(2011) 05 DEL CK 0183

In the Delhi High Court

Case No : CS (OS) No. 1295 of 2011

HCL Technologies Limited APPELLANT

Vs

Unique Identification Authority of India RESPONDENT

Date of Decision : 31-05-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 3(1), 9

Citation : (2011) 183 DLT 443 : (2011) 124 DRJ 305

Hon'ble Judges : V.K. Jain, J

Bench : Single Bench

Advocate : Neeraj Kishan Kaul, Kartik Yadav, for the Appellant; S.K. Dubey, Sr. Government Counsel, Neeraj Chaudhari, CGSC, Khalid Arshad, Nitin Sharma for D-1 and 2 and Rajiv Kapur, for D-3, for the Respondent

Final Decision : Dismissed

Judgement

V.K. Jain, J.

IA No. 8635/2011 (O. 39 R. 1&2 CPC)

1. This is a suit for grant of perpetual injunction. Defendant No. 2 - Unique Identification Authority of India (UIDAI) which is stated to be an office attached to the Planning Commission, to issue, a unique identification number to all Indian residents invited ''Expression of Interest'' for appointment of ''Managed Service Provider'' (MSP) for Central ID Data Repository. Each participant in the tendering process was required to submit an ''Earnest Money Deposit'' (EMD) of Rs. 2 crores in the form of bank guarantee in favour of Defendant No. 2. The EMD of unsuccessful applicants was to be returned to them within one month of issue of ''Request For Proposal'' (RFP) to the successful applicants. The EMD furnished by the successful applicants was to remain in force till RFP evaluation process was complete. The Plaintiff, in compliance with the terms and conditions of the aforesaid tender submitted a bank guarantee of Rs. 2 crores issued by Defendant No. 3 - State Bank of India. The bank guarantee was extended from time to time

and is valid up to May 31, 2011. Vide letter dated May 9, 2011, the Plaintiff withdrew from the biding process, without submitting a bid. It is alleged that Defendant No. 2, assuming the Plaintiff to be a bidder, is seeking to encash the aforesaid bank guarantee and has informed the Plaintiff that its request for returning the bank guarantee has not been accepted. It has accordingly been prayed that Defendant No. 2 be restrained from forfeiting the earnest money and be directed to return the earnest money amount of Rs. 2 crores deposited by the Plaintiff, vide bank guarantee dated 23.08.2010.

2. This suit was listed for the first time on 23.05.2011 when an adjournment was taken by the Plaintiff. When the matter was taken up on 24.05.2011, the Plaintiff amended the plaint so as to implead Union of India as Defendant No. 1 and State Bank of India as Defendant No. 3. The matter was adjourned to 25.05.2011 on the request of the Plaintiff which was required to serve advance copy of the plaint on the nominated counsel for Union of India. The arguments on IA 8635/2011 filed by the Plaintiff seeking ad interim injunction against invocation of bank guarantee and receipt of money from the bank were heard. The Defendants did not get enough time to file written statement and has orally opposed the application.

3. A perusal of the tender document dated 18.06.2010 filed by the Plaintiff - Company would show that the tendering process was divided into two sections. Defendant No. 2 invited ''Expression of Interest'' for selection of the ''Managed Service Provider'' making it clear that the document was not to be construed as Tender/RFP. The second stage of tendering process comprised inviting techno-commercial bids by issuance of Request for Proposal to those EOI Respondents, who were short-listed on the basis of pre-qualification criteria mentioned in the document.

4. Clause 1 of Annexure 6.4 which is proforma of EMD Form reads as under:

THE CONDITIONS of this obligation are:

1. If the Respondent, having been notified of the acceptance of its EOI by the Client during the period of validity of EOI

(a) Withdraws his participation from the EOI during the period of validity of EOI document; or

(b) Fails or refuses to participate in the subsequent tender process after having been short listed in accordance of the EOI Document.

