

(2011) 06 DEL CK 0004
In the Delhi High Court
Case No : CS (OS) No. 1878 of 2010

ITD Cementation India Ltd.		APPELLANT
	Vs	
National Thermal Power Corporation Ltd. and Others		RESPONDENT

Date of Decision : 03-06-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2
Constitution of India, 1950 — Article 12

Citation : (2011) 4 BC 197 : (2011) 180 DLT 688 : (2011) 124 DRJ 281 :
(2011) 5 ILR Delhi 345

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

Bench : Single Bench

Advocate : Niraj Kishan Kaul and R. Sudhinder and Shivram, for the Appellant;
Bharat Sangal, for D1 and Rakesh Sinha and Srishti Sharma for D2, for the
Respondent

Judgement

V.K. Jain, J.

IA No. 12229/2010 (Order 39 Rule 1 and 2 Code of Civil Procedure)

1. This is a suit for declaration and permanent injunction. Both the Defendants are Government of India undertakings. Defendant No. 1 awarded a contract to Defendant No. 2 for construction of main plant civil works, stage-II, phase-II for its thermal power plant at Kahalgaon, for an aggregate value of Rs. 49,21,27,837/-. As per a pre tender arrangement between the Plaintiff and Defendant No. 2, the sub-contract for piling work was to be awarded by Defendant No. 2 which did not have requisite experience/manpower for this purpose, to the Plaintiff company. Defendant No. 2 accordingly awarded the aforesaid sub-contract to the Plaintiff company for an aggregate sum of Rs. 14,05,98,920.37. The Plaintiff company, pursuant to the award of the aforesaid work furnished a performance bank guarantee of Rs. 1,23,03,196/-.

2. The case of the Plaintiff is that the sub-contracted work was completed by it by 29.6.2005 and completion of the work was also acknowledged by Defendant

No. 2. The defect liability period in respect of the work carried out by the Plaintiff company also expired in June, 2006, thereby entitling the Plaintiff company to return of the performance bank guarantee submitted by it. Since, the cost of the Plaintiff company increased on account of reduction of work during the course of construction activities and the Plaintiff company had to deploy additional staff and equipment, it called upon Defendant No. 2 to reimburse it to the extent of Rs. 1,53,23,456/-. Defendant No. 2, however, did not pay the aforesaid amount to the Plaintiff company. It is alleged that in order to prevent further erosion in its balance sheet, the Plaintiff company at the instance of the Defendants submitted a bank guarantee of Rs. 70,30,000/- on the specific understanding that the Defendants would release the aforesaid sum which represented the retention amount. However, the aforesaid amount was not released despite bank guarantee having been accepted. The performance bank guarantee which the Plaintiff company had furnished was extended by it till 31.5.2011, at the instance of Defendant No. 1. Defendant No. 1 sought to invoke the performance guarantee which the Plaintiff company had submitted and sent a letter to Defendant No. 3 bank which had issued the aforesaid bank guarantee, in this regard on 6.9.2010, though Defendant No. 2 had requested it to keep the encashment of bank guarantee in abeyance.

3. Thus, in nutshell, the case of the Plaintiff company is that it was awarded only sub-contract for 14,05,98,920.37; it has already completed its work within the stipulated time to the satisfaction of the Defendants and even the defect liability period is over and it is entitled to recover more than Rs. 2 crores from Defendant No. 2. The Plaintiff company has sought a declaration that invocation of performance bank guarantee by Defendant No. 1 is void and illegal. It has also sought an injunction against invocation/encashment of performance bank guarantee which it had submitted in favour of Defendant No. 1.

4. In its Written Statement, Defendant No. 1 NTPC Limited has stated that in terms of Clause 9.5.0 of Letter of Award (in short Lo A) dated 3.2.2004 , Clause 3.3.0 of the Special Conditions of Contract and Clause 5 of the Joint Deed of Undertaking submitted jointly by the Plaintiff company and Defendant No. 2; the Plaintiff company, being an associate of Defendant No. 2 was required to furnish an on-demand bank guarantee for 2.5% of the total contract price and this was to be over and above the security deposited by Defendant No. 2. The bank guarantee of Rs. 1,23,03,196/- according to Defendant No. 1, was a performance guarantee in relation to the whole of the work awarded to Defendant No. 1 and was not confined to the sub-contract awarded by Defendant No. 2 to the Plaintiff company. It is also stated that the Plaintiff company as well as Defendant No. 2 had jointly undertaken and declared that they shall be fully responsible for the successful performance of the contract. It was also agreed that it would not be necessary for Defendant No. 1 to proceed against Defendant No. 2 before it proceeds against the Plaintiff company. It is claimed that the Plaintiff company failed to fulfill its joint and several obligations under the LoA dated 3.2.2004 read with Joint Deed of Undertaking dated 5.9.2003. It is also alleged that since

