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(2018) 04 BOM CK 0047

In the Bombay High Court

Case No : COMMERCIAL APPEAL (L) NO. 20, 21, 22, 23, 24, 25 OF 2018 IN ARBITRATION PETITION (L) NO.366, 367, 368, 369, 371 OF 2016 IN NOTICE OF MOTION (L) NO. 31, 32, 33, 34, 35 OF 2018

FELGUERA GRUAS INDIA PRIVATE LIMITED APPELLANT

Vs

TUTICORIN COAL TERMINAL PRIVATE LIMITED AND 2 ORS. RESPONDENT

Date of Decision : 10-04-2018

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9

Citation : (2018) 04 BOM CK 0047

Hon'ble Judges : NARESH H. PATIL, J, G.S.KULKARNI, J

Bench : Division Bench

Advocate : Darius Khambata, Zal Andhyarujina, Sanjeev Sharma, Mumtaz Bhalla, Praveer Shetty, Anirudh Gandhi, Aspi Chinoy, Chirag Kamdar, Ranjit Shetty, Nishit Tanna, Vatsala Pant, Mustafa Doctor, Parikshit Desai

Final Decision : Dismissed

Judgement

Naresh H. Patil, J.

[1] These appeals arise out of judgment and order passed by the learned Single Judge on 11th January,2018. As issues involved in these appeals are

similar, by consent the appeals are heard finally at admission stage and are being disposed of accordingly.

[2] The appellants M/s.Felguera Gruas India Private Limited (hereinafter referred to as 'FGIPL' for short) preferred Arbitration Petition under Section

9 of the Arbitration and Conciliation Act, 1996 (for short referred to as 'the Act') praying for interim injunction against encashment of the

Advance/Down Payment Bank Guarantees and Performance Bank Guarantees which were furnished by the FGIPL to the Respondent No.1 -

Tuticorin Coal Terminal Pvt. Ltd. (hereinafter referred to as ""TCTPL"" for short).

These guarantees were furnished consequent to six purchase

orders. The particulars of subject Bank Guarantees and Purchase orders are set out in the judgment delivered by the learned Single Judge. FGIPL is a

Company incorporated under the provisions of the Companies Act, 1956. The company is in the business of undertaking turn key projects across the

country. It offers end to end services in design, testing, commissioning, manufacturing, sourcing, supply and construction. It has executed several

major projects in Ports.

[3] Tctpl is a Private Company incorporated under the provisions of the Companies Act,1956. They entered into a Concession Agreement on 11th

September, 2010 with the Board of Trustees for Tuticorin Port (""Concessioning Authority"") for Development of North Cargo BerthII (NCBII) for

handling bulk cargoes at Tuticorin Port on Design, Build, Finance, Operate and Transfer basis. This concessional agreement was operational for a

period of 30 years. In the year 2012, FGIPL offered services to TCTPL for supplying as well as designing, erecting and commissioning of

stackercumreclaimers, stacker and conveyor system. A Letter of Intent was entered into accordingly. There were six purchase orders under the

contract entered into between the parties. Each purchase order had clause for advance payment, down payment, bank guarantee and performance

bank guarantee. FGIPL issued Down Payment Bank Guarantee and Performance Bank Guarantee in favour of TCTPL in respect of each Purchase

Order. In the petition filed under Section 9 of the Act, FGIPL seeks injunction from invoking the guarantees mainly on the ground that they were

conditional. The guarantees were worth Rs.43 Crores. An injunction against respondents 2 and 3 bank from releasing the amounts under the said

Bank Guarantees, in favour of respondent no.1 is sought by the appellant. The grounds were that the guarantees were conditional and could be

invoked if the appellants had defaulted in complying with their obligations under the Purchase Orders. There were special equities in favour of

appellants. According to appellants the TCTPL had admitted in correspondence that Rs.32 Crores was payable to the appellants. It is the case of the

appellants that irretrievable injustice and injury would be caused to the appellants if respondent no.1 was permitted to encash the bank guarantees.

Respondent no.1 is a Special Purpose Vehicle which is making losses.

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[4] By an order dated 10th March, 2016 the appellants obtained ex parte order passed by the learned Single Judge in favour of the appellants in terms

of prayer clauses (b) and(c) of the petition i.e. restraining Respondents 2 and 3, the two Banks from releasing the amounts under the Guarantees in

favour of Respondent No.1 or anyone else.

