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In the High Court Of Himachal Pradesh

Case No : Arb. Appeal No. 8 of 2014

Himachal Pradesh State Electricity Board Ltd. — APPELLANT

Vs

Ahluwalia Contracts (India) Ltd. and Others — RESPONDENT

Date of Decision : 05-08-2015

Acts Referred:
Arbitration and Conciliation Act, 1996 — Section 37, 9
Civil Procedure Code, 1908 (CPC) — Order 2 Rule 3, Order 6 Rule 4
Contract Act, 1872 — Section 126, 17

Citation : AIR 2015 HP 108 : (2015) 6 ARBLR 279

Hon'ble Judges : Mansoor Ahmad Mir, C.J;Tarlok Singh Chauhan, J

Bench : Division Bench

Advocate : J.S. Bhogal, Senior Advocate and Satish Sharma, for the Appellant; S.K. Maniktala and Shweta Joolka, Advocates for the Respondent

Final Decision : Allowed

Judgement

Tarlok Singh Chauhan, J—This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (for short ''Act'') is directed against the judgment passed by learned Single Judge of this Court on 15.9.2014 whereby he allowed the application filed by respondent No. 1 under Section 9 of the Act and restrained the appellant from invoking the bank guarantee(s) furnished by respondent No. 1.

The facts in brief may be noticed.

2. The respondent No. 1 had entered into two contracts with the appellant for the Design Engineering, Manufacturing, Testing of Equipment, Erection, Commissioning alongwith other allied works such as Earthmat and Civil Works on turn key basis of 132/33KV, 1x25/31.5 MVA Sub-station at Maliana near Shimla and separate formal agreements were executed between the parties pursuant to two separate letters of award, both dated 18.01.2011. While one award letter related to the supply portion of the works, the other related to the erection, commissioning and civil works.

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3. At the time of start of the works, the appellant had advanced certain amounts to respondent No. 1 and for securing such amounts, respondent No. 1 had given unconditional bank guarantee(s) issued by respondent No. 2 bank in favour of the appellant. In addition, respondent No. 1 had also furnished the bank guarantee(s) as Performance Guarantee(s) for the contract. The Performance Guarantee(s) were for the amounts of Rs. 72,09,680/- and Rs. 28,08,180/- respectively for the works of supply and erection. The guarantees furnished to secure the advance given to respondent No. 1 were for the amounts of Rs. 42,24,297/- and Rs. 21,99,556/- respectively for the works of supply and erection. Thus, the total amount of the bank guarantees issued by respondent No. 2 and furnished by respondent No. 1 to the appellant came to Rs. 1,64,41,713/-.

4. The respondent No. 1 moved an application under Section 9 of the Act in which it sought the following substantive reliefs:

"(a) Pass an order staying operation of the letter dated 04.07.2014 bearing No. SE(D)ES/SSD-273/Maliana/2014-2168, of respondent No. 1, levying liquidated damages on the petitioner and further restraining respondent No. 1 and its agents, employees, servants etc. from giving any effect thereto; and/or taking any coercive action on the basis thereof;

(b) pass an order restraining respondent No. 1 by itself or through its employees, agents, servants etc. from invoking the Bank Guarantees furnished by respondent No. 2 Bank on behalf of the petitioner, and as more specifically detailed in para 6 & 7 above, and further restraining respondent No. 2 Bank from encashing the said Bank Guarantees furnished by respondent No. 2 to respondent No. 1 on behalf of the petitioner;

(c) pass ad-interim ex-parte orders in terms of prayers (a) and (b) above, and confirm the same after notice to the respondents."

5. The learned Single Judge allowed the application by granting the reliefs (b) and (c) supra and directed the respondents to keep alive the bank guarantees by way of its renewal till the completion of the arbitral proceedings or the issue of revocation thereof is decided by the Arbitrator/Court.

6. It is contended by the appellant that the learned Single Judge has not taken into consideration that there was no exceptional case for grant of injunction made out by respondent No. 1. Further, there was no legal ground for restraining the appellant from invoking the bank guarantees especially when admittedly substantial amounts were found due from the respondent No. 1 even by the learned Single Judge towards the appellant. It is also contended that a single application for interim relief in respect of two separate arbitration agreements was not maintainable and, therefore, objections ought to have been dismissed on this short score alone.

