(2015) 06 DEL CK 0010

In the Delhi High Court

Case No : O.M.P. No. 1234 of 2012

GMR Kishangarh Udaipur Ahmedabad Expressway Ltd. APPELLANT

Vs

National Highway Authority of India RESPONDENT

Date of Decision : 29-06-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9

Citation : (2015) 8 AD 248 : (2015) 221 DLT 316

Hon'ble Judges : V. Kameswar Rao, J

Bench : Single Bench

Advocate : Gopal Jain, Parag Tripathi, Senior Advocates, Mrinalini, Chinmayee Chandra and R.S. Bobde, for the Appellant; Sudhir Nandrajog and Mukesh Kumar, Advocates for the Respondent

Final Decision : Dismissed

Judgement

V. Kameswar Rao, J.—This is a Petition filed under Section 9 of Arbitration and Conciliation Act, 1996 ("Act" in short) seeking the following reliefs:--

"(i) Restrain the Respondent from invoking or encashing the Performance Guarantee bearing No. 120377IBGP00479 dated 23.5.2012 till the disposal of this petition.

(ii) Restrain the Respondent from making any demand or receiving any money under the, Performance Guarantee bearing No. 120377IBGP00479 dated 23.5.2012 till the disputes between the parties are finally decided."

PETITIONER''S CASE

2. It is the case of the petitioner that the respondent had called for bids for design, engineering, finance, construction, operation and maintenance of six-laning of Kishangarh - Udaipur - Ahmedabad section of National Highway No. NH 79A, NH 79, NH 76 and NH 8. The Petitioner was the successful bidder and was awarded the Contract. The Concession Agreement was executed between the

parties on November 30, 2011. Under the Concession Agreement, the respondent authority had to fulfill mandatory Conditions Precedent under clause 4 and the rights and obligations of the parties only come into effect after fulfillment of the Conditions Precedent. It is the case of the petitioner, that as per clause 4.1.2 of the Agreement, the respondent had to fulfill the following obligations;

"i) Issue a Fee Notification;

ii) Providing a Right Of Way to the Site to the Concessionaire;

iii) Procure approval of the Railway Authorities to enable the Concessionaire to construct road over-bridges/under-bridges at crossings on the highway project;

iv) Procure all Applicable Permits relating to environmental protection and conservation of the Site."

3. According to the petitioner, a notice by the Concessionaire under clause 4.1.2 is optional, while the satisfaction of Conditions Precedent prior to the ''Appointed Date'' by the respondent is mandatory. Only, upon the respondent authority fulfilling the Conditions Precedent, the ''Appointed Date'' takes place and the rights and obligations under the Concession Agreement come into effect. None of the Conditions Precedent is capable of being waived by the parties. The petitioner would state, that as per proviso to clause 4.1.2, the respondent authority has an option to extend the time required for performance of the Conditions Precedent relating to environmental clearances and approval from railway authorities, provided that the commercial operation date has taken place and the right of way has been handed over. Thus, compliance of the Conditions Precedent for right of way and the Fee Notification is a must before the ''Appointed Date''.

4. The petitioner''s case is that, it had started to fulfill its obligations under the Concession Agreement and notified the respondent authority that it had appointed EPC contractors and sub-contractors and that mobilization had commenced. It would state, that it made significant investments and was ready to commence work. According to the petitioner, it had notified, time and again to the respondent authority that the respondent has an obligation to inter-alia publish the Fee Notification and grant environmental and forest clearances, which are necessary for the petitioner to commence operations. It had been submitting regularly, its status report to the respondent. The petitioner has referred to letter dated October 22, 2012 of the respondent whereby the respondent had written to the petitioner stating that the User Fee Notification would be issued shortly and the forest clearance proposal was still pending with the Ministry of Environment and Forest. It is the case of the petitioner that the said communication records a clear admission that the Fee Notification and the forest clearance proposal had not been obtained and thereby the Conditions Precedent had not been fulfilled. It is also averred that till date i.e. December 27, 2012, the respondent authority has not complied with its obligations and has failed to satisfy the Conditions Precedent, which would constitute material default of the

conditions of the Concession Agreement on the part of the respondent.

5. It is the petitioner''s case, that even the independent Engineer, in its communication dated November 23, 2012, appointed by the respondent authority has also recorded the default. The petitioner also averred, that the respondent failed to fulfill and discharge its obligations in a timely manner. The respondent did not approach the petitioner to seek additional time to fulfill the Conditions Precedent nor did it fulfill the Conditions Precedent within the time provided. It had issued a notice of intention to terminate the agreement dated December 21, 2012, which was to take effect after 15 days of serving a termination notice. It is the case of the petitioner that in view of the respondent''s failure to fulfill the Conditions Precedent, the question of the petitioner''s performance does not arise at all. Therefore, there is no basis or justification for the respondent to invoke the Performance Guarantee. It is averred that para 2 of the Performance Guarantee specifically stipulate that the respondent must clearly mention that the petitioner has committed default in due and faithful performance of all or any of its obligations during the construction period under the Concession Agreement. It is also the petitioner case, due to the acts of the respondent, the performance of obligation of the petitioner was not possible. Allowing encashment of Bank Guarantee would result in unjust enrichment of the respondent for its own wrong.