Defendant No. 1 is not a party to the alleged pre tender understanding between Plaintiff company and Defendant No. 2, it is not bound by the terms and conditions of the aforesaid understanding. Defendant No. 1 has denied that the work was completed within the stipulated time or to its satisfaction. It has been stated that Defendant No. 1 had protested in writing against delay in the work of piling and the Plaintiff company had failed to conduct Piling Integrity Test which was the most crucial test to be carried out by it. It is further stated that since Defendant No. 2 failed to complete the work awarded to it, in terms of the LoA dated 3.2.2004, Defendant No. 1 was constrained to issue notice to cancel the LoA and encase the performance bank guarantee. It is also alleged that as far as Defendant No. 1 is concerned, it has not kept any retention amount of the Plaintiff company with it. The case of Defendant No. 1 is that since Defendant No. 2 failed to complete the work, it had to offload the work and get it completed by the other contractors at the sole risk and cost of Defendant No. 2 and it had rejected the request for return of the security deposit.

5. Defendant No. 2 in its Written Statement has alleged that the bank guarantee has been wrongly invoked by Defendant No. 1 and though the Plaintiff company had completed the piling work, Defendant No. 1 had failed to release payment to it in terms of the contract.

6. Clauses 3.1.0, 3.2.0 & 3.3.0 of the Special Conditions of the Contract read as under:

3.1.0 The bidder should have achieved in the preceding seven (7) years reckoned as on date of bid opening, in the construction of industrial/infrastructure projects, at least the following progress:

(i) Concreting of 25,000 cu. m. in any one (1) year in one (1) or cumulative of two (2) concurrently running contracts and

(ii) Fabrication of 6,000 MT of Structural Steel in any one (1) year in one (1) or cumulative of two (2) concurrently running contracts and

(iii) Erection of 6,000 MT of Structural Steel in any one (1) year in one (1) or cumulative of two (2) concurrently running contracts and,

(iv) Installation of 25,000 running meters of cast-in-situ bored piles of minimum 600mm dia in any one (1) year in one or more contracts, using rotary hydraulic rigs. Alternatively, installation of 3,500 running meters of cast-in-situ bored piles of minimum 1000 mm dia in any one (1) year in one or more contracts, using rotary hydraulic rigs.

3.2.0 The average annual turnover of the bidder, in the preceding three (3) financial years as on the date of bid opening shall not be less than Rs. 30 crores.

3.3.0 Bidder, who meets the requirements at Clause 3.2.0 above and at least any two requirements of Clause 3.1.0 above, can also participate, provided he associate with not more than two agencies of repute, who should individually

fully meet requirements of the relevant part under Clause 3.1.0 above for which he is being associated and which the bidder himself is not able to meet. In such a case, bidder shall along with the bid furnish an undertaking jointly executed by him and his associate(s), for successful performance of the contract, as per format enclosed in the bid documents. In case, of award, each associate shall be required to furnish an On Demand Bank Guarantee for 2.5% of total Contract Price over and above the Security Deposit to be furnished by the Contractor.

7. Clause 9.5.0 of LoA reads as under:

In terms of Clause No. 3.3.0 of Special Conditions of Contract, in case of association, the Associate shall be required to furnish an "On Demand Bank Guarantee" for 2.5% of Total Contract Price over and above the Security Deposit to be furnished by the Contractor. You have associated with M/s Skanska Cementation India Ltd., Mumbai for Piling Works included in this Contract. Accordingly, you have confirmed that in addition to the security deposit to be provided by you, your Associate M/s Skanska Cementation India Ltd., Mumbai shall submit a Performance Bank Guarantee to NTPC for 2.5% of the total Contract Price i.e. for Rs. 1,23,03,196/-, within two weeks of issue of LoA in line with the provisions of bidding documents.

8. Some of the Clauses of the Joint Deed of Undertaking submitted by Plaintiff company and Defendant No. 2 to Defendant No. 1 read as under:

1. That in consideration of the Signing of Contract Agreement between the Owner and the Contractor, we the Associate and the Contractor, do hereby declare and undertake that we shall be jointly and severally responsible to the Owner for the execution and successful performance of the Contract to the satisfaction of the Owner.