[5] We may reproduce the paragraphs 1 and 2 of the Advance Bank Guarantee and Performance Bank Guarantee as under:

ADVANCE BANK GUARANTEE

NOW THEREFORE IN CONSIDERATION OF THE FOREGOING PREMISES AND FOR OTHER GOOD AND VALUABLE

CONSIDERATION, THE RECEIPT AND LEGAL SUFFICIENCY OF WHICH IS HEREBY ACKNOWLEDGED. THE GUARANTOR

HEREBY ABSOLUTELY AND IRREVOCABLY AGREES FOR THE BENEFIT OF THE PURCHASER AS FOLLOWS:

1. IF THE DELIVERY OBLIGATION IS NOT PERFORMED BY THE SELLER IN ACCORDANCE WITH THE TERMS OF THE

PURCHASE ORDER, THE GUARANTOR SHALL WITHIN 7 (SEVEN) DAYS FROM THE RECEIPT OF A DEMAND BY THE

PURCHASER PAY TO THE PURCHASER ANY SUM NOT EXCEEDING RS.17,000,000/ (RUPEES ONE CRORE SEVENTY LAKHS

ONLY)

2. THE OBLIGATION OF THE GUARANTOR UNDER THE GUARANTEE SHALL BE UNCONDITIONAL ABSOLUTE AND

IRREVOCABLE IRRESPECTIVE OF THE GENUINENESS, VALIDITY, REGULARITY OR ENFORCEABILITY OF THE PURCHASE

ORDER OR ANY OTHER CIRCUMSTANCE WHICH MIGHT OTHERWISE CONSTITUTE A LEGAL AND/OR EQUITABLE

DISCHARGE OF A SURETY OR THE GUARANTOR UNDER THE LAW RELATING TO SURETIES, THE GUARANTOR SHALL NOT

BE ENTITLED TO DISPUTE OR ENQUIRE INTO WHETHER THE PURCHASER HAS BECOME ENTITLED TO CLAIM THE SAID

AMOUNT UNDER THE PURCHASE ORDER OR NOT OR WHETHER THE SUPPLIER HAS COMMITTED ANY BREACH OF THE

PURCHASE ORDER AND/OR THE GENERAL TERMS AND CONDITIONS APPLICABLE THERETO OR NOT OR WHETHER THE

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PURCHASER IS ENTITLED TO RECOVER ANY DAMAGES FROM THE SUPPLIER FOR BREACH THEREOF OR NOT.

PERFORMANCE BANK GUARANTEE

NOW THEREFORE, IN CONSIDERATION OF THE FOREGOING PREMISES, THE GUARANTOR HEREBY ABSOLUTELY AND

IRREVOCABLY AGREES FOR THE BENEFIT OF THE PURCHASER AS FOLLOWS:

1. IF THE SELLER EITHER FAILS TO PERFORM ANY OF ITS OBLIGATIONS UNDER THE PURCHASE ORDER OR

BREACHES/VIOLATES ANY OF THE TERMS OF THE PURCHASE ORDER, THE GUARANTOR SHALL, WITHIN 7 (SEVEN)

WORKING DAYS FROM THE DATE OF RECEIPT OF A WRITTEN DEMAND FROM THE PURCHASER, PAY TO THE PURCHASER

ANY SUM NOT EXCEEDING RS.85,00,000 (RUPEES EIGHTY FIVE LAKH ONLY).

2. THE OBLIGATION OF THE GUARANTOR UNDER THIS GUARANTEE SHALL BE UNCONDITIONAL ABSOLUTE AND

IRREVOCABLE, IRRESPECTIVE OF THE GENUINENESS, VALIDITY, REGULARITY OR ENFORCEABILITY OF THE PURCHASE

ORDER OR ANY OTHER CIRCUMSTANCE WHICH MIGHT OTHERWISE CONSTITUTE TO A LEGAL/OR EQUITABLE DISCHARGE

OF A SURETY OR THE GUARANTOR UNDER THE LAW RELATING TO SURETIES. THE GUARANTOR SHALL NOT BE ENTITLED

TO DISPUTE OR ENQUIRE INTO WHETHER THE PURCHASER HAS BECOME ENTITLED TO CLAIM THE SAID AMOUNT UNDER

THE PURCHASE ORDER OR NOT OR WHETHER THE SUPPLIER HAS COMMITTED ANY BREACH OF THE PURCHASE ORDER

AND/OR THE GENERAL TERMS AND CONDITIONS APPLICABLE THERETO OR NOT OR WHETHER THE PURCHASER IS

ENTITLED TO RECOVER ANY DAMAGES FROM THE SUPPLIER FOR BREACH THEREOF OR NOT.

[6] Briefly stated, the grounds as reflected during the course of arguments and the written submissions filed on behalf of the appellants are as under:

It is submitted by the learned Senior Counsel Shri Darius Khambatta that the impugned order is bad in law and deserves to be set aside on the grounds

that the final arguments have now commenced before the Arbitral Tribunal on 02.02.2018; that the bank guarantees are conditional; the conditions for

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invocation of the bank guarantees in question are not satisfied; and existence of special equities in favour of FGI (including irretrievable injustice).

It is submitted by the learned Senior Counsel that the two bank guarantees which are in issue in the present Appeal are Advance Bank Guarantee

dated 442014 and the Performance Bank Guarantee dated 2942015. It is submitted that both these bank guarantees in fact contain express provisions,

which make it unambiguously clear that they are conditional. Learned Counsel submits that Article 1 of the Advance Bank Guarantee is clearly

conditional.