6. In substance, it is the case of the petitioner that failure on the part of the respondent to perform the Conditions Precedent; the petitioner has given notice of termination of the agreement and the same having been terminated, the respondent has no legal right to invoke Bank Guarantee. Further, without fulfillment of Conditions Precedent by the respondent, the question of performance of obligations by the petitioner does not arise and invocation of Bank Guarantee would tantamount to fraud. The petitioner averred, prima facie case, balance of convenience in its favour apart from stating that irretrievable injury would be caused to the petitioner, unless the respondent is restrained from invoking the Bank Guarantee, which in fact must be returned to the petitioner upon termination of the Concession Agreement.

RESPONDENT''S CASE

7. On the other hand, the respondent''s case, in the reply is that, it had awarded the Contract to the petitioner in terms of the Concession Agreement executed on November 30, 2011. It is one of the biggest project undertaken by the Government, and involves improvement and development of 555.5 km of National Highway. The petitioner was selected from amongst the seven bidders who participated in the International Competitive Bidding undertaken by the respondent authority. The petitioner was the successful bidder having committed to pay a sum of Rs. 636 crores per year with annual increment of 5% for a period of 26 years commencing from the Appointed Date and as such, the petitioner was to pay a sum of approximately Rs. 32,500/- crores over a period of 26 years. The petitioner was entitled to collect User Fee (Toll) for the four

laning from the Commercial Operation Date and for the entire six lane upon date of completion of six laning besides carrying out the improvement and construction of six lane and operation and maintenance during the currency of the Agreement.

8. It is also the stand of the respondent that the respondent authority was collecting toll for four laning of approximately 350 crores annually. It is the case of the respondent that the petitioner has committed serious breaches of the Concession Agreement entered into between the petitioner and the respondent authority. The petitioner has failed to fulfill the mandatory Conditions Precedent evidencing inter-alia, its lack of readiness and willingness to perform its obligations under the Concession Agreement. According to the respondent, the petitioner has not even chosen to take possession of the land in question. More than 88% of land required for the project in question was available but the petitioner has chosen not to avail it. According to the respondent, the land to the said extent was available at the time of pre-bid meeting and no protest whatsoever was raised at the relevant time. The plea that land available is short is barred by waiver, acquiescence and estoppel and cannot be countenance as a plea for grant of relief.

9. The respondent would submit that the Agreement lays down rights and obligations of the parties, which inter-alia, required that certain Conditions Precedent were required to be fulfilled by both the parties. Unless, both the parties achieve/fulfill their respective Conditions Precedent, the ''Appointed Date'' i.e., the date of Commencement of work cannot be declared. The Conditions Precedent required to be fulfilled by the parties are listed in clause 4.1.2 and clause 4.1.3. The clauses 4.2 and 4.3 expressly empowers both the parties to claim damages for delay by any other party in fulfilling its Conditions Precedent. According to the respondent, the notice dated December 21, 2012 of the petitioner was based on flimsy and factually erroneous plea that the Conditions Precedent had not been met by the respondent. A reply to the notice was sent by the respondent on January 1, 2013 wherein it was stated that the notice is misconceived and contrary to the express terms of Concession Agreement. The respondent, in its reply, had highlighted the status of the three issues i.e., issuance of Fee Notification, handing over of land and environment clearance. The respondent had inter-alia stated, in so far as Fee Notification is concerned, the same stands issued on January 1, 2013 itself.

10. On the aspect of handing over of land, it is the case of the respondent that the requisite land required under the Concession Agreement to fulfill the Conditions Precedent in that respect is available not only on the date of letter but from the date, even prior to the award of the Contract. The respondent''s case is that 88% of the required land in terms of a Concession Agreement was available with the respondent authority for handing over to the petitioner, upon the petitioner fulfilling its obligations and complying with the requirements of the Agreement. In fact, a reference is made by the respondent that the independent

Engineer vide its letter dated September 22/26, 2012 requested the petitioner to depute its team for inspecting the site and for preparing a memorandum containing inventory of the site including the vacant and unencumbered land, buildings, structures, road works, trees and any other immovable property on or attached to the site as per the requirement of clause 10.3.1 of the Concession Agreement. For the reasons best known to the petitioner, it chose not to deploy its representative, in the absence of which inspection of the site and the Memorandum could not be prepared and the formal handing over of the land could not be done.