We undertake to pay to the Client up to the above amount upon receipt of its first written demand, without the Client having to substantiate its demand, provided that in its demand the Client will note that the amount claimed by it is due to it owing to the occurrence of one or both of the two conditions, specifying the occurred condition or conditions.

This guarantee will remain in force up to and including 60 days after the period of EOI Response validity, and any demand in respect thereof should reach the Bank not later than the above date.

5. Clause 6.1.6 of Annexure 6.3 reads as under:

6.1.6 We understand that the bid security furnished by us may be forfeited:

(a). If we withdraw our participation from the EOI during the period of validity of EOI document; or

(b). In the case we do not participate in the subsequent Tender process after having been short listed

6. Clause 7 & 8 of Invitation to Bid read as under:

7. The Bidder is required to pay Rs. 50,00,00,000/- (INR Fifty Crore Only) towards Bid Security in the form of a Bank Guarantee failing which the bid submitted by the bidder shall be rejected. The Bank Guarantee should be drawn in favour of ''PAO, UIDAI'' and payable at New Delhi.

8. The bidders, in line with Clause 3.2 of relevant expression of interest (EoI) for ''Managed Services Provider(MSP) for CIDR dated 18th June, 2010 shall extend the validity of the EMD of Rs. 2,00,00,000 (INR Two Crores only), submitted as part of EoI Response, so that the same is valid for 45 days beyond the validity of this RFP Bid as per Clause 5(f) above. This extension of EMD submitted at the time of EoI stage shall be submitted along with bid security of Rs. 50,00,00,000/- (INR Fifty Crore Only).

7. Clause 12.7 of the Invitation to Bid reads as under:

12.7 The bid security may be forfeited:

(a). If a Bidder withdraws its bid during the period of bid validity specified by the Bidder in the Bid; or

(b). In the case of a successful Bidder, if the Bidder fails;

(i). to sign the Contract in accordance with Clause 31; or

(ii). to furnish performance security in accordance with Clause 32.

8. Clause 21.1 of the Invitation to Bid reads as under:

21.1. The Bidder may modify or withdraw its bids after the bids'' submission, provided that written notice of the modification or withdrawal is received by the Purchaser prior to the last date prescribed for receipt of bids.

9. Clause 32.1 of the tender document reads as under:

32.1. Within 15 days of the receipt of notification of award from the Purchaser, the successful Bidder shall furnish the performance security in accordance with the Conditions of Contract, in the form of a Contract Performance Bank Guarantee as per the format prescribed at Attachment 1 of Section III.

10. Clause 32.2 of the tender document reads as under:

32.2 Failure of the successful Bidder to comply with the requirement of Clause 31 or Clause 32.1 shall constitute sufficient grounds for the annulment of the award and forfeiture of the bid security, in which event the Purchaser may award the Contract to the next best evaluated Bidder or call for new bids.

11. Clauses 1 and 2 of Annexure-I; bid security form reads as under:

THE CONDITIONS of this obligation are:

1. If the bidder, withdraws its Bid during the period of bid validity specified by the bidder on the Bid Form; or

2. If the bidder, having been notified of the acceptance of its bid by the Purchaser during the period of bid validity,

(a) Fails or refuses to execute the Contract, if required; or

(b) Fails or refuses to furnish the Performance Security, in accordance with the instructions to bidders

12. A perusal of the bank guarantee executed by Defendant No. 3 - State Bank of India, would show that it is in terms of the format provided in the tender document in this regard. To the extent it is relevant the bank guarantee reads as under:

THE CONDITIONS of this obligation are:

1. If the Respondent, having been notified of the acceptance of its EOI by the Client during the period of validity of EOI

(a). withdraws his participation from the EOI during the period of EOI document; or

(b). fails or refuses to participate in the subsequent tender process after having been short listed in accordance of the EOI Document.

