracted in this case. Canara Bank is bound to honour its commitment under the contract of Bank guarantees. What cannot be done directly would not be allowed to be achieved indirectly. The power of Court

u/s 9 of the Act in this respect is not different to the power of the Court under Order 39 Rules 1 & 2 while trying a suit. Before an injunction could be granted under Order 39 Rules 1 & 2 CPC, plaintiff has to establish that it has prima facie case, i.e., there was a bona fide contention between the parties or a serious question to be tried in the facts and circumstances of the case. The petitioner as assignee is bound by the obligations emanating from license Agreement dated 28.3.1995. The licensee had furnished financial bank guarantees and performance bank guarantee for fulfillment of its obligation under the licence. These were renewed. The petitioner had also furnished two additional guarantees of Rs. 50 lakhs and Rs.15 lakhs to secure excess liability remaining outstanding. The license Agreement has been in force, operated and acted upon by the petitioner and its predecessor in interest for well over four years. The petitioner is bound to fulfill their commitments voluntarily agreed. Great public interest will suffer if the Governmental dues are allowed to be delayed or avoided to be paid. No Government can run and discharge its financial obligations on mere paper bank guarantees. It needs money. As already noticed, the disputes about the liability as existing on 31st March, 1997 were resolved mutually on 28.2.1997 in earlier arbitration proceedings A.A. No.101/96. The petitioner would not be entitled to rake up the settled disputes. No prima facie case is made up. The balance of convenience in the circumstances also does not lie in allowing the petitioner to shirk its financial obligations. The petitioner has also failed to establish that they would be put to any loss or injury what to talk of irreparable loss. On the other hand, it is the respondent who is deprived of its lawful dues. In the circumstances, no case for restraining invocation of the bank guarantees is made out. To that extent, this petition seems to be misuse of the process of the Court and has no merit. The license is also terminable on account of breach of its terms. However, it is seen that the license is in the middle of its operation and by now substantial amounts have also been paid under the agreement. Government seems to be more interested in Realizing its overdue charges rather than in terminating the licence. It will be in the interest of both the parties to stick to the obligations undertaken in the agreement. This action on the part of the petitioner seems to be a misadventure. To avoid hardship and loss that is likely to be caused to both the parties, it seems just and proper that till the arbitration proceedings are decided, the petitioner should clear the dues as demanded and to continue to pay the same as agreed in the license Agreement. Accordingly, it is ordered that if the petitioner pays the arrears of up to date dues as demanded @ Rs. 50.00 lakhs per month and continue to pay further fees and charges as and when become due, first Installment being paid within ten days of this order and each subsequent Installment within 30 days thereafter every month and the Bank Guarantees being kept alive, the invocation of bank guarantees and termination of the license shall remain stayed. This is further subject to the condition that petitioner gives an undertaking within one week hereafter to the satisfaction of the Registrar of this Court accepting these conditions. In case of failure to furnish such undertaking or to pay the arrears or any Installment thereof as aforesaid, the stay shall automatically stand vacated.

It is ordered accordingly.

Nothing stated herein shall be deemed to be expression of opinion on merit which may prejudice the parties in proceedings before the arbitrator.

34. A.A. No. 181/99 and I.A. No. 5714/99 stand disposed of.