11. In so far as environment clearance is concerned, it is the stand of the respondent that the environment clearance for the project had already been obtained by the respondent authority from the Ministry of Environment and Forest, which is a matter of record, the progress made in achieving or otherwise of Conditions Precedent was well known to each other and the authority has also communicated the status of the same through various letters. The respondent had also referred to the MOEF circular letter dated January 7, 2013 that for linear Highway Projects including the present Project, prior forest clearance is no longer required and construction can be started in non-forest area. The respondent would also state that in terms of clause 37.2.2, it is required that the respondent be served with a "Cure Period" notice granting a minimum 90 days period to cure the default, if any. It is only after the failure of the respondent authority to cure the said default within the "Cure Period", that the ''authority default'' occurs upon which, the petitioner can issue notice informing the respondent of its intention to issue the termination notice. No such notice, much less the "Cure Period" notice as envisaged under clause 37.2.1 was served by the petitioner on the respondent. Respondent, would state, there was no occasion for the petitioner to issue such notice and also the applicability of clause 37.2.2 of the Concession Agreement does not arise at all. Respondent had also stated, that the petitioner is yet to fulfill its obligations under clause 4.1.3 of the Agreement prior to the "Appointed Date". It would state, the obligations include procurement of all applicable permits specified in schedule E like;-

"a. Permission of State Government for Extraction of Boulders from Quarry;

b. Permission of Village Panchayat and Pollution Control Board for Installation of Crushers;

c. License for use of Explosives;

d. Permission of the State Government for drawing Water from River/Reservoir;

e. License from Inspector of Factories or other Competent Authority for setting up of Batching Plant;

f. Clearance of Pollution Control Board for setting up of Batching Plant;

g. Clearance of Village Panchayat &Pollution Control Board for Asphalt Plant; and

h. Permission of Village Panchayat and State Government for Borrow Earth."

12. The respondent would refer to various letters of the petitioner, wherein the petitioner has admitted of not fulfilling the Conditions Precedent by it. According to the respondent, since the petitioner has not fulfilled its obligations, the event of "Appointed Date" could not have occurred. Hence, no act of the respondent has caused any "Material Adverse Effect" on the petitioner. It had called upon the petitioner to withdraw its illegal and untenable notice dated December 21, 2012 and co-operate with the respondent to achieve the ''Appointed Date''. The interim order passed by this Court was on the petitioner misreading and wrongly explaining to the Court, the letter dated December 21, 2012. The respondent would also state, that the attempt of the petitioner has been to wriggle out of the contractual obligations. The conduct of the petitioner amounts to concessionaire default.

13. I note that in the written submissions filed by the respondent, a reference has been made to letter dated March 5, 2013 wherein the respondent has referred to fulfilling the Conditions Precedent which included the environment clearance for the entire project. The respondent has also referred to a letter dated February 25, 2013 of the petitioner expressing its interest to revive the project and put forward certain suggestions regarding rationalization of premium. According to the respondent, even after the report of the Rangarajan Committee, the petitioner has failed to submit its proposal. According to the respondent, it appears, the petitioner was not willing to do the project work right from the beginning for commercial reasons and its only purpose, was to linger on the matter to protect its bid security as well as Performance Bank Guarantee and to raise huge illegal claims on the respondent.

14. Mr. Gopal Jain and Mr. Parag Tripathi, learned Senior Counsel appearing for the petitioners have drawn my attention to various provisions of the Contract to submit that the respondent has failed to fulfill its Conditions Precedent and as such there was no conclusive Contract between the parties. According to them, the Conditions Precedent under Article 4.1 included handing over of land/ unencumbered right of way to the petitioner, issuance of Fee Notification by the authority and obtaining approval from the relevant authorities. Even after, one year of the execution of the Agreement, the respondent had failed to fulfill the Conditions Precedent. A reference is made to letter of the petitioner dated May 23, 2012 whereby the petitioner had sought the status of the Conditions Precedent and requested for a joint inspection to ascertain the right of way but the same could not be carried out. It was contended that the respondent vide its letter dated May 29, 2012, had stated that only 77.39% land was available. The subsequent communication from the petitioner for fulfillment of the Conditions Precedent bore no result. Even the independent Engineer''s letter shows that the respondent was yet to hand over the right of way; failure to issue the Fee Notification and obtain the Forest and Environment clearance. In reply to the letter of the independent Engineer, the petitioner had reiterated that the land is

not available as mentioned by the independent Engineer as no further land was acquired after May 28, 2012. These Conditions Precedent constitute a fundamental term of the Contract. The authority is in material breach of the terms of the Agreement which had a "Material Adverse Effect" on the petitioner, who mobilized resources and infused equity of Rs. 700/-Crores in the project and the petitioner had carried out almost 50% of design, set up all site offices and base camp for construction activities apart from installing crushers and batching plants etc. It was under these circumstances, the notice of intention to terminate dated December 21, 2012 was issued by the petitioner under Article 37.2.2 and sought for return of the Performance Security. Since the respondent had failed to cure the breaches and defaults, the petitioner terminated the Agreement vide letter dated January 7, 2013. The petitioner has also referred to, its proposal dated February 25, 2013 and a modified proposal dated November 7, 2014 in which staggered payment of premium was suggested. A further revised proposal was submitted on January 7, 2015 with some modifications for revival of the project which has not been responded to by the respondent. A reference is also made to an Application filed by the respondent before the Supreme Court for directions in Writ Petition (Civil) No. 202/1995 relevant paras of which are reproduced as under:--