13. It is an admitted position that on scrutiny of the ''Expression of Interest'' submitted by the Plaintiff Company, it was short-listed for inviting techno-commercial bids by issuance of RFP. It is also an admitted case that no techno-commercial bid was actually submitted by the Plaintiff - Company and it sought refund of the bank guarantee. Relying upon Clause 6.1.6 of Annexure-6.3, it was contended by the learned Counsel for the Plaintiff that there is no provision in the tender document for forfeiting the amount of EMD in case the short-listed Respondent withdraws from the tendering process before submitting the techno-commercial bid. It was also contended by him, that this is also a case of special equity in favour of the Plaintiff - Company since no loss has been caused to the Defendants on account of withdrawal of the Plaintiff from the tendering process without submitting the techno-commercial bid whereas irretrievable loss will be caused to the Plaintiff, if the bank guarantee is allowed to be encashed. It was

also submitted that being State, the Defendant is expected to act fairly and reasonably in all its dealings including the commercial contracts. This is also his contention, that since the bank guarantee furnished by the Plaintiff - Company expressly referred to the terms of the tender document, those terms have necessarily be read while interpreting the bank guarantee and the bank guarantee cannot be invoked unless the terms and conditions of the tender document provide for the forfeiture of the EMD. In support of his contention, the learned Counsel for the Plaintiff has relied upon Hindustan Construction Co. Ltd. and Another Vs. Satluj Jal Vidyut Nigam Ltd., , Pioneer Publicity Corporation Vs. Delhi Transport Corporation and Another, .

The learned Counsel for the Defendant, on the other hand, has contended that the bank guarantee furnished by the Plaintiff Company has become invocable as the Plaintiff Company has withdrawn from the tendering process and has failed or refused to participate in the subsequent tendering process, after having been short-listed in accordance with the EOI document. He has also contended that no fraud has been pleaded by the Plaintiff and there are no special equities in favour of the Plaintiff - Company. This is also his contention that the alleged unjust enrichment of the Defendants cannot be a ground for not invoking the bank guarantee. In support of his contention, he has relied upon the decision of the Supreme Court in Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works (P) Ltd., and another, .

14. In Hindustan Construction Co. Ltd. (supra), the applicants furnished guarantees which were to be returned to it on 7th July, 2003 i.e. after one year of the maintenance periods. The Respondent, however, sought to invoke the bank guarantee on 7th July, 2003. On account of the threats and duress alleged to have been applied by the Respondent by invoking the bank guarantees, the applicant, submitted an undertaking that the performance was not to be considered complete till such time advance ad hoc payments remained unadjusted and that the bank guarantee would be kept in force and could be invoked by the Respondent without need to prove or show grounds for invocation. In view of this undertaking, encashment of the bank guarantee was put on hold by the Respondent. This was also the case of the applicant that before the original time for completion of contract was to expire on 23rd April, 1998, the Respondent appointed a Consultant to examine the issue of extension of time, since the Respondent had conveyed its difficulty in settling the claims by the applicant on the ground that their officers were not having the requisite experience and skill. On the recommendations of the Consultant, the Petitioner was granted an interim extension of 25 months i.e. up to 30th June, 1997 and thereafter, an interim payment of Rs. 35.98 crores was also released to it by the Respondent as partial compensation of additional cost arising from the prolongation of the work. Subsequently, the Respondent unilaterally set up an Internal Claims Review Committee and sought to review the additional time and additional compensation awarded to the Petitioner. This was alleged to be a mala fide act on the part of the Respondent. The Petitioner protested against it and