7. On the other hand, learned counsel for the respondents have supported the

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order passed by the learned Single Judge.

We have heard learned counsel for the parties and have gone through the records of the case carefully and meticulously.

8. The instant dispute relates to the release of the bank guarantees. The nature and purpose of the bank guarantees has been succinctly discussed by the Hon''ble Supreme Court in the case of Hindustan Construction Co. Ltd. Vs. State of Bihar and Others, AIR 1999 SC 3710 : (2000) 99 CompCas 297 : (1999) 3 CTC 618 : (1999) 8 JT 142 : (1999) 6 SCALE 486 : (1999) 8 SCC 436 : (1999) 3 SCR 554 Supp : (2000) 1 UJ 336 : (1999) AIRSCW 3747 : (1999) 9 Supreme 1 , the relevant observations are reproduced as under:--

"8. Now, a Bank Guarantee is the common mode, of securing payment of money in commercial dealings as the beneficiary, under the Guarantee, is entitled to realise the whole of the amount under that Guarantee in terms thereof irrespective of any pending dispute between the person on whose behalf the Guarantee was given and the beneficiary. In contracts awarded to private individuals by the Government, which involve huge expenditure, as, for example, construction contracts, Bank Guarantees are usually required to be furnished in favour of the Government to secure payments made to the contractor as "Advance" from time to time during the course of the contract as also to secure performance of the work entrusted under the contract. Such Guarantees are encashable in terms thereof on the lapse of the contractor either in the performance of the work or in paying back to the "Government Advance", the Guarantee is invoked and the amount is recovered from the Bank. It is for this reason that the Courts are reluctant in granting an injunction against the invocation of Bank Guarantee, except in the case of fraud, which should be an established fraud, or where irretrievable injury was likely to be caused to the Guarantor. This was the principle laid down by this Court in various decisions. In 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 , the law laid down in Bolivinter Oil SA v. Chase Manhattan Bank, [1984] 1 All E.R. 351 was approved and it was held that an unconditional Bank Guarantee could be invoked in terms thereof by the person in whose favour the Bank Guarantee was given and the Courts would not grant any injunction restraining the invocation except in the case of fraud or irretrievable injury. In Svenska Handelsbanken Vs. M/s. Indian Charge Chrome and others, AIR 1994 SC 626 : (1994) 1 BC 215 : (1994) 78 CLT 1 : (1994) 79 CompCas 589 : (1994) 1 CompLJ 145 : (1993) 6 JT 189 : (1993) 4 SCALE 124 : (1994) 1 SCC 502 : (1993) 3 SCR 323 Supp ; Larsen and Toubro Limited Vs. Maharashtra State Electricity Board and others, AIR 1996 SC 334 : AIR 1995 SC 334 : (1995) 2 ARBLR 482 : (1996) 2 BC 255 : (1996) 85 CompCas 214 : (1995) 7 JT 18 : (1995) 5 SCALE 342 : (1995) 6 SCC 68 : (1995) 3 SCR 615 Supp ; Hindustan Steel Workers Construction Ltd. Vs. G.S. Atwal and Co. (Engineers) Pvt. Ltd., AIR 1996 SC 131 : AIR 1995 SC 131 : (1996) 85 CompCas 270 :

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(1995) 7 JT 26 : (1995) 5 SCALE 352 : (1995) 6 SCC 76 : (1995) 2 UJ 691 ; National Thermal Power Corporation Ltd. Vs. M/s. Flowmore Private Ltd. and another, AIR 1996 SC 445 : AIR 1995 SC 445 : (1995) 2 ARBLR 184 : (1995) 2 BC 221 : (1995) 84 CompCas 97 : (1995) 5 JT 590 : (1995) 3 SCALE 545 : (1995) 4 SCC 515 : (1995) 1 SCR 29 Supp : (1995) 2 UJ 278 ; State of Maharashtra and another Vs. M/s. National Construction Company, Bombay and another, (1996) 1 AD 458 : AIR 1996 SC 2367 : (1998) 92 CompCas 21 : (1996) 1 JT 156 : (1996) 1 SCALE 176 : (1996) 1 SCC 735 : (1996) 1 SCR 293 ; Hindustan Steel Works Construction Ltd. Vs. Tarapore and Co. and another, (1996) 5 AD 369 : AIR 1996 SC 2268 : (1996) 2 BC 231 : (1996) 87 CompCas 344 : (1996) 6 JT 295 : (1996) 5 SCALE 186 : (1996) 5 SCC 34 : (1996) 3 SCR 396 Supp as also 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 , the same principle has been laid down and reiterated.