"7....There are more than 22 awarded projects where "Appointed Date" has not been declared as the formal environment clearance is still pending. All these widening projects have been duly recommended by the Environmental Appraisal Committee of MoEF, however the formal Environment clearance has not been issued yet as now it is mandatory to obtain the Forest Clearance before Environment Clearance can be granted.

8....Besides the incompensable loss of the timely execution of the Project, the Applicant Authority is already facing huge claims on account of delay in grant of environmental clearance..... the Applicant Authority has already received claims running into hundreds of crores on account of idling of resources, increase in construction cost etc., where construction has not started on account of the pending environmental clearance".

15. The petitioner has prayed that it has invoked the Arbitration Clause and during the pendency of the Arbitration, the subject-matter of the dispute need to be preserved and no prejudice is going to be caused to the respondent. Learned counsel for the petitioners relied upon D.S. Constructions Limited Vs. Rites Limited and Another, AIR 2006 Delhi 98 : (2006) 3 BC 82 : (2006) 1 CTLJ 123 : (2006) 127 DLT 1 ; Union of India Vs. Uttam Singh Dugal and Co. (Pvt.) Ltd., AIR 1972 Delhi 110 to contend, there is no concluded Contract as there is a failure to fulfill the Conditions Precedent and the petitioner is entitled to the refund of the Performance Bank Guarantee and the invocation would be fraudulent and illegal; 2006 (1) Arbitration Law Reporter 321 Delhi Continental Construction Ltd. and Anr v. Satluj Jal Vidyut Nigam to contend that the injunction against invocation of Bank Guarantee must be granted where there is a fraud or special equities or

where non-grant of an injunction would lead to irretrievable injustice to the party seeking injunction; J.G. Engineers Pvt. Ltd. Vs. Union of India (UOI) and Another, AIR 2011 SC 2477 : (2011) 2 ARBLR 84 : (2011) 5 JT 380 : (2011) 3 RCR(Civil) 683 : (2011) 5 SCALE 46 : (2011) 5 SCC 758 : (2011) 8 SCR 486 : (2011) 2 UJ 1832 : (2011) AIRSCW 2849 : (2011) 4 Supreme 531 , 1987 (2) SCC 160 State of Karnataka v. Shri Rameshwara Rice Mills to contend that the respondent, as a Contracting Party cannot decide the issue by itself or a party to the Agreement cannot be an Arbiter in its own cause.

16. On the other hand, Mr. Sudhir Nandrajog, learned Senior Counsel for the respondent would reiterate the stand taken by the respondent in its reply by drawing my attention to the various documents annexed with the pleadings. According to him, the dispute is primarily related to the main Contract and the same is irrelevant for the purpose of invocation of Bank Guarantee. He has drawn my attention to the terms of the Bank Guarantee, which, according to him, are unequivocal, unconditional. He states, in view of clause 2 of the terms of the Bank Guarantee, even if there are disputes, the same can be invoked. He would urge that there is no pleading of fraud in the execution of the main Contract or even in the execution of the Contract of Bank Guarantee. Even the averments in para 11 of the petition would not constitute fraud. He states, fraud cannot be even pleaded, when Bank is not a party. It is not a case of irretrievable injury as the respondent herein, is one hundred percent owned by the Central Government, having been constituted under the Act of the Parliament. According to him, the petitioners have portrayed that the respondent has not complied with any of its obligations. Rather, it is a case where the petitioner has not discharged its Conditions Precedent. He would refer to the letter dated January 2, 2013 intimating the issue of Fee Notification on January 1, 2013. He would also state, that 88.92% of the area was available and the same is clear from the letter dated December 21, 2012 of the independent Engineer. He states, that the petitioner has intentionally not brought to the notice of the Court on December 28, 2012 when this Court had passed the interim order, clause (d) at page 233 which reflects the Conditions Precedent required to be fulfilled by the petitioner but not fulfilled. According to him, the respondent, in its reply dated January 1, 2013 had highlighted the status of the various Conditions Precedent required to be fulfilled by the respondent and in that regard, he pointed out to para 13 of its reply at running page 34 of the paper book. He would further submit, that despite the request by the independent Engineer, the petitioner had not come forward for joint verification of the site. He also states, the petitioner can take the project now, start and complete the work. He would refer to clause 44.2 of the Agreement, which details the manner in which the dispute resolution has to take place which includes the process of Conciliation, which has not been invoked. It is, his endeavor to stress on the fact that the notice of termination dated December 21, 2012 issued by the petitioner is not as per Article 37.2, which contemplates a "Cure Period" of 90 days. Even in terms of notice dated January 7, 2013, the 90 days was to expire on March 21, 2015; the clearance

had come from the Ministry of Environment and Forest, giving clearance to the project, which aspect has been communicated to the petitioner vide letter dated March 5, 2013, much before March 21, 2013. It is only in the eventuality of failure to cure the defects the termination could have been effected. In other words, it is his endeavour to submit that the agreement has not been terminated, the case set up by the petitioner.