The learned Senior Counsel submits that a plain reading of the aforesaid articles of the Advance Bank Guarantee shows that the invocation and

obligation of the bank under the Bank Guarantee is dependent and conditional upon the delivery obligation not being performed by the seller in

accordance with the terms of the Purchase Order. The 'delivery obligation' is defined as being 'the terms of the Purchase Order'.

It is pointed out that the Learned Single Judge has further held that the said 'general reference' was followed by subsequent Articles and that made it

clear that the Bank guarantee was absolute and unconditional. It is submitted that the other provisions of the bank guarantees cannot override and/or

whittle down in any manner whatsoever the condition imposed by Article 1 which is categorical and which is the provision imposing liability on the

Bank.

The learned Senior Counsel submits that indeed what the Learned Single Judge has in fact done is to give overriding effect to Article 2 to supersede

the conditional nature of Article 1. The learned Single Judge, by adopting such construction, has rendered the words ""If the Delivery Obligation is not

performed by the Seller in accordance with the terms of the Purchase Order"" and ""if the Seller either fails to perform any of its obligations under the

Purchase Order or breaches/violates any of the terms of the Purchase Order"" contained in Article 1 of the advance bank guarantee and performance

bank guarantee respectively, meaningless and otiose.

The learned Senior Counsel Shri Khambatta further argued that the learned Single Judge erred by rejecting the submissions of FGI that existence of

special equities was not limited to irretrievable harm / injury and entitled a party to an injunction against the invocation/pay out under the Bank

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Guarantee.

It is submitted that the law laid down by the Supreme Court on the definition of Special Equities is clear and the term 'Special Equities' comprises of

special circumstances which make it inequitable for the Bank Guarantee to be invoked. Special Equities is wide enough to cover any other

miscellaneous issues that might arise among the parties other than just irretrievable injuries/harm.

It is submitted that the learned Single Judge failed to appreciate that FGI will also suffer irretrievable injustice if the bank guarantees are permitted to

be encashed. The irretrievable injustice lies in the fact that the aggregate amount of the Bank Guarantees viz Rs. 43,98,13,832 will be irrecoverable by

FGI from TCTPL.

The tests for this laid down in the judgments cited on behalf of TCTPL are fully satisfied in the present case by the undisputed facts. It is submitted

that it is decisively established that FGI would suffer irretrievable injustice.

[7] The learned counsel for the appellants, in support of his submissions, placed reliance on the following judgments:

(a) Mahatma Gandhi Sahakari Sakhar Karkhana vs. National Heavy Engg. Coop.Ltd., 2007 AIR(SC) 2716.

(b) Sri. Tufan Chatterjee vs. Sri. Rangan Dhar, 2016 AIR(Cal) 213.

(c) BSES Ltd. vs. Fenner India Ltd. and anr., 2006 2 SCC 728.

(d) Western Coialfields Ltd. & Anr. vs. Rajesh Biyani, 2011 6 AllMR 722.

(e) Crest Communications ltd. vs. SBI, 2000 1 AllMR 598.

(f) Radha Sundar Dutta vs. Mohd. Jahadur Rahim, 1959 AIR(SC) 24 (V46 C5).

(g) Sahebzada Mohd Kamgarh Shah vs. Jagdish Chandra Deo, 1960 AIR(SC) 953 (V 47 C 169).

(h) Hindustan Construction Co. Ltd. vs. State of Bihar, 1999 8 SCC 436.

(i) M/s. Meena Advertisers vs. Delhi Metro Rail Corpn. Ltd. [OMP(I) No. 344/2015 and I.A. No. 13973/2015].

(j) HSSG India Pvt. Ltd. vs. Gammon India Ltd. [Comp. Appeal (L) No. 22/2017].

(k) Nagar Palika Parishad vs. Ramesh Construction Pvt. Ltd., 2017 3 UC 2214.

In the case of BSES Ltd. (Now Reliance Energy Ltd.) v/s. Fenner India Ltd. & anr., 2006 2 SCC 728, citedthe Apex Court in Paragraph 10 observed

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as under:

10. There are, however, two exceptions to this rule. The first is when there is a clear fraud of which the bank has notice and a fraud of the

beneficiary from which it seeks to benefit.

The fraud must be of an egregious nature as to vitiate the entire underlying transaction. The second exception in the general rule of nonintervention is

when there are ""special. equities"" in favour of injunction, such as when ""irretrievable injury"" or ""irretrievable injustice"" would occur if such an injunction

were not granted. The general rule and its exceptions has been reiterated in so many judgments of this Court, that in U.P. State Sugar Corpn. v/s.

Sumac International Ltd. (hereinafter ""U.P. State Sugar Corpn"") this Court, correctly declared that the law was ""settled"".