9. What is important, therefore, is that the Bank Guarantee should be in unequivocal terms, unconditional and recite that the amount would be paid without demur or objection and irrespective of any dispute that might have cropped up or might have been pending between the beneficiary under the Bank Guarantee or the person on whose behalf the Guarantee was furnished. The terms of the Bank Guarantee are, therefore, extremely material. Since the Bank Guarantee represents an independent contract between the Bank and the beneficiary, both the parties would be bound by the terms thereof. The invocation, therefore, will have to be in accordance with the terms of the Bank Guarantee; or else, the invocation itself would be bad."

9. Law relating to invocation of Bank Guarantee is by now well settled by catena of decisions of the Hon''ble Supreme Court. The Bank Guarantee which provides that they are payable by the guarantor on demand is considered to be an unconditional Bank Guarantee. So, when in the course of commercial transaction/ dealings, an unconditional Bank Guarantee is given or accepted, the beneficiary is entitled to realise such a Bank Guarantee in terms thereof irrespective of any pending disputes.

10. 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 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 of such an exceptional and irretrievable nature as would override the terms of the guarantee and the

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adverse effect of such an injunction on commercial dealings in the country. The two grounds are not necessarily connected, though both may coexist in some cases.

11. 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 , which was the case of works contract where the performance guarantee given under the contract was sought to be invoked, the Hon''ble Supreme Court, after referring extensively to English and Indian cases on the subject, said that the guarantee must be honoured in accordance with its terms. The bank which gives the guarantee is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contractual obligation or not, nor with the question whether the supplier is in default or not. The bank must pay according to the tenor of its guarantee on demand without proof or condition. There are only two exceptions to this rule. The first exception is a case when there is a clear fraud of which the bank has notice. The fraud must be of an egregious nature such as to vitiate the entire underlying transaction. Explaining the kind of fraud that may absolve a bank from honouring its guarantee, the Hon''ble Supreme Court in the above case quoted with approval the observations of Sir John Donaldson, M.R. in Bolivinter Oil SA v. Chase Manhattan Bank NA (1984) [1] AER 351 at 352) :

"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 charged".

The Hon''ble Supreme Court set aside an injunction granted by the High Court to restrain the realisation of the bank guarantee.

12. In case of 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 , the Hon''ble Supreme Court in para 12 observed as under:

"The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realise such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would

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otherwise be defeated. The Courts should, therefore, be slow in granting an injunction to restrain the realisation of such a bank guarantee. "

13. It is equally well settled in law that Bank Guarantee is an independent contract between the bank and the beneficiary thereof. The bank is always obliged to honour its guarantee as long as it is unconditional and irrevocable one. The dispute between the beneficiary and the party at whose instance, the bank has given guarantee is immaterial and of no consequence.

14. In case of BSES Ltd. (Now Reliance Energy Ltd.) Vs. Fenner India Ltd. and Another, AIR 2006 SC 1148 : (2006) 1 ARBLR 388 : (2006) 2 BC 20 : (2006) 130 CompCas 8 : (2006) 2 CompLJ 430 : (2006) 2 CTC 137 : (2006) 1 CTLJ 228 : (2006) 2 JT 192 : (2006) 143 PLR 227 : (2006) 2 SCALE 186 : (2006) 2 SCC 728 : (2006) AIRSCW 721 : (2006) 2 Supreme 106 , the Hon''ble Supreme Court in para 10 observed 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 to 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 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 (hereinafter U.P. State Sugar Corpn) this Court, correctly declare that the law was settled."