2. In case of any breach of the Contract committed by the Contractor, we the Associate do hereby undertake, declare and confirm that we shall be fully responsible for the successful performance of the contract and undertake to carry out all the obligations and responsibilities under this Deed of Joint Undertaking in order to discharge the Contractor's obligations and responsibilities stipulated in the contract. Further, if the Owner sustains any loss or damage on account of any breach of the Contract, we the Associate/Contractor jointly and severally undertake to promptly indemnify, and pay such loss/damages caused to the Owner on its written demand without any demur, reservation, contest or protest in any manner whatsoever. This is without prejudice to any rights of the owner against the contractor under the contract and all guarantees. It shall not be necessary or obligatory for the owner to first proceed against the contractor before proceeding against the associate, nor any extension of time or any relaxation given by the owner to the contractor shall prejudice any rights of the owner under this deed of Joint Undertaking to proceed against the Associate and Contractor.

3. x x x

4. The Contractor and the Associate will be fully responsible for the quality of all the Works and their repair or replacement if necessary and timely execution thereof to meet the completion schedule under the contract.

5. Apart from the Contractor's Performance Bank Guarantee/Security Deposits, the Associate shall, furnish "as Security" the Performance Bank Guarantee, from any reputed Bank as per list enclosed at Annexure-XIII to SCC in favour of the Owner in a form acceptable to Owner. The value of such Bank Guarantee (BG) shall be equal to two and a half percent (2 ½ %) of total Contract Price and it shall be towards guaranteeing the faithful performance/compliance of this Deed of Undertaking in accordance with the terms and conditions specified herein. The Bank Guarantees shall be unconditional, irrevocable and valid for the entire period of the contract, i.e. till ninety (90) days beyond the end of the Defect Liability Period of the Works under the contract. The guarantee amount shall be promptly paid to the Owner on demand without any demur, reservation, protest or contest.

6. x x x

7. We, the Associate, and the Contractor agree that this Undertaking shall be irrevocable and shall form an integral part of the Contract. We further agree that this Undertaking shall continue to be enforceable till the successful completion of Contract and till the Owner discharges it.

9. The relevant Clause of the bank guarantee furnished to Defendant No. 1 reads as under:

We, Union Bank of India having our Registered Office at Union Bank Bhavan, 239, Widhan Bhavan Marg, Nariman Point, Mumbai 400 021 and one of its branch offices at Veer Nariman Road Branch, 84, Raj Mahal, Churchgate, Mumbai-400 020 (hereinafter referred to as the "Bank" which expression shall, unless repugnant to the context or meaning thereof, include its successors, administrators, executors and assigns) do hereby guarantee and undertake to pay to NTPC on demand any and all monies to the extent of Rs. 1,23,03,196/- (Rupees One Crore Twenty Three Lakh Three Thousand One Hundred Ninety Six Only) as aforesaid at any time up to 31/05/2010 @ 5 PM without any demur, reservation, contest, recourse or protest and/or without any reference to "Associate" or "Contractor". Any such demand made by NTPC on the Bank shall be conclusive and binding, notwithstanding any difference between NTPC and Contractor and/or between NTPC and Associate pending before any Court, Tribunal, Arbitrator or any Authority.

x x x

The Bank also agrees that NTPC at its options shall be entitled to enforce this Guarantee against the Bank as a principal debtor, in the first instance, without proceeding against Contractor or Associate and notwithstanding any security or other guarantee that NTPC may have in relation to Contractor's or Associates?

liabilities.

10. It would thus, be seen that Defendant No. 2 which did not meet the requirements of Clause 3.2.0 and at least one of the two requirements laid down in Clause 3.1.0 of the Special Conditions of the Contract, could not have participated in the bidding process without associating the Plaintiff company, since it was the Plaintiff company which met that requirement of Clause 3.1.0 which Defendant No. 2 did not meet. In view of the requirement laid down in Clause 3.3.0 above, it was also necessary for Defendant No. 2 as well as Plaintiff company, which Defendant No. 2 had associated with it, to furnish joint undertaking for successful performance of the contract and the Plaintiff company being an associate of Defendant No. 2 was also required to furnish an on-demand bank guarantee of 2.5% of the total contract price. This bank guarantee was to be over and above the security deposit required to be furnished by Defendant No. 2. Had the Plaintiff company and Defendant No. 2 not furnished the joint undertaking in terms of Clause 3.3.0 and/or had the Plaintiff company not furnished on-demand bank guarantee for 2.5% of the total contract price, the bid given by Defendant No. 2 would not have even been considered eligible by Defendant No. 1. There is no dispute that the predecessor of the Plaintiff company, ITD Cementation India Ltd. had furnished the bank guarantee in terms of Clause 3.3.0 of the Special Conditions of Contract and this bank guarantee was in addition to the performance guarantee which Defendant No. 2 had furnished to Defendant No. 1.