In the case of Western Coalfields Limited & anr. Vs. Rajesh s/o Nandlal Biyani & anr., 2011 6 AllMR 722., it is observed in Paragraph 24 as under:

24. The requirement of unconditional payment of the amount of Bank Guarantee without any demur, has nothing to do with the compliance of the

conditions of Bank Guarantees and it only prohibits the respondent no .2 Bank from raising any dispute as to compliance or fulfillment of the terms and

conditions of the contract between the appellant and the respondent no.1 Company. The respondent no.2 Bank cannot insist for proof of failure or

negligence of respondent no.1 Company in performing the terms and conditions contained in the contract. It is in this background that the Condition

No.1 has been incorporated in the Bank Guarantees agreeing, that the appellant Company shall be the sole judge as to whether the said contractor has

failed/neglected in performing any of the terms and conditions of the said contract and the decision of the appellant Company in this behalf shall be

binding upon the respondent no.2 Bank. Hence, on the basis of condition no.1 in the Bank Guarantee it cannot be urged that it is an unconditional Bank

Guarantee and confers an unfettered right upon the appellant to invoke the Bank Guarantees and to demand immediate payment.

In the case of Crest Communications Ltd. Vs. State Bank of India & anr., 2000 1 AllMR 598, it is observed in Paragraph 12 as under:

12. Recently, in Hindustan Construction Co. Ltd. & others v. State of Bihar & others , the Apex Court while reiterating the principles which govern

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Court interference in invocation of bank guarantee highlighted that such performance guarantee has to be invoked in accordance with the terms and

conditions of the guarantee. In paragraph 21 of the report, the Apex Court held thus :

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 the 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.

In the case of Sahebzada Mohammad Kamgarh Shah vs Jagidsh Chandra Deo Dhabai Deb & ors., 1960 AIR(SC) 953 (V 47 C 169)], The Apex

Court in paragraphs 12 and 13 observed as under:

12. In his attempt to establish that by this later lease the lessor granted a lease even of those minerals which had been excluded specifically by clause

16 of the earlier lease, Mr. Jha has arrayed in his aid several well established principles of construction. The first of these is that the intention of the

parties to a document of grant must be ascertained first and foremost from the words used in the disposition clause, understanding the words used in

their strict, natural grammatical sense and that once the intention can be clearly understood from the words in the disposition clause thus interpreted it

is no business of the courts to examine what the parties may have said in other portions of the document. Next it is urged that if it does appear that the

later clauses of the document purport to restrict or cut down in any way the effect of the earlier clause disposing of property the earlier clause must

prevail. Thirdly it is said that if there be any ambiguity in the disposition clause taken by itself, the benefit of that ambiguity must be given to the

grantee, the rule being that all documents of grants must be interpreted strictly as against the grantor.

Lastly it was urged that where the operative portion of the document can be

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interpreted without the aid of the preamble, the preamble ought not and

must not be looked into.

13. The correctness of these principles is too well established by authorities to justify any detailed discussion. The task being to ascertain the intention

of the parties, the cases have laid down that that intention has to be gathered by the words used by the parties themselves. In doing so the parties must

be presumed to have used the words in their strict grammatical sense. If and when the parties have first expressed themselves in one way and then go

on saying something, which is irreconcilable with what has gone before, the courts have evolved the principle on the theory that what once had been

granted cannot next be taken away, that the clear disposition by an earlier clause will not be allowed to be out down by later clause.

Where there is ambiguity it is the duty of the Court to look at all the parts of the document to ascertain what was really intended by the parties. But

even here the rule has to be borne in mind that the document being the grantor's document it has to be interpreted strictly against him and in favour of

the grantee.

In the case of Hindustan Construction Co. Ltd. v/s. State of Bihar & ors., 1999 8 SCC 436., in Paragraphs 13, 14 and 22 the Apex Court observed as

under:

13. The Bank, in the above Guarantee, no doubt, has used the expression ""agree unconditionally and irrevocably"" to guarantee payment to the

Executive Engineer on his first demand without any right of objection, but these expressions are immediately qualified by following :-

......in the event that the obligations expressed in the said clause of the abovementioned contract have not been fulfilled by the contractor giving the

right of claim to the employer for recovery of the whole or part of the Advance Mobilisation Loan from the contractor under the contract.