15. 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 Hon''ble Supreme Court summarized the principles for grant or refusal to grant of injunction to restrain enforcement of a bank guarantee or a letter of credit, in para 14, which reads as under:--

"(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.

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(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."

Keeping these principles in mind, we shall now proceed to apply the same to the present case.

16. It is evident from the perusal of the impugned judgment that the only reason that weighed with the learned Single Judge in granting the injunction is that after coming to the conclusion that the respondent No. 1 owes a considerable amount to the appellant, it proceeded to hold that no prejudice was likely to be caused to the appellant because the performance guarantee and bank guarantee in lieu of mobilization advance would remain in its custody and would be kept alive by the contractor. It was further observed that since the Arbitrator had already been appointed, the parties could approach the Arbitrator for settlement of the issue qua encashment of the bank guarantees during the course of arbitral proceedings.

17. Now, in case the aforesaid reasons as set out in the impugned judgments are tested in light of the principles as have been laid down by the Hon''ble Supreme Court in the aforesaid decisions, then it can conveniently be held that none of the aforesaid principles have in fact been taken into consideration while passing the impugned judgment.

18. Learned counsel for the respondents would however vehemently argue that the learned Single Judge did not commit any error in granting the injunction, as the appellant''s had played fraud.

19. Fraud is defined in Section 17 of the Indian Contract Act in the following terms:

"Fraud defined.--Fraud means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:--

(1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

(2) the active concealment of a fact by one having knowledge or belief of the fact;

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(3) a promise made without any intention of performing it;

(4) any other act fitted to deceive;

(5) any such act or omission as the law specifically declares to be fraudulent.

Explanation.--Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence, is, in itself, equivalent to speech."

20. The contract of guarantee is defined under Section 126 of the Indian Contract Act in the following terms:

"126. ''Contract of guarantee'', ''surety'', ''principal debtor'' and ''creditor''- A ''contract of guarantee'' is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the ''surety''; the person in respect of whose default the guarantee is given is called the ''principal debtor'' and the person to whom the guarantee is given is called the ''creditor''. A guarantee may be either oral or written."

21. Bank Guarantee constitutes an agreement between the Banker and the Principal, albeit, at the instance of the promisor. When a contract of guarantee is sought to be invoked, it is primarily for the bank to plead a case of fraud and not for a promisor to set up a case of breach of contract.

22. The expression ''fraud'' has been lucidly dealt with and explained in the case of Meghmala and Others Vs. G. Narasimha Reddy and Others, (2010) 8 JT 658 : (2010) 8 SCC 383 : (2010) 10 SCR 47 : (2010) 9 UJ 4376 and the Courts have been advised to take the element of fraud seriously and it has held that any act which is tainted by fraud should not be condoned and sustained and it was observed as under:

"Fraud/Misrepresentation:--

28. It is settled proposition of law that where an applicant gets an order/office by making misrepresentation or playing fraud upon the competent Authority, such order cannot be sustained in the eyes of law. "Fraud avoids all judicial acts ecclesiastical or temporal." (Vide S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others, AIR 1994 SC 853 : (1993) 2 BC 546 : (1993) 6 JT 331 : (1995) 109 PLR 293 : (1993) 4 SCALE 277 : (1994) 1 SCC 1 : (1993) 3 SCR 422 Supp : (1994) 1 UJ 1). In Lazarus Estate Ltd. v. Besalay 1956 All. E.R. 349), the Court observed without equivocation that "no judgment of a Court, no order of a Minister can be allowed to stand if it has been obtained by fraud, for fraud unravels everything."

29. In Andhra Pradesh State Financial Corporation Vs. M/s. GAR Re-Rolling Mills and another, AIR 1994 SC 2151 : (1994) 80 CompCas 140 : (1994) 1 JT 586 : (1994) 1 SCALE 565 : (1994) 2 SCC 647 : (1994) 1 SCR 857 : (1994) 1 UJ 351 :

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(1994) WritLR 497 ; and State of Maharashtra and Others Vs. Prabhu, (1995) 1 LLJ 622 : (1994) 2 SCC 481 . this Court observed that a writ Court, while exercising its equitable jurisdiction, should not act as to prevent perpetration of a legal fraud as the courts are obliged to do justice by promotion of good faith. "Equity is, also, known to prevent the law from the crafty evasions and sub-lettie''s invented to evade law."