11. In view of Clause 3.3.0 of the Special Conditions of the Contract, Clause 9.5.0 of the LoA dated 3.2.2004 and the above referred terms of the Joint Deed of Undertaking submitted by Plaintiff company and Defendant No. 2, to Defendant No. 1; both, Defendant No. 2 as well as the Plaintiff company became jointly and severally responsible to Defendant No. 1 for successful execution of the whole of the contracted work, to the satisfaction of Defendant No. 1 NTPC. The liability of the Plaintiff company therefore was not restricted only to sub-contract or to that part of the work which was sub-contracted to it by Defendant No. 2. Both of them were liable to Defendant No. 1 in case of any loss or damage being suffered by it on account of breach of the contract by Defendant No. 2. It was not necessary for Defendant No. 1 to first proceed against Defendant No. 2 before it proceeds against the Plaintiff company. The performance bank guarantee submitted by Plaintiff company therefore covered the whole of the contract awarded to Defendant No. 2.

12. It is by now settled proposition of law with respect to invocation of bank guarantees that its invocation is not in any manner dependent on any dispute between the person at whose instance the bank guarantee is given and the person, who is its beneficiary. The only grounds on which invocation of bank guarantee can be disputed are a) fraud and b) special equities in favour of the person at whose instance the bank guarantee has been given. As observed by Supreme Court in Vinitec Electronics Private Limited Vs. HCL Infosystems

Limited, the bank guarantee which provides that it is payable by the guarantors is considered to be unconditional bank guarantee and the bank guarantee is an independent contract between the bank and the beneficiary. It is a contractual obligation of the bank to honour the unconditional and irrevocable bank guarantee irrespective of any dispute between the beneficiary and the person at whose instance the bank guarantee is given.

13. Recently, I had an occasion to examine this issue while deciding IA No. 8635/2011 in CS(OS) No 1295/2011 on 31.5.2011. During the course of the judgment the following decisions were noted by this Court:

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. 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 tribal issue, the beneficiary cannot be restrained from encasing 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 tribal 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.

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.

14. If the bank guarantee furnished by the Plaintiff company is read without reference to other documents, the obligation of the bank to pay to Defendant No. 2 is absolute and unqualified and the bank must necessarily remit the amount of the bank guarantee to Defendant No. 2 without demur or protest merely on demand from it. It is not open to the bank to go into the question as to whether there was breach of the contract on the part of Plaintiff company/Defendant No. 2 or not. The bank is duty bound to honour the bank guarantee unless a case of fraud or special equity is made out.

15. In the present case, no fraud has been pleaded or made out. The contentions of the learned Sr. Counsel for the Plaintiff company is that since the Plaintiff company performed that part of the work which was sub-contracted to it by Defendant No. 2, there can be no justification for invoking the bank guarantee submitted by it. It was also contended by him, that NTPC being State within the meaning of Article 12 of the Constitution of India, it needs to act fairly and reasonably and therefore invocation of bank guarantee furnished by the Plaintiff company without there being any breach of the contract on the part of the Plaintiff company can neither be just nor reasonable. I, however, find no merit in these contentions. As noted earlier, it was one of the conditions of the bid document that if the bidder was not fully eligible in terms of Clause 3.1.0 and Clause 3.2.0 of the Special Conditions of Contract, it could have associated another person with it provided, the other person was able to meet the requirement which the bidder itself did not meet. Not only a joint performance undertaking making the bidder as well as the associate jointly as well as severally liable in case of breach of the contract on the part of the bidder but also furnish the on-demand bank guarantee for 2.5% of the total contract price was furnished by the Plaintiff. Had the Plaintiff company not submitted the joint undertaking and bank guarantee in terms of the tender document, the work would not have been awarded to Defendant No. 2 and consequently, there would have been no sub contract awarded to the Plaintiff company by Defendant No. 2.

Having furnished the joint undertaking coupled with the unconditional and payable on demand bank guarantee extending to the whole of the contract, the Plaintiff company cannot say that the bank guarantee furnished by it should not be encashed unless there is default in performance of that part of the contract which was sub contracted to it. The Plaintiff company has become liable in law not only in respect of that part of the contract which it had to execute in terms of the work between it and Defendant No. 2 but also to the parts which were not to be executed by it.