14. This condition clearly refers to the original contract between the HCCL and the defendants and postulates that if the obligations, expressed in the

contract, are not fulfilled by HCCL giving to the defendants the right to claim recovery of the whole or part of the ""Advance Mobilisation Loan"", then

the Bank would pay the amount due under the Guarantee to the Executive Engineer. By referring specifically to Clause 9, the Bank has qualified its

liability to pay the amount covered by the Guarantee relating to ""Advance

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Mobilisation Loan"" to the Executive Engineer only if the obligations under

the contract were not fulfilled by HCCL or the HCCL has misappropriated any portion of the ""Advance Mobilisation Loan"". It is in these

circumstances that the aforesaid clause would operate and the whole of the amount covered by the ""Mobilisation Advance"" would become payable on

demand. The Bank Guarantee thus could be invoked only in the circumstances referred to in Clause 9 whereunder the amount would become payable

only if the obligations are not fulfilled or there is misappropriation. That being so, the Bank Guarantee could not be said to be unconditional or

unequivocal in terms so that the defendants could be said to have had an unfettered right to invoke that Guarantee and demand immediate payment

thereof from the Bank. This aspect of the matter was wholly ignored by the High Court and it unnecessarily interfered with the order of injunction,

granted by the Single Judge, by which the defendants were restrained from invoking the Bank Guarantee.

22.We have scrutinised the facts pleaded by the parties in respect of both the Bank Guarantees as also the documents filed before us and we are,

prima facie, of the opinion that the lapse was on the part of the defendants who were not possessed of sufficient funds for completion of the work.

The allegation of the defendants that HCCL itself had abandoned the work does not, prima facie, appear to be correct and it is for this reason that we

are of the positive view that the ""special equities"" are wholly in favour of HCCL.

[8] The learned Senior Counsel Mr. Aspi Chinoy submits that the subject guarantees are unconditional, absolute and irrevocable. The petitioners had

filed Company Petition No.780/2015 against TCTPL seeking winding up of of the company for nonpayment of amount of Rs.2 Crores. By an order

dated 22nd August, 2017 the said petition was dismissed by the Company Judge. Learned Counsel has referred to Paragraph 13 of the said order

which reads as under:

13. I find that the admissions of liability were all as a result of negotiations which were in anticipation of continuation of work under the contract sand

not as a result of the termination of the contract. All these negotiations were pre termination and hence should not now be held against the Company.

The appellants herein did not prefer any appeal against the order passed on 22nd August, 2017. The appellants did not seek any relief against TCTPL.

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An ex parte order was granted against respondents 2 and 3 i.e. two Banks restraining them from releasing the payment. The Arbitral Tribunal was

constituted on 13th September, 2016 and the reference made to the arbitrator is presently being heard before the Arbitral Tribunal. In the submissions

of the Counsel, the learned Single Judge has addressed all the three substantial issues raised by the appellants and a sound and reasoned view has

been adopted by the learned Single Judge while dealing with the issue raised by the appellants. The issue is covered by the judgment of the Apex

Court in the case of Mahatma Gandhi Sahakari Karkhana v/s Heavy Engineering Corpn, 2007 6 SCC 470,. The appellants have sought to distinguish

the aforesaid case on the ground that clause 2 of the Guarantee in that case has made the purchasers the sole judge in determining whether there is a

breach of the Purchase Order. This distinction sought to be made by the appellants is a distinction without difference. The Clause 1 of the Bank

Guarantee had to be read alongwith Clauses 2 and 15 thereof which makes it clear that guarantees were absolute and unconditional. Clause2 of the

Guarantee contemplates that the demand by the respondents shall not be disputed or enquired into by the Bank and it is this language of Clause 2

which makes TCTPL the sole Judge in determining whether there is a breach of the purchase order and whether any amount should be claimed under

the Bank Guarantee from the Guarantor i.e. the Bank.

[9] It is further submitted that the judgment in the case of Hindustan Construction Co. vs State of Bihar, 1999 8 SCC 436, which was relied upon by

the appellants was not applicable to the facts; either terms of Bank Guarantee in that case were quite different and liability thereunder was clearly

qualified and conditional.

[10] The judgment of the Apex Court in the case of Mahatma Gandhi Sahakari Karkhana was not a determining aspect/feature on the basis of

decision in that case. The Bank Guarantee is a separate contract between the Bank and beneficiary. It was submitted that appellants reliance on the

decisions in the case of Hindustan Construction Company is misplaced as the terms of the Bank Guarantee in that case were very different.

[11] It is submitted by the learned Senior Counsel in written submissions in clauses (A) to (D) of Paragraph 3 as under:

(A) The Petitioners / Appellants have sought to contend that there were ""Special

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Equities"" for restraining the invocation of the Bank Guarantees, as an

amount of Rs.32 Crores was allegedly payable by TCTPL to the Petitioners / Felguera (as evidenced by correspondence and Minutes of Meetings).

(B) The Learned Judge has rejected the Petitioners contention and held that non payment of dues under a Contract, by the party invoking a Bank

Guarantee, did not constitute ""Special Equities"", inasmuch as non payment was only a dispute arising under the Contract. The Learned Judge has

relied upon three Supreme Court judgments which have held that such contractual claims and disputes could not be considered by the Guarantor Bank,

or by the Court to restrain payment under the bank Guarantee.