30. In Smt. Shrisht Dhawan Vs. M/s. Shaw Brothers, AIR 1992 SC 1555 : (1991) 5 JT 378 : (1991) 2 SCALE 1386 : (1992) 1 SCC 534 : (1991) 3 SCR 446 Supp : (1992) 1 UJ 346 , it has been held as under: (SCC p. 553, para 20)

"20. Fraud and collusion vitiate even the most solemn proceedings in any civilised system of jurisprudence. It is a concept descriptive of human conduct."

31. In United India Insurance Co. Ltd. Vs. Rajendra Singh and Others, (2000) 1 ACC 484 : (2000) ACJ 1032 : AIR 2000 SC 1165 : (2000) 2 CLT 25 : (2000) 100 CompCas 705 : (2000) 3 CTC 506 : (2000) 3 JT 122 : (2000) 2 SCALE 343 : (2000) 3 SCC 581 : (2000) 2 SCR 264 : (2000) 1 UJ 655 : (2000) AIRSCW 835 : (2000) 2 Supreme 294 , this Court observed that "Fraud and justice never dwell together" (frais et jus nunquam cohabitant) and it is a pristine maxim which has never lost its temper over all these centuries.

32. The ratio laid down by this Court in various cases is that dishonesty should not be permitted to bear the fruit and benefit to the persons who played fraud or made misrepresentation and in such circumstances the Court should not perpetuate the fraud. (See District Collector and Chairman, Vizianagaram Social Welfare Residential School Society, Vizianagaram and Another Vs. M. Tripura Sundari Devi, (1990) 2 LLJ 153 : (1990) 1 SCALE 806 : (1990) 3 SCC 655 : (1990) 2 SCR 559 : (1990) 1 UJ 710 ; Union of India and others Vs. M. Bhaskaran, G. Radhakrishnan and C. Devan, AIR 1996 SC 686 : (1996) 1 LLJ 781(2) : (1995) 6 SCALE 214 : (1995) 4 SCC 100 Supp : (1995) 4 SCR 526 Supp : (1996) 1 UJ 600 ; Vice Chairman, Kendriya Vidyalaya Sangathan & Anr. v. Girdharilal Yadav (2004) 6 SCC 325 ; State of Maharashtra and Others Vs. Ravi Prakash Babulalsing Parmar and Another, AIR 2007 SC 295 : (2006) 10 JT 110 : (2006) 10 SCALE 575 : (2007) 1 SCC 80 : (2007) 1 SCC(L&S) 5 : (2006) 9 SCR 105 Supp : (2006) 2 UJ 1449 ; 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 ; and Md. Ibrahim and Others Vs. State of Bihar and Another, (2010) CriLJ 2223 : (2009) 11 JT 533 : (2009) 12 SCALE 250 : (2009) 8 SCC 751 : (2009) 9 UJ 4349).

33. Fraud is an intrinsic, collateral act, and fraud of an egregious nature would vitiate the most solemn proceedings of courts of justice. Fraud is an act of deliberate deception with a design to secure something, which is otherwise not due. The expression "fraud" involves two elements, deceit and injury to the person deceived. It is a cheating intended to get an advantage. [Vide Dr. Vimla

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Vs. Delhi Administration, AIR 1963 SC 1572 : (1963) CriLJ 434 : (1963) 2 SCR 585 Supp , Indian Bank Vs. M/s. Satyam Fibres (India) Pvt. Ltd., (1996) 6 AD 112 : AIR 1996 SC 2592 : (1998) 92 CompCas 149 : (1996) 7 JT 135 : (1996) 5 SCALE 722 : (1996) 5 SCC 550 : (1996) 4 SCR 464 Supp , The State of Andhra Pradesh and Another Vs. T. Suryachandra Rao, AIR 2005 SC 3110 : (2009) 52 CompCas 477 : (2005) 6 JT 391 : (2005) 141 PLR 551 : (2005) 6 SCC 149 : (2005) 1 SCR 809 Supp : (2005) AIRSCW 3603 : (2005) 5 Supreme 213 , K.D. Sharma Vs. Steel Authority of India Ltd. and Others, (2008) 4 BC 557 : (2008) 8 JT 57 : (2008) 10 SCALE 227 : (2008) 12 SCC 481 and Regional Manager, Central Bank of India Vs. Madhulika Guruprasad Dahir and Others, AIR 2008 SC 3266 : (2008) 118 FLR 879 : (2008) 8 JT 265 : (2009) 1 LLJ 215 : (2008) 10 SCALE 431 : (2008) 13 SCC 170 : (2009) 1 SCC(L&S) 272 : (2008) AIRSCW 5525 : (2008) 5 Supreme 400 .]

34. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res judicata. Fraud is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false. Suppression of a material document would also amount to a fraud on the court. (Vide Gowrishankar and Another Vs. Joshi Amba Shankar Family Trust and Others, (1996) 2 AD 440 : AIR 1996 SC 2202 : (1996) 2 JT 560 : (1996) 2 SCALE 454 : (1996) 3 SCC 310 : (1996) 2 SCR 949 ; Ram Chandra Singh Vs. Savitri Devi and Others, (2004) 1 BC 187 : (2005) 11 JT 439 : (2003) 8 SCALE 505 : (2003) 8 SCC 319 : (2003) 4 SCR 543 Supp ; Roshan Deen Vs. Preeti Lal, (2002) 1 ACC 17 : (2002) ACJ 17 : AIR 2002 SC 33 : (2002) 92 FLR 175 : (2001) 10 JT 309 : (2002) LabIC 106 : (2002) 1 LLJ 465 : (2001) 7 SCALE 616 : (2002) 1 SCC 100 : (2002) 2 SCT 106 : (2002) 1 UJ 334 : (2001) AIRSCW 4577 : (2001) 8 Supreme 97 ; Ram Preeti Yadav Vs. U.P. Board of High School and Intermediate Education and Others, AIR 2003 SC 4268 : (2003) 1 JT 25 Supp : (2003) 7 SCALE 316 : (2003) 8 SCC 311 : (2003) 3 SCR 352 Supp : (2003) AIRSCW 4912 : (2003) 7 Supreme 74 ; and Ashok Leyland Ltd. Vs. State of Tamil Nadu and Another, (2004) 1 SCALE 224 : (2004) 3 SCC 1 : (2004) 1 SCR 306 : (2004) 134 STC 473 : (2004) AIRSCW 5361 : (2004) 6 Supreme 407).

35. In kinch v. Walcott (1929) AC 482, it has been held that:

"....mere constructive fraud is not, at all events after long delay, sufficient but such a judgment will not be set aside upon mere proof that the judgment was obtained y perjury."

Thus, detection/discovery of constructive fraud at a much belated stage may not be sufficient to set aside the judgment procured by perjury.

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36. From the above, it is evident that even in judicial proceedings, once a fraud is proved, all advantages gained by playing fraud can be taken away. In such an eventuality the questions of non-executing of the statutory remedies or statutory bars like doctrine of res judicata are not attracted. Suppression of any material fact/document amounts to a fraud on the court. Every court has an inherent power to recall its own order obtained by fraud as the order so obtained is non est".

23. The respondent No. 1 in order to establish its plea of fraud has claimed that the exercise of powers by the appellant are of fraudulent nature and the threatening action of levying compensation is a fraud being played by the appellant. The respondent No. 1 has repeatedly averred that the threatened imposition/recovery of damages amounts to gross misrepresentation, suppression and distortion of material facts, which clearly amounts to fraud being perpetrated by the appellant, giving rise to special equities in its favour. But how and in what manner the fraud has been committed is neither forthcoming nor spelled out.

24. Rule 4 of Order 6 CPC reads thus:

"4. Particulars to be given where necessary.--In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, willful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with date and items if necessary) shall be stated in the pleading."

It is thus clear from the aforesaid provisions that the allegations in regard to fraud must be specifically and explicitly pleaded so as to enable the opposite party to reply thereto effectively.