sought reference of the dispute to Dispute Review Board (DRB) which was constituted in terms of the contract. The Board granted certain extensions and related cost compensation to the applicants on cost of various items. It was also held that the applicants were entitled to Rs. 41 crores over and above the amount already paid and they were not liable for any liquidated damages. However, a part of the findings recorded by the Board was not accepted by the Respondent who intended to invoke the arbitration clause. The applicants wrote to Respondent requesting that no step should be taken for encashment of the bank guarantee until the points/issues were finally decided by the arbitral forum. The Respondent intended to claim liquidated damages of Rs. 73.44 crores in addition to claim of Rs. 35.98 crores which it had already paid to the applicant as ad hoc payments. The Respondent threatened to invoke the bank guarantees amounting to Rs. 123.97 crores. The case of the applicant was that the Respondent could not be permitted to invoke the bank guarantee in an arbitrary method which was opposed to the specific terms of the contract as it would cause serious prejudice to its interest. It was also pointed out that the Respondent itself had accepted the decision of the Board in regard to part of the extended period while the other part was being questioned by it without any basis and justification. In a petition filed by the applicant u/s 9 of the Arbitration and Conciliation Act, the following four grounds were mainly taken:

(a). The invocation of bank guarantees by the Respondents is intended to overreach the adjudicative process, provided under the terms of the agreement. This is a fraudulent attempt on the part of the Respondent;

(b). The invocation of bank guarantees is contrary to the terms of the bank guarantee;

(c). The facts and circumstances of the case clearly demonstrate special equities in favor of the Petitioners so as to justify grant of an injunction order; and

(d). The Petitioners shall suffer irretrievable injustice and injury in the event the bank guarantees are permitted to be encashed.

15. After considering various decisions on this subject, this Court inter alia observed as under:

12. ... Originally, the only exception carved out to encashment of bank guarantee unconditionally was, fraud. However, subsequent judicial pronouncements have extended this scope by adding other class of cases which would fall in this exception - Cases of irretrievable injury, fraud, extraordinary special equities and invocation of bank guarantee being not in terms of the bank guarantee itself. It is very difficult to draw any straitjacket formula which would universally apply to all the cases. The Court would have to examine each case in order to find out whether the case falls in any or more of the afore-stated classes....

16. The legal propositions were formulated by the Court as under:

On the analysis of the above law laid down by the Supreme Court in its different judgments, it is clear that injunction against encashment of bank guarantee is an exception and not the rule. Cases of such exceptions would have to be evidenced by documents and pleadings on record and compulsorily should fall within any of the following limited categories:

(i). If there is a fraud in connection with the bank guarantee which would vitiate the very foundation of such guarantee and the beneficiary seeks to take advantage of such fraud.

(ii). The applicant, in the facts and circumstance of the case, clearly establishes a case of irretrievable injustice or irreparable damage.

(iii). The applicant is able to establish exceptional or special equities of the kind which would prick the judicial conscience of the court.

(iv). When the bank guarantee is not invoked strictly in its terms and by the person empowered to invoke under the terms of the guarantee. In other words, the letter of invocation is in apparent violation to the specific terms of the bank guarantee.

x x x. The concept of irretrievable injustice, or damages, or special equities would come into play where the parties to a contract having been provided with internal adjudicative mechanism, attempts to frustrate results of such an internal adjudication by recourse to encashment of bank guarantee, particularly when under the terms and conditions of the contract, including the terms of the guarantee, such determination is ''final'', of course subject to the limitations spelled out in such contracts. An attempt to over-reach the process of adjudication with intent to cause irreparable prejudice to the other side would be a circumstance which would influence the decision or tilt the special equities in favor of the applicant before the Court.

17. In Hindustan Steel Works Construction Ltd. Vs. Tarapore and Co. and another, Supreme Court held that in case of an unconditional bank guarantee, the nature of obligation of the bank is absolute and not dependent upon any dispute or proceeding between the party at whose instance the bank guarantee is given and the beneficiary, there being only two exceptions - fraud and special equities. In that case Special equities were claimed on the basis as to who had committed breach of the contract. Determination of disputes was held not to be a factor, which would be sufficient to make the case as exceptional case justifying interference by the court restraining invocation of the bank guarantee.