(C) It is submitted that the so called 'admissions' of liability which are relied on, were made in the course of negotiations between the parties and

accordingly cannot be held against the Respondent Company / TCTPL. As has been stated above, the Petitioners / Felguera had filed a Company

Petition (No. 780 of 2015) for winding up against the Respondent / TCTPL, on the basis of the very same 'admissions' / material. The Hon'ble Court

[Menon, J] had dismissed the Appellant/Felguera's Company Petition by an order dated 22nd August, 2017 and had held that the admissions of liability

were made in the course of negotiations and hence could not be held against the Company/TCPTL.

In paragraph 13 of the order dated 22nd August 2017 the Learned Single Judge had held as follows:

13. I find that the admissions of liability were all as a result of negotiations which were in anticipation of continuation of work under the contract sand

not as a result of the termination of the contract. All these negotiations were pre termination and hence should not now be held against the Company.

The Petitioners/Appellants herein had not preferred an Appeal against the said Order dt.22nd August, 2017, which has accordingly attained finality.

(D) The Supreme Court has repeatedly held, that such contractual disputes and claims of nonpayment of dues / breach of contract [including claims of

admitted non payment of contractual dues, or double recovery of contractual advances], could not be considered as a basis for seeking to restrain the

invocation and encashment of an unconditional Bank Guarantee.

[12] The learned Senior Counsel appearing for respondent no.1 placed reliance on following judgments:

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(a) Mahatma Gandhi Sahakari Sakhar Karkhana vs. National Heavy Engg. Coop.Ltd., 2007 AIR(SC) 2716.

(b) Vinitec Electronics Pvt. Ltd. vs. HCL Inforsystems Ltd., 2008 1 SCC 544.

(c) Dwarikesh Sugar Ind. Ltd. vs. Prem Heavy Eng. Works, 1997 6 SCC 450.

(d) U. P. State Sugar Corpn. vs. Sumac International Ltd., 1997 1 SCC 568.

(e) Somwanti and ors. vs. The State of Punjab and the State of Gujarat, 1963 AIR(SC) 151.

[13] The learned Single Judge while dealing with the issues referred to the clause of the guarantees as incorporated in the judgment and dealt with

rival contentions of both the parties. Paragraph 17 of the impugned judgment is reproduced herein below:

...........It is therefore clear that Article 1 of the Advance Bank Guarantee as well as the Performance Bank Guarantee have only made a general

reference to the purchase order and generally set out that if the delivery obligation is not performed by the seller/FGIPL in accordance with the terms

of the purchase order, or if the seller fails to perform any of its obligation/s under the purchase order, or breaches or violates any of the terms of the

purchase order, the guarantor bank shall within seven days from receipt of the demand from the purchaser make payment to TCTPL in a sum not

exceeding the amount for which the Bank Guarantee is provided. After the above general reference to the purchase orders in Article 1, the

subsequent Articles have made it clear that the Bank Guarantees are absolute and unconditional by a clear assertion that the bank shall not be entitled

to dispute or inquire into whether TCTPL has become entitled to claim the guaranteed amount under the purchase order or not ; or whether FGIPL

has committed any breach of purchase order and/or general terms and conditions applicable thereto or not ; or whether TCTPL is entitled to recover

any damages from the Supplier/FGIPL for breach thereof or not. It is further clearly asserted in Articles 3, 6, 7(D) and 15 of the Bank Guarantees

that TCTPL need not initiate any proceeding or claim against FGIPL before lodging any claim under the guarantee; that the liability of the

Guarantor/Bank under the Guarantees shall be primary, direct and immediate, and not conditional and/or contingent upon pursuit by the

purchaser/TCTPL of any remedies that it may have against the seller/FGIPL and/or any other person in relation to the purchase order; that the

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demand for observance, performance and/or enforcement of any terms and/or provisions of the guarantees and/or purchase order is expressly waived

; and that a demand for payment under the guarantees shall be deemed to have been sufficiently made if a claim in writing is sent by post or hand

delivered to the Guarantor/Bank at its office and is received by the guarantor. It is required to be made clear that only because TCTPL has in its

invocation letters stated that, ""the delivery obligation is not performed by the seller"" and that ""the seller has failed to perform its obligation/s under the

purchase order"", the submission of FGIPL that TCTPL is conscious of the fact that the Bank Guarantees are conditional, cannot be accepted.

[14] As regards the judgment relied upon by the appellants, the learned Single Judge observed that in view of peculiar facts and circumstances of the

Apex Court case and language of the Bank Guarantee, the Apex Court held that the Bank Guarantee therein was conditional. The contents of none of

the articles is found in the subject bank guarantee. It was, therefore, observed that the judgment of the Apex Court is not applicable to the facts of the

present case. The learned Single Judge observed in Paragraph 24 as under:

24. I am therefore, of the view that Articles 1 and 2 of the subject Bank Guarantees and the other Articles set out hereinabove can be harmoniously

construed, and since I do not find any conflict between Articles 1 and 2 of the subject Bank Guarantees and/or any other Article/s of the subject Bank

Guarantees, I hereby hold that the Bank Guarantees in question are absolute and unconditional. The submissions made on behalf of FGIPL in support

of their contention that the Bank Guarantees are conditional, therefore cannot be accepted and the case laws relied upon by them do not assist them.