17. He would also refer to the respondent''s letter dated January 17, 2013 written to the petitioner, wherein the respondent had stated that the termination notice got issued by the petitioner is invalid and the conduct of the concessionaire to walk out of the project would cause huge loss to NHAI beside causing irreparable loss and injury to the general public depriving them from using the much essential project facilities. The learned counsel for the respondent has stated that even the present petition filed by the petitioner was before the expiry of the 15 days of the notice dated December 21, 2012 of the petitioner whereby it had issued notice of intention to terminate the Agreement in terms of clause of 37.2.2 as the petition was filed immediately thereafter on December 26, 2012. Mr. Nandrajog would also submit that no advance petition was served on the respondent. He also states, that in page 9 of the plaint, it is highlighted that 88.4 % of the land was available for construction. He states, that independent Engineer had never said that the petitioner has complied with the Conditions Precedent. The Arbitration was only invoked in the month of February 2015. He would also state, that the judgments relied upon by the petitioner are not applicable to the facts of this case.

18. Mr. Gopal Jain, in rejoinder, would submit that the rights and obligations of the parties under the Agreement shall be subject to the satisfaction in full, of the Conditions Precedent specified in clause 4.1. Once the Performance Security is taken, the precedents need to be fulfilled in terms of clause 4.1.2. It is his case, that the termination has been accepted by the respondent by conduct. He would state, that once the termination has been effected, the Performance Security must come back to the petitioner.

19. Having heard the learned counsel for the parties, the only issue which arises for consideration is that the petitioner is entitled to the relief as prayed for, in the petition i.e seeking an injunction against the respondent from invoking/encashing the Performance Bank Guarantee. The law on bank guarantees is quite well settled. The exhaustive submissions made by learned counsel for the parties, relates to the Concession Agreement executed between the parties and the rights and obligations and the violation of those rights and obligations under the said Agreement. The submissions, as noted above, would highlight that the parties herein are blaming each other for the violation/non fulfilment of Conditions Precedent, which has also effected the project as it could not take off, despite the fact that the Agreement was executed way back in 2012. Be that as it may, the issues raised in the petition primarily relates to the merit of the disputes. This Court in a petition under Section 9 of the Act, for the purpose of

the relief, as prayed for, need to take into consideration the position of law with regard to the bank guarantees. As rightly pointed out by Mr. Sudhir Nandrajog, a perusal of the petition would not show that fraud in relation to execution of Bank Guarantee has been pleaded by the petitioner. The only paragraph wherein fraud has been averred is in para 11 wherein the petitioner has inter-alia stated that without fulfilment of the Conditions Precedent by the respondent, the question of performance of obligations would not arise and in such circumstance allowing enforcement of Performance Guarantee would tantamount to fraud. Surely, such an averment is not an allegation of fraud in the execution of Contract of Bank Guarantee. Further, there is no averment in the petition, wherein the petitioner has pleaded irreparable injustice. In fact, such a case can''t be set up by the petitioner for the simple reason, the respondent herein, has been established by the Central Government under the Act of Parliament and even if the petitioner succeeds, before the Arbitrator, the Award can be satisfied. Further, the Bank has not been made a party. To obtain an injunction, it is necessary to prove, the bank has the knowledge of fraud. In this case, there is no averment that bank has the knowledge of fraud. Rather, I find an averment in para 17 of the petition, wherein the petitioner has stated that it had notified the bank on December 24, 2012. The petitioner has also stated that despite notifying the bank, the bank cannot resist/refuse paying the secured amount upon its invocation by the respondent. This is, primarily because the bank, in its letter dated December 26, 2012, has conveyed to the petitioner, if the Bank Guarantee is invoked, it is bound to honour it unless there is an order of the Court. In other words, it is the Bank''s view that there is no fraud. Further, the submission of Mr. Nandrajog that for effecting termination, there has to be a notice of 90 days is appealing as there is nothing on record to suggest, even after March 05, 2013 there are Conditions Precedent, which were yet to be fulfilled by the respondent.