25. That apart, the fraud in terms of the judgments of the Hon''ble Supreme Court (supra) must be of an egregious nature as to vitiate the entire underlying transaction. Having failed to raise the plea of fraud as envisaged under the law, we find no force in this plea of respondent No. 1.

26. Learned counsel for respondent No. 1 would then argue that there were special equities in favour of grant of an injunction or else irretrievable injury or irretrievable injustice would be caused to respondent No. 1.

27. Undoubtedly, there is another exception where the Court can grant injunction, which relates to cases where allowing encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases the 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 of such an exceptional and irretrievable nature as would override the terms of the guarantee and adverse effect of such an injunction on commercial dealings in the country.

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28. The respondent No. 1 has claimed that there were number of hindrances created by the appellant, which resulted in the delay of the execution of the project, such as site not being cleared and earmarked. The control room area where the existing material store was located was not vacated and therefore, the civil work for control room construction could not be done. The continuous stacking of materials/poles/transformers/isolators in the area was always a hindrance and respondent No. 1 had to demobilize on several occasions with notice to the appellant. The retaining wall design was submitted by respondent No. 1 to the appellant on 9.5.2011. However, the matter remained unresolved till as late as December, 2011. Similarly the appellant took as long as five months (19.3.2011 to 23.8.2011) to finalise the bench levels and as a result thereof the work could not be executed during the period.

29. It is further contended that though the contract specified that the time was the essence of the contract but the conduct, attitude and approach of the appellant in the matter of discharge of its reciprocal obligations left no room for any doubt that it was not ready with all that was required of it under the contract and get the work executed within the stipulated contract period. It is also contended that there were huge quantity variations and in terms of the contract stipulation, respondent No. 1 was entitled to be paid for such deviations/ variations, but the same was not paid.

30. We have considered these submissions of the learned counsel for respondent No. 1 and are of the considered opinion that all the aforesaid contentions are matters which are required to be determined by the Arbitrator in the proceedings which are already pending before it and the same do not create any special equities in favour of respondent No. 1 entitling it to the grant of injunction.

31. As cautioned by the Hon''ble Supreme Court, the dispute between the beneficiary and the party at whose instance the bank has given guarantee, is an independent contract between the bank and the beneficiary thereof and the beneficiary is entitled to realise such a bank guarantee irrespective of any pending disputes relating to the terms of the contract. The bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.

32. The respondent No. 1 has failed to show any special equities in its favour whereby it could be proved that irretrievable injury or irretrievable injustice would be caused to it in case the injunction is not granted. As already observed earlier, these are the dispute, which are yet to be established and determined and the matter is already pending adjudication before the Arbitrator.

33. That apart, it would be seen that even as per the case of respondent No. 1, there are two separate letters of awards made in its favour vide letter dated 18.1.2011, while one award relating to the supply portion of the works, the other relating to erection, commissioning and civil works. If that be so, then the appellant is right in contending that a single application for interim relief for two

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separate arbitration agreements was not maintainable.

34. The respondent No. 1 has sought to justify the maintainability of the objections by invoking the provisions of Order 2 Rule 3 CPC which reads as under:

"3. Joinder of causes of action.--(1) Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendant jointly may unite such causes of action in the same suit.

(2) Where causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject matters at the date of instituting the suit."

35. We are at a lose to understand as to how the aforesaid provisions would be applicable to the facts of the instant case, more particularly, when it is not disputed even by respondent No. 1 that two separate and distinct awards had been made in its favour. The mere fact that the parties are common to both the awards, would not entitle respondent No. 1 in uniting the claim in one application as the cause of action in both the claims is separate and distinct. Violation or breach of one award would not essentially mean the breach or violation of the other. Moreover, the right to relief does not arise out of the same act or transaction but arises out of two separate and distinct awards. Therefore, the respondent No. 1 cannot be permitted to unite in one application several causes of action by taking protection of the provisions of Rule 3 of Order 2 CPC and consequently the application preferred by respondent No. 1 under Section 9 of the Act itself was not maintainable.

36. In view of the aforesaid discussion, we find merit in this appeal and the same is accordingly allowed, consequently the judgment passed by learned Single Judge on 15.9.2014 is set-aside. Pending application(s), if any, stands disposed of. Parties are left to bear their own costs.

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