18. In Ansal Engineering Projects Ltd. Vs. Tehri Hydro Development Corporation Ltd. and Another, , Supreme Court inter alia held as under:

4. It is settled law that bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction and the validity of the primary contract between the person at whose instance the bank guarantee was given and the beneficiary. Unless fraud or special equity exists, is pleaded and prima facie established by strong evidence

as a triable issue, the beneficiary cannot be restrained from encashing the bank guarantee even if dispute between the beneficiary and the person at whose instance the bank guarantee was given by the Bank, had arisen in performance of the contract or execution of the works undertaken in furtherance thereof. x x x

5. ... The court exercising its power cannot interfere with enforcement of bank guarantee/letters of credit except only in cases where fraud or special equity is prima facie made out in the case as triable issue by strong evidence so as to prevent irretrievable injustice to the parties. The trading operation would not be jettisoned and faith of the people in the efficacy of banking transactions would not be eroded or brought to disbelief....

19. In AIR 1997 1644 (SC) , the Supreme Court held as under:

The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take the advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country.

20. The legal proposition with respect to irretrievable injury was summarized by this Court in the case of Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works (P) Ltd., and another, as under:

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

21. In the case of Pioneer (supra), there was a contract between the parties in respect of ''back panel right side space and inside space above window panel'' of buses. A clause in the agreement stipulated that any decrease or increase in the

number of buses will not alter the monthly rental fee. Clause 9 (C) provided that the parties were competent to terminate the contract without assigning any reasons, but giving three months notice in writing. Invoking the aforesaid clause, DTC sought to terminate the contract w.e.f 02.02.2003 vide its letter dated 02.11.2002. This Court was of the view that DTC had not been able to adequately justify its action for terminating the Contract before it was otherwise determinable and its actions were whimsical and devoid of any reason. During the course of judgment, this Court, inter alia, observed as under:

The freedom which exists under the realm of private contract in respect of the performance of contractual obligation does not apply in the same measure where the Government is a party. Every action of the Government has to pass the rigorous inquisition of fair play, lack of arbitrariness, and its being founded on good and sound reasons. Government''s freedom to contract as well as freedom to break free from the obligations of a contract is now rightly restricted in diverse manners. While the Government may enjoy the role of distribution of largesse, it may also suffer from the vulnerability of committing errors or perpetrating an inequitable or unjust implementation of its policies through its faceless and unidentifiable officers and agents. It, therefore, behoves the Court to treat Government contracts in a manner altogether different to that of the compact between private parties. XXXX.....XXXX. The Hon''ble Supreme Court has opined that even where the State is empowered by a particular clause in a contract to terminate it by a notice simplicitor, the only possible construction that can be given to such a clause is that the reasons which prevailed upon it for justifying the termination need not be conveyed to the adversary. The Apex Court has clarified that such a clause does not permit the taking of arbitrary, biased, unreasonable or an ill-informed decisions.

22. In National Highway Authority of India Vs. Ganga Enterprises and Another, the Appellant issued a tender notice calling for tenders for collection of toll on a portion of the highway running through Rajasthan. Two types of securities were to be furnished by the tenderer, one being a bid security and the other was a performance security. The tender document, inter alia, provided as under:

7.3. The Bid Security of unsuccessful bidders will be returned by National Highways Authority of India as promptly as possible, but not later than 30 days after the expiration of the period of bid validity.

7.4. The Bid Security of the successful bidders will be returned by National Highways Authority of India soon after the bidder has furnished the required Performance Security.

7.5. The Bid Security may be forfeited:

(a). if the bidder withdraws his bid during the period of bid validity; or

(b). in case this successful bidder fails within the specified period to

(i). furnish the required Performance Security; and (ii). sign the Agreement.