20. In Federal Bank Ltd. Vs. V.M. Jog Engineering Ltd. and Others, AIR 2000 SC 3166 : (2001) 106 CompCas 267 : (2000) 4 CTC 687 : (2000) 1 JT 317 Supp : (2000) 6 SCALE 654 : (2001) 1 SCC 663 : (2000) 3 SCR 542 Supp : (2000) AIRSCW 3639 : (2000) 6 Supreme 619 wherein, the Supreme Court observed that the Court ought not to grant injunction, to restrain invocation of bank guarantees or letters of credit. The Supreme Court carved out two exceptions to this rule, viz. fraud and irretrievable damage. It further observed that the Contract of Bank Guarantee or letter of credit is independent of the main contract between the seller and the buyer. In case of an irrevocable bank guarantee or letter of credit, the buyer cannot obtain injunction against the final payment on the ground that there was a breach of the contract by the seller. The bank is to honour the demand for encashment if the seller, prima facie, complies with the terms of the Bank Guarantee or the letter of credit namely, if the seller produces the documents enumerated in the Bank Guarantee or the Letter of Credit. If the bank is satisfied on the basis of the documents that they are in conformity with the list of documents mentioned in the Bank Guarantee or the Letter of Credit and there is no discrepancy, it is bound to honour the demand of the seller for

encashment. It is not permissible for the bank to refuse the demand on the ground that the buyer is claiming that there is a breach of contract. The obligation of the bank under the documents has nothing to do with any dispute as to breach of contract between the seller and the buyer. The Supreme Court also observed that in order to obtain injunction against the issuing bank that it is necessary to prove that the bank had knowledge of fraud. The Supreme Court relied on the observations of Kerr, J. in R.D. Harbottle (mercantile) Ltd. v. National Westminster Bank Ltd. (1978) QB 146:(1977) 2 All England Reporter 862 to state that irrevocable Letters of Credit are "lifeblood of international commerce" and also observed as under:

"Except possibly in clear cases of fraud of which the banks have notice, the Courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration........ Otherwise, trust in international commerce could be irreparably damaged."

Denning M.R, stated In Edward and Owen Engineering Ltd. v. Barclays Sank International Lid. (1978) Q.B. 159 that ''the only exception is where there is a clear fraud of which the bank had notice": Browne, LJ. said in the same case : "but it is certainly not enough to alleged fraud, it must be established" and in such circumstances, I should say, very clearly established", in Bolvinter Oil S.A.v. Chase Manhattan Bank, (1984) 1 All E.R, 351 at P. 352, it was said ''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 be sufficient that this rests Upon the uncorroborated statement of the customer,, for irreparable damage can be done to a bank''s credit in the relatively brief time "before the injunction is vacated". Thus, not only must ''fraud'' be clearly proved but so far as the Bank is concerned, it must prove that it had knowledge of the fraud. In United Trading Corp. S.A. v. Allied Ards Bank, (1985) 2 Lloyds Rep, 554, it was stated that there must be proof of knowledge of fraud on the part of the Bank at any time before payment."

21. In Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Company, AIR 2007 SC 2798 : (2007) 3 ARBLR 139 : (2007) 139 CompCas 706 : (2007) 9 JT 631 : (2007) 9 SCALE 631 : (2007) 8 SCC 110 : (2007) 8 SCR 869 : (2007) AIRSCW 5080 , the Supreme Court has held as under:

"10. The law relating to grant or refusal to grant injunction in the matter of invocation of a Bank Guarantee or a Letter of Credit is now well settled by a plethora of decisions not only of this court but also of the different High Courts in India. In U.P. State Sugar Corporation Vs. M/s. Sumac International Ltd., (1996) 9 AD 213 : AIR 1997 SC 1644 : (1997) 1 BC 286 : (1997) 89 CompCas 179 : (1996) 10 JT 709 : (1996) 8 SCALE 676 : (1997) 1 SCC 568 : (1996) 9 SCR 511 Supp : (1997) AIRSCW 694 : (1996) 8 Supreme 530 , this court considered its various earlier decisions. In this decision, the principle that has been laid down clearly on the enforcement of a Bank guarantee or a Letter of Credit is that in respect of a Bank Guarantee or a Letter of Credit which is sought to be encashed by a beneficiary, the bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. Accordingly this Court held that the courts should be slow in granting an order of injunction to restrain the realization of such a Bank Guarantee. It has also been held by this court in that decision that the existence of any dispute between the parties to the contract is not a ground to restrain the enforcement of Bank guarantees or Letters of Credit. However this court made two exceptions for grant of an order of injunction to restrain the enforcement of a Bank Guarantee or a Letter of Credit. (i) Fraud committed in the notice of the bank which would vitiate the very foundation of guarantee; (ii) injustice of the kind which would make it impossible for the guarantor to reimburse himself.