The distinction sought to be made by them, with regard to the case laws relied upon by TCTPL, also cannot be accepted. The principles laid down by

the Hon'ble Supreme Court in the case of Saheb Zada Mohd. Kamgar Shah and Radha Sundar Dutta also do not assist FGIPL.

Since I am of the view that there is no ambiguity qua the construction of the Bank Guarantees, the question of applying the contra proferentum rule

also does not arise.

In respect of plea of special equities, the learned Single Judge observed in Paragraph 33 as under:

33. I am in agreement with the above submissions of Mr. Kamdar. The word

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""special equities"" came to be coined for the first time by Sabyasachi

Mukharji J. sitting as a judge of the Calcutta High Court in the case of Texmaco Ltd. v. State Bank of India and Ors. , in which he observed as

follows:

10. In my opinion, the position in law is as follows, whether the bank is obliged to pay and pay on what terms must depend upon both in the case of

bank guarantee and in the case of letter of credit on the terms of the document.

With respect to the Court of Appeal, it is not necessary for this Court to go to the extent of saying whether the performance guarantee stands on a

similar footing of a letter of credit but so far as the Court of Appeal says the bank must pay according to the guarantee on demand, if so stipulated,

without proof or conditions, I respectfully agree.

The Court of Appeal has referred to the exception of a clear fraud. I venture to suggest there may be another exception in the form of special equities

arising from a particular situation which might entitle the party to an injunction restraining the performance of bank guarantee. But in the absence of

such special equities and in the absence of any clear fraud, the Bank must pay on demand, if so stipulated, and whether the terms are such must have

to be found out from the performance guarantee as such."" [See at Page 49] Sabyasachi Mukharji J., when sitting as a Judge of the Hon'ble Supreme

Court explained the above observation in the Texmaco case whilst deciding the case of U.P. Cooperative Federation Ltd. v. Singh Consultants and

Engineers (P) Ltd. in the following terms:

16. The Court of Appeal in England had occasion once again to consider this question in Elian and Rabbath v. Matsas and Matsas, 1966 2 LloydsRep

495. In that case injunction was granted to prevent irretrievable injustice......

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

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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 wellsettled principle of the law in England. This is

also a wellsettled principle of law in India, as I shall presently notice from some of the decisions of the High Court and decisions of this Court. ...

24. I may notice that in India, the trend of law is on the same line. In the case of Texmaco Ltd. v. State Bank of India and ors., 1979 AIR(Cal) 44,

one of us (Sabyasachi Mukharji, J.) held that in the absence of special equities arising from a particular situation which might entitle the party on

whose behalf guarantee is given to an injunction restraining the bank in performance of bank guarantee and in the absence of any clear fraud, the

bank must pay to the party in whose favour guarantee is given on demand, if so stipulated, and whether the terms are such have to be found out from

the performance guarantee as such. There the Court held that where though the guarantee was given for the performance by the party on whose

behalf guarantee was given, in an orderly manner its contractual obligation, the obligation was undertaken by the bank to repay the amount on ""first

demand"" and ""without contestation, demur or protest and without reference to such party and without questioning the legal relationship subsisting

between the party in whose favour guarantee was given and the party on whose behalf guarantee was given,"" and the guarantee also stipulated that

the bank should forthwith pay the amount due ""notwithstanding any dispute between the parties,"" it must be deemed that the moment a demand was

made without protest and contestation, the bank had obliged itself to pay irrespective of any dispute as to whether there had been performance in an

orderly manner of the contractual obligation by the party. Consequently, in such a case, the party on whose behalf guarantee was given was not

entitled to an injunction restraining the bank in performance of its guarantee. It appears that special equities mentioned therein may be a situation

where the injunction was sought for to prevent injustice which was irretrievable in the words of Lord Justice Denning, M.R. in Elian and Rabbath v.

Matsas and Matsas. ...

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28. I am however, of the opinion that these observations must be strictly considered in the light of the principle enunciated. It is not the decision that

there should be a prima facie case. In order to restrain the operation either of irrevocable letter of credit or of confirmed letter of credit or of bank

guarantee, there should be serious dispute and there should be good prima facie case of fraud and special equities in the form of preventing

irretrievable injustice between the parties. Otherwise the very purpose of bank guarantees would be negatived and the fabric of trading operation will

get jeopardised. ...