16. 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.

17. In Hindustan Construction Co. Ltd. and Another Vs. Satluj Jal Vidyut Nigam Ltd., this Court held that the exceptional case pleaded against encashment of bank guarantee needs to 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.

18. In ITEK Corporation v. The First National Bank of Boston 566 Supp 1210, which is a judgment referred by Supreme Court quite often in the matters relating to bank guarantee, an exporter in USA entered into an agreement with the Imperial Government of Iran and sought an order terminating its liability on standby letters 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 company.

19. In the case before this Court, no such circumstance is shown as existing and therefore, it is difficult to say that an exceptional circumstance justifying grant of injunction against encashment of the bank guarantee is made out.

20. As held by Supreme Court in the case of Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works (P) Ltd., and another, 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 No. 1 happens to be an Undertaking of Government of India.

21. In my view the Plaintiff company has not been able to make out a case of special equity in its favour nor it can be said that there will be irreparable injury to it if the encashment of bank guarantee is not injected. The case of Defendant No. 1 is that there has been breach of contract on the part of Defendant No. 2. In fact the breach is alleged even on the part of the Plaintiff company. It has been pointed out that the Plaintiff company did not carry out breaking and integrity test in respect of the piling work done by it. Vide letter dated 24.3.2006 the Plaintiff company informed Defendant No. 2 that it had not been able to finish Pile Breaking and Integrity Test due to non-exposure of piles and other reasons beyond its control and not attributable to it. Vide its letter dated 9.8.2006 written to Defendant No. 2, Defendant No. 1 brought to its notice that nothing had been done towards the Pile Integrity Test of piling of various foundations in Unit 7. Defendant No. 1 again requested to take immediate action for remaining PIT of piling as per specifications. There is no material on record to indicate that even thereafter the Plaintiff company had carried out Pile Integrity Test in respect of piling of various foundations in Unit 7. However, even if it is assumed that the Plaintiff company had successfully completed the work sub contracted to it by Defendant No. 2, it would still be liable even if there was breach of any part of the contract on the part of Defendant No. 2 and Defendant No. 1 is entitled in law to invoke the bank guarantee furnished by the Plaintiff company. I fail to appreciate, how the Plaintiff company can claim any special equity in its favour when it is a contractual obligation to compensate Defendant No. 1 in case of breach of contract on the part of Defendant No. 2 and it has chosen to become jointly as well as severally liable to Defendant No. 1 in this regard.

22. Defendant No. 1 NTPC is a large Public Sector Undertaking. It cannot be said that in the event of bank guarantee being encashed , it would be impossible or even difficult for the Plaintiff company to reimburse itself in case it sues the

Defendant No. 1 for recovery of amount of the bank guarantee. Considering the contractual obligation undertaken by the Plaintiff company, I find no exceptional circumstances warranting issue of an injunction against encashment of the bank guarantee.

23. It was pointed out by the learned Counsel for the Plaintiff that Plaintiff company submitted a bank guarantee of Rs. 70,30,000/- in order to get that much amount released from Defendant No. 2 but since NTPC did not agree for release of retention money/security deposit, neither the aforesaid amount has been released nor the bank guarantee of Rs. 70,30,000/- has been returned to it. Admittedly, the aforesaid bank guarantee of Rs. 70,30,000/- was submitted by the Plaintiff company to Defendant No. 2 and not to Defendant No. 1. Therefore, Defendant No. 1 does not come into the picture as far as the aforesaid bank guarantee is concerned and the matter rests solely between the Plaintiff company and Defendant No. 2. If the Plaintiff company is aggrieved on account of failure of Defendant No. 2 to release the amount of Rs. 70,30,000/- despite receiving the bank guarantee for the aforesaid amount, it can initiate such proceedings against Defendant No. 2 as are open to it in law but, the Plaintiff company is not entitled to injunction against encashment of the bank guarantee submitted by it to Defendant No. 1 merely because Defendant No. 2 has neither paid the amount of Rs. 70,30,000/- to it nor returned the bank guarantee of the aforesaid amount.

24. For the reasons given in the preceding paragraphs, I am of the view that the Plaintiff has no prima facie case for grant of injunction against encashment of bank guarantee. The application therefore is dismissed. The interim order passed by this Court on 17.9.2010 is hereby vacated.

The IA stands disposed of.

CS(OS) No. 1878/2010

The matter be listed before Joint Registrar on 24th August, 2011 for admission/denial of the documents and before this Court on 16th December, 2010.