11. Except under these circumstances, the courts should not readily issue injunction to restrain the realization of a Bank Guarantee or a Letter of Credit. So far as the first exception is concerned, i.e. of fraud, one has to satisfy the court that the fraud in connection with the Bank Guarantee or Letter of Credit would vitiate the very foundation of such a Bank Guarantee or Letter of Credit. So far as the second exception is concerned, this court has held in that decision that it relates to cases where allowing encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. While dealing with the case of fraud, this court in the case of U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd., (1987) 2 ARBLR 279 : (1988) 1 CompLJ 39 : (1987) 4 JT 406 : (1987) 2 SCALE 1149 : (1988) 1 SCC 174 : (1988) 1 SCR 1124 held as follows:

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

(emphasis supplied)

While coming to a conclusion as to what constitutes fraud, this court in the above case quoted with approval the observations of Sir John Donaldson, M.R. in Bolivinter Oil SA v. Chase Manhattan Bank (1984) 1 All ER 351 at p. 352 which is as follows:

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

(Emphasis supplied)

12. In Svenska Handelsbanken and Others Vs. Indian Charge Chrome Ltd. and

Others, (1994) 1 JT 240 , it has also been held that a confirmed Bank Guarantee/ irrevocable Letter of Credit cannot be interfered with unless there is established fraud or irretrievable injustice involved in the case. In fact, on the question of fraud, this decision approved the observations made by this court in the case of U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd., (1987) 2 ARBLR 279 : (1988) 1 CompLJ 39 : (1987) 4 JT 406 : (1987) 2 SCALE 1149 : (1988) 1 SCC 174 : (1988) 1 SCR 1124 .

13. So far as the second exception is concerned, this court in U.P. State Sugar Corporation Vs. M/s. Sumac International Ltd., (1996) 9 AD 213 : AIR 1997 SC 1644 : (1997) 1 BC 286 : (1997) 89 CompCas 179 : (1996) 10 JT 709 : (1996) 8 SCALE 676 : (1997) 1 SCC 568 : (1996) 9 SCR 511 Supp : (1997) AIRSCW 694 : (1996) 8 Supreme 530 as considered herein earlier, at para 14 on pp. 575-76 observed as follows :

"14. On the question of irretrievable injury which is the second exception to the rule against granting of injunctions when unconditional bank guarantees are sought to be realized the court said in the above case that the irretrievable injury must be of the kind which was the subject matter of the decision in the Itek Corpn. Case (566 Fed Supp 1210). In that case an exporter in USA entered into an agreement with the Imperial government of Iran and sought an order terminating its liability on stand by letter of credit issued by an American Bank in favour of an Iranian Bank as part of the contract. The relief was sought on account of the situation created after the Iranian revolution when the American Government cancelled the export licences in relation to Iran and the Iranian government had forcibly taken 52 American citizens as hostages. The US Government had blocked all Iranian assets under the jurisdiction of United States and had cancelled the export contract. The court upheld the contention of the exporter that any claim for damages against the purchaser if decreed by the American courts would not be executable in Iran under these circumstances and realization of the bank guarantee/letters of credit would cause irreparable harm to the Plaintiff. This contention was upheld. To avail of this exception, therefore, exceptional circumstances which make it impossible for the guarantor to reimburse himself it he ultimately succeeds, will have to be decisively established. Clearly, a mere apprehension that the other party will not be able to pay, is not enough. In Itek case, there was certainty on this issue. Secondly, there was good reason, in that case for the Court to be prima facie satisfied that the guarantors i.e. the bank and its customer would be found entitled to receive the amount paid under the guarantee."

14. From the discussions made hereinabove relating to the principles for grant or refusal to grant of injunction to restrain enforcement of a Bank Guarantee or a Letter of Credit, we find that the following principles should be noted in the matter of injunction to restrain the encashment of a Bank Guarantee or a Letter of Credit :--

(i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional Bank Guarantee or Letter of Credit is given or accepted, the Beneficiary is entitled to realize such a Bank Guarantee or a Letter of Credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.

(ii) The Bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.

(iii) The Courts should be slow in granting an order of injunction to restrain the realization of a Bank Guarantee or a Letter of Credit.

(iv) Since a Bank Guarantee or a Letter of Credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of Bank Guarantees or Letters of Credit.

(v) Fraud of an egregious nature which would vitiate the very foundation of such a Bank Guarantee or Letter of Credit and the beneficiary seeks to take advantage of the situation.

(vi) Allowing encashment of an unconditional Bank Guarantee or a Letter of Credit would result in irretrievable harm or injustice to one of the parties concerned.

"The aforesaid has further been reiterated and reaffirmed by the Apex Court in Appeal (civil) 5121 of 2007 titled Vinitec Electronics Private limited v. HCL Infosystems Limited. In the present case neither a case of fraud or irretrievable harm and injury has been alleged and as such the only two grounds upon which a court of law can interfere with the right of the Respondent herein are not satisfied in the present case. In this regard, it is respectfully submitted that there is not even a whisper by the Petitioner much less any allegation of fraud having being committed by the Respondents. Even otherwise, mere allegation of fraud alone is not enough, the said allegation has to be substantiated as also the fraud has to be of an egregious nature, which would vitiate the very foundation of the Bank Guarantee. On this ground alone the prayer for restraining the Respondent from encashing the bank guarantee is not maintainable and liable to be dismissed."