34. On the basis of these principles I reiterate that commitments of banks must be honoured free from interference by the courts. Otherwise, trust in

commerce internal and international would be irreparably damaged. It is only in exceptional cases that is to say in case of fraud or in case of

irretrievable injustice be done, the Court should interfere."" [see at pages 183; 186; 187 - 188; 189; 190]

The learned Single Judge observed in Paragraph 36 of the judgment that the alleged admitted nonpayment of claim by TCTPL to FGIPL cannot

create a special equity so as to injunct the invocation of the Bank Guarantee. It was observed that whether there was any payment due or not under

the underlying contract is not the subject matter which can be considered for grant or refusal of grants. The learned Single Judge also considered the

submission that the respondent TCTPL is financially sound company and has already invested in excess of Rs.350 Crores to develop and commission

a Rs.640 Crore Coal Terminal for the V.O. Chadambaranar Port Trust, Tuticorin.

[15] We have perused the record placed before us, considered reply and written submissions advanced. We have also perused the record placed

before us.

[16] The Counsel appearing for the appellants submits that Bank Guarantee is conditional. We have perused the relevant clauses of Bank Guarantee,

particularly clauses 1 and 2.

[17] In the facts we are of the view that both the Bank Guarantees have to be harmoniously construed in the light of the agreement executed between

the parties, the purchase orders and correspondence exchanged.

[18] A conjoint reading of Articles 1 and 2 of the Advance Bank Guarantee and Performance Bank Guarantee indicate that it is an unconditional

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Bank Guarantee. We find substance in the submissions of the learned Counsel that there was a similar clause for consideration of the Apex Court in

Mahatma Gandhi Sahakari Karkhana cited supra. It was held that said guarantees were unconditional one. Clause1 of the Bank Guarantee has to be

read alongwith clause2 which would make it clear that Guarantees are absolute and unconditional. Taking into consideration clause2 of the Bank

Guarantee we find that TCTPL would be sole judge in determining whether there is breach of the purchase order and whether any amount should be

claimed under the Bank Guarantee. In the facts of the case the judgment in the case of Hindustan Construction citedby the appellants would not be

applicable to the present set of facts. In that case the guarantees were qualified and conditional. It is a settled position that Bank Guarantee is a

separate contract between the Bank and beneficiary. Accordingly, if by the terms of Bank Guarantee, the Bank/Guarantor is precluded from

questioning or enquiring into the beneficiary's decision to invoke the Guarantee, the beneficiary necessarily would become the sole Judge in deciding

whether the right to invoke guarantee has accrued or not.

[19] The learned Senior Counsel Shri Khambata submitted that amount of Rs.30 Crores was payable by TCTPL to the appellants which constituted

special equities"" justifying the restraint upon the encashment of Bank Guarantee. We have gone through the Apex Court judgment and the issues and

in the facts of the case we hold that such contractual claims and disputes could not be considered by the Guarantor Bank or by the Court to restrain

payment under the Bank Guarantee. It is to be noticed that the relief sought and granted are against the Bank in this case.

[20] We find substance in the submissions of the learned Senior Counsel Aspi Chinoy that so called demands of the liability which are relied upon by

the appellants were made in the core of negotiations between the parties and, therefore, cannot be held against the respondent company/TCPTL. The

Company Petition filed by the appellants was dismissed by the learned Single Judge on 22nd August, 2017 and as no appeal has been preferred, thus it

has become final.

[21] In the facts of the case, we find that the view of the Supreme Court in Mahatma Gandhi case citedapplies to the present guarantees in question.

The distinction sought to be made in respect of Articles 1 and 2 of the

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Guarantees and the reliance on the case of Apex Court is misplaced one in our

view and is not convincing one. The view adopted by the learned Single Judge is sound, reasonable and convincing one.

[22] The learned Counsel appearing for appellants submitted that TCTPL is a special purpose Vehicle which was making losses and its debts exceeds

its equity. This proposition has been dealt with by the Counsel appearing for the respondents. In the submissions of the Counsel though the contention

has been denied on the said proposition that TCTPL is making losses, the same could not be ground for the Court to grant an injunction against

TCTPL from invoking the Bank Guarantee. It is the contention of the TCTPL that they have infused capital of Rs.170 Crores in the project. The

Concession Agreement executed between the parties is for 30 years. During this period TCTPL will be entitled to recover tariff from the users of the

Project Facilities and services. The total estimated revenue during the balance concession period shall be Rs.10,067.14 crores.

[23] In the facts of the case we find that appellants have failed to make out a case for interfering in the view adopted by the learned Single Judge. We

find that the learned Single Judge adopted a reasonable and sound view based on the facts and material placed before the Court by harmoniously

construing the relevant clauses of the advance and performance bank guarantees. There is no merit in these appeals. They are accordingly dismissed.

[24] After pronouncement of the judgment, the learned Counsel appearing for the appellants prays for continuation of the adinterim relief for a period

of six weeks which was in operation for near about two years.

[25] The learned Counsel appearing for respondents opposes the prayer. It is submitted that taking into consideration the efficacy of Bank Guarantee

in commercial transactions, prayer for stay be rejected.

[26] In the facts of the case, we continue the adinterim relief granted by this Court earlier for a period of three weeks.

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