It was noticed by Supreme Court that the bid security was not for performance of the contract, but was in essence an earnest to be given to ensure that the bidder did not withdraw his bid during the period of bid validity and/or that after acceptance, the performance security was furnished and the agreement signed. The Respondent withdrew his bid before expiry of the period during which it was to remain valid. On the next day, the Appellants accepted the offer of the Respondent. However, as the Respondent had withdrawn his bid, the performance guarantee was not furnished and no agreement was entered into. The Appellant encashed the bank guarantee for Rs 50 lakhs. The Respondent filed a writ petition in the High Court for refund of the aforesaid amount. The writ petition was allowed by the High Court holding that the offer had been withdrawn before it was accepted and no completed contract had come into existence. The High Court also noted that in law it was always open to the parties to withdraw its offer before its acceptance. Setting aside the decision of the High Court, Supreme Court, inter alia, held as under:

In our view, the High Court fell in error in so holding. By invoking the bank guarantee and/or enforcing the bid security, there is no statutory right, exercise of which was being fettered. There is no term in the contract which is contrary to the provisions of the Indian Contract Act. The Indian Contract Act merely provides that a person can withdraw his offer before its acceptance. But withdrawal of an offer, before it is accepted, is a completely different aspect from forfeiture of earnest/security money which has been given for a particular purpose. A person may have a right to withdraw his offer but if he has made his offer on a condition that some earnest money will be forfeited for not entering into contract or if some act is not performed, then even though he may have a right to withdraw his offer, he has no right to claim that the earnest/security be returned to him. Forfeiture of such earnest/security, in no way, affects any statutory right under the Indian Contract Act. Such earnest/security is given and taken to ensure that a contract comes into existence. It would be an anomalous situation that a person who, by his own conduct, precludes, the coming into existence of the contract is then given advantage or benefit of his own wrong by not allowing forfeiture.

It must be remembered that, particularly in government contracts, such a term is always included in order to ensure that only a genuine party makes a bid. If such a term was not there even a person who does not have the capacity or a person who has no intention of entering into the contract will make a bid. The whole purpose of such a clause i.e. to see that only genuine bids are received would be lost if forfeiture was not permitted.

In para 3 of the judgment, Supreme Court, inter alia, noted as under:

As earnest/security for performance (of the first part of the offer) the Respondent along with his bid furnished a bank guarantee in a sum of Rs. 50

lakhs as bid security. The bank guarantee furnished was a ''on demand guarantee'' which specifically provided that the bank guarantee could be enforced ''on demand'' if the bidder withdraws his bid during the period of bid validity or if the bidden having been notified of the acceptance of his bids, fails to furnish the performance security or fails to sign the Agreement. The amount of the bank guarantee was to be paid by the bank without demur on a written demand merely stating that one of these conditions had been fulfilled. The moment the bank guarantee was given and accepted by the Appellants the first portion of the offer, regarding bid security, stood accepted. Of course, this did not mean that a completed contract in respect of the work of toll collection had come into existence.

23. A careful examination of the terms of the bank guarantee furnished by the Plaintiff-company to the Defendant-UIDAI would show that in the event of the Plaintiff-company, having been informed of acceptance of EOI, by the UIDAI, during the period of its validity, failing or refusing to participate in the subsequent tender process after having been short listed, the bank is required to pay to UIDAI the amount of Rs 2 crores on the very first written demand and without asking UIDAI to substantiate its demand. During the course of arguments, the learned Counsel for UIDAI, placed on record a copy of the letter dated 29th May, 2011, written by it to Defendant No. 3-State Bank of India, invoking the bank guarantee furnished by the Plaintiff-company and asking the bank to pay a sum of Rs 2 crore to it, latest by 25th May, 2011. It has been clearly stated in para 2 of this letter that by not submitting the bid after having been listed at the EOI stage, the Plaintiff had failed or refused to participate in the tender process in terms of Clause 1(b) of the bank guarantee, which also amounts to violation of the conditions of the EOI. It would be pertinent to note that there is absolutely no reference to the bid security in the bank guarantee and the obligation of the bank, to pay the amount of the bank guarantee to UIDAI, arises the moment, it receives a demand from it on the ground that, the Plaintiff had either withdrawn participation from the EOI or had failed or refused to participate in the subsequent tender process after having been short listed. Reading the bank guarantee without any aid of the tender document clearly entitles the Defendant UIDAI to invoke the bank guarantee in the event of failure or refusal of the Plaintiff-company to participate in the tendering process by declining to submit the bid or otherwise withdrawing from the subsequent tendering process.