22. Insofar as the judgment relied upon by the learned Senior Counsel for the petitioner are concerned, in D.S. Construction Ltd. (supra) this Court was dealing with facts wherein the defendant No. 1 issued a letter inviting tender on February 17, 2003 in respect of a power plant in Jharkhand. The bids were to be accompanied by earnest money deposit of Rs. 15 Lakhs, which was to be, by way of crossed Bank Draft or Pay Order or in the alternative, Bank Guarantee for the amount. The plaintiff submitted tender on March 24, 2003. The bids were opened on the same day. The tender was to remain valid for six months from March 24, 2003 to September 23, 2003. On September 9, 2003, the plaintiff sought extension of the validity of its bid till November 30, 2003. On September 9,

2003, the defendant No. 1 sent a letter to the plaintiff informing the plaintiff that the finalization of the said tender would take some more time and therefore, requested the plaintiff to extend the validity of the same unconditionally upto November 30, 2003. The plaintiff, by letter dated September 22, 2003, responded to the aforesaid request of the defendant No. 1 by indicating that in the quotation submitted by it on March 24, 2003, the plaintiff had offered a rebate of 18% but in the intervening period, the price of Steel had seen a steep rise and therefore the rates quoted in the original bid were no longer workable. However, the plaintiff extended the validity of the bid till November 30, 2003 with a condition that the rebate is reduced from 18% offered on March 24, 2003 to 5%. It is noted, that by letter dated October 28, 2003, the defendant informed the plaintiff that the offer of extension of validity has been accepted unconditionally. The defendant No. 1 also issued the letter of award accepting the plaintiffs'' bid and the defendant No. 1 informed the plaintiff that the earnest money submitted by it in the form of Bank Guarantee for Rs. 15 Lakhs, would be retained as part of the total security deposit and would be adjusted against the security deposit as per Clause 16.1 of the General Conditions of Contract. Since the plaintiff did not respond to the letter awarding the Contract, the defendant No. 1 sent another letter dated November 18, 2003 asking the plaintiff to expedite the return of two copies of the letter of award sent by it as a token of its unconditional acceptance. The defendant No. 1, by the same letter, also communicated that failure to do so, would constitute breach of the Agreement effected by the acceptance/award of the tender and that the earnest money accompanying the tender would be forfeited by the defendant No. 1 as liquidated damages for such default. The plaintiff instituted the suit. It was the case of the plaintiff that there was no enforceable Contract between the plaintiff and the defendant and therefore, the defendant No. 1 was not entitled to invoke the Bank Guarantee and thereby, forfeit the earnest money. This submission of the plaintiff was accepted by the Court on the ground, there was no underlying Contract between the plaintiff and defendant No. 1 in as much as when the plaintiffs offer lapsed on September 23, 2003, it became entitled to the return of the earnest money amount and the defendant No. 1 could not in law forfeit the same. The case relied upon by the learned Senior Counsel is clearly distinguishable on facts. In the case in hand, the parties have advanced much further and executed a Concession Agreement. The relationship has to be governed by the said Agreement. It is the petitioner''s own case, that it had terminated the Agreement. The termination pre-supposes a concluded Contract. The plea of the petitioner is contradictory. It can''t plead that there is no concluded Contract; when its case is that the Agreement stands terminated. The judgment is not applicable to the facts of this case. Insofar as the judgment in Continental Construction Ltd. and Anr (supra) is concerned, there is no dispute on the proposition advanced by learned counsel for the petitioner. As held above, there is no plea of fraud in the execution of Contract of Bank Guarantee nor there is any plea of Special Equities. Even the ground of irretrievable injustice would not be available to the petitioner in this case. In Continental Construction Ltd.

and Anr. (supra), there is a finding of fact that the Bank Guarantee has not been invoked strictly in terms thereof, which is not the case here. The judgment has no application.

23. Insofar as JG Engineers (P) Ltd. (supra) and Shri Rameshwara Rice Mills (supra) are concerned, there is no dispute on the proposition as advanced by learned counsel for the petitioner that the party cannot be Arbitrator in its own cause. Surely, the disputes, inter-se would be decided by the Arbitral Tribunal and I do not see the applicability of the judgments in the facts of this case.

24. In view of the detailed discussion above, this Court is of the view that the petitioner has not been able to establish a prima facie case in its favour. The balance of convenience is also not in favour of the petitioner for this Court to injunct the respondent from invoking the Bank Guarantee. I do not see any merit in the petition, the same is dismissed.

25. No costs.