24. The learned Counsel for the Plaintiff relying upon the decision of Supreme Court in Daewoo Motors India Ltd. Vs. Union of India (UOI) and Others, as stated below:

x x x it is true that the bank guarantees has to be read in conjunction with the terms of the contract but when the bank guarantee itself is in absolute terms, the agreement between the company and the first Respondent would be of no avail to the bank.

and reiterated by this Court in Hindustan Construction (supra) case that the terms and conditions of the tender document have necessarily to be read in the bank guarantee. The bank guarantee provided for payment of Rs 4 crore 80 lakhs to President of India by way of loss or damage caused or suffered by reason of non-fulfillment of export obligations under a notification or by reason of any breach of any of the terms and conditions of the bond submitted by Daewoo Motors India Limited. Emphasizing on the words ''by reason of the non-fulfillment of the export obligations under the above-said Notification'', it was contended on behalf of the Petitioner that since there was no default or non-fulfillment of the export obligation, the Respondent was not entitled to invoke the bank guarantee. The contention was, however, rejected by Supreme Court. Holding that the above-referred words could not be read in isolation by disassociating them from the context in which they had been used, it was held that the words ''by reason of the non-fulfillment of the export obligations under the above-said notification'' do not constitute a condition precedent to invoke the bank guarantee much less they give any cause of action to the bank to contest the encashment of the bank guarantee on the ground of there being non-fulfillment of the export obligation. This judgment, therefore, does not help the Plaintiff.

25. Assuming that the terms and conditions of the tender document have to be read in order to decide whether the bank guarantee could be invoked by UIDAI or not, I find that the terms and conditions of the tender document clearly stipulated forfeiture of the EMD in the event of the Respondent, who has been successful on evaluation of the EOI refusing to participate in the tendering process by declining to submit the bid or in some other manner.

26. As noted earlier, annexure 6.4 which is the proforma of EMD form and which has been used in the bank guarantee furnished by the Plaintiff-company expressly provided for payment of the amount of EMD (Rs 2 crore) to UIDAI in the event of the short-listed Respondent failing or refusing to participate in the subsequent tender process and it is not in dispute that the Plaintiff-company was short-listed and it has declined to participate in the subsequent process by not submitting the bid. The expression ''bid security'' used in Clause 6.1.6 of annexure 6.3, to my mind, is a mistake since it is Clause 12.7 of Invitation to bid which provides for forfeiture of the bid security in the event the bidder withdrawing the bid during its validity or failing to sign the contract or furnishing the performance security. It would be pertinent to note here that the amount of bid security fixed in the tender document was Rs 50 crores, whereas the amount of EMD was only Rs 2 crore.

27. Coming to the question as to whether the act of the Defendant- UIDAI in invoking the bank guarantee furnished by way of EMD is unfair or unreasonable, it would only be appropriate to note that deposit of earnest money and its forfeiture in the event specified in the tender document is not unknown to the Government tenders and in fact is more or less a standard condition in all the tenders invited by the Government and its agencies. The purpose of stipulating

forfeiture of the EMD in the event of the tenderer backing out of his contractual obligation to participate in the whole of the tendering process is to ensure that it is only serious and financially sound tenderers who participate in the tendering process and the fly by not operators, or those who are not serious about participating in the tendering process do not frustrate the whole process of tendering by withdrawing at the initial or an intermediate stage. If the tenderers know that the EMD furnished by them cannot be forfeited, in the event of there being a price/cost escalation, they may get to withdraw from it at a subsequent stage and in a given case, if the number of tenderers withdrawing from the tendering process happens to be substantial, the remaining tenderers left in the fray for submitting the bids may not be sufficient in number and consequently the Government may not get a competitive rate for the product it seeks to purchase or the service it seeks to avail. If the Government, on account of the number of tenderers left in the fray being inadequate has to cancel the tendering process and issue fresh tenders that may, besides causing financial loss to the Government, may also delay the important and time bound projects of the Government. It is, therefore, necessary that the parties to the tendering process strictly abide by the terms of the tender and this can be ensured only by enforcing the provision made in the tender document for forfeiture of EMD/bid security/performance security, as the case may be. In a situation of this nature, the tenderer, who participates in the tendering process, having read, understood and accepted all its terms and conditions cannot be allowed to say that the State is unfair in enforcing its contractual right under the tender document. The present case, in my view, is squarely covered by the decision of the Supreme Court in the case of National Highways Authority of India (supra), where similar invocation of bank guarantee was upheld by the Court.

28. In my view, the facts and circumstances of the case do not make out a case of special equities in favour of the Plaintiff or of an irreparable injury to it in the event of the bank guarantee being encashed. Since there is breach of the terms of the tender on the part of the Plaintiff and not on the part of the Defendant-UIDAI, it is difficult to say that there is any special equity in favour of the Plaintiff-company. In the case before this Court, since the Defendant- UIDAI is none other than the Union of India, it cannot be said that in the event of bank guarantee being allowed to be encashed, it would be impossible or even difficult for the guarantor (the Plaintiff-company) to reimburse itself in case it sues the Defendant for recovery of the amount of bank guarantee. Also, prima facie, the Defendant- UIDAI appears to be entitled to receive the amount of bank guarantee from Defendant No. 3-Bank. Hence, there are no exceptional circumstances warranting intervention of the Court against encashment of the bank guarantee. As held by Supreme Court in the case of Dwarikesh Sugar Industries Ltd. (supra), the resulting of irretrievable injury has to be such a circumstance which would make it impossible for the guarantor to reimburse himself if he ultimately succeeds and it must be proved to the satisfaction of the Court that there would be no possibility whatsoever of the recovery of the

amount from the beneficiary by way of restitution. No such circumstance exists in this case since the Defendant happens to be Government of India. In Dwarikesh Sugar Industries Ltd. (supra), Supreme Court held that unjust enrichment is not a valid ground to grant injunction against encashment of bank guarantee. The Court inter alia observed as under:

We also do not find any justification for the High Court in invoking the alleged principle of unjust enrichment to the facts of the present case and then deny the Appellant the right to encash the bank guarantee. If the High Court had taken the trouble to see the law on the point it would have been clear that in encashment of bank guarantee the applicability of the principle of undue enrichment has no application.

29. In my view, the Plaintiff-company has failed to establish even prima facie any harm or injustice of such an exceptional or irretrievable nature as would override the terms of the guarantee and the adverse effect of an injunction by the Court against invocation of the bank guarantee would have on the commercial dealings in our country. The facts of this case are altogether different from the facts of Hindustan Construction (supra) and the case does not fall under any of the categories stipulated therein as exception against encashment of bank guarantee as a rule. This is not the case of one of the parties to the contract trying to frustrate the internal adjudicating mechanism or an internal adjudication nor is there any attempt to overreach the process of any pending adjudication.

30. For the reasons given in the preceding paragraphs, I find no prima facie case for grant of injunction against encashment of the bank guarantee.

31. The application is, therefore, dismissed. The interim order passed by this Court on 25th May, 2011 directing the bank not to remit the amount of bank guarantee till further orders, is hereby vacated.

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32. Written statement be filed within the prescribed period. Replication be filed within four weeks thereafter.

33. The parties to appear before the Joint Registrar for admission/denial of documents on 11th August, 2011.

34. The matter be listed before the Court for framing of issues on 05th December, 2011.

