

(2004) 03 BOM CK 0030
In the Bombay High Court
Case No : Arbitration Petition No. 133 of 2004

Kamal Virdichandji Garg

APPELLANT

Vs

Fiat India Pvt. Ltd. and Another

RESPONDENT

Date of Decision : 22-03-2004

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9
Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1
Evidence Act, 1872 — Section 114
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 23

Citation : AIR 2004 Bom 462 : (2004) 3 ARBLR 589 : (2004) 4 BomCR 744 :
(2005) 126 CompCas 241 : (2005) 1 CTLJ 225 : (2004) 4 MhLj 233

Hon'ble Judges : S.U. Kamdar, J

Bench : Single Bench

Advocate : F. D'vitre, instructed by T.N. Tripathi, for the Appellant; V. Tulzapurkar and P. Kabadia, instructed by Doijode Phatarphekar and Associates for respondent No. 1 and V.R. Shetty, for the Respondent

Final Decision : Dismissed

Judgement

S.U. Kamdar, J.—The present petition u/s 9 of the Arbitration and Conciliation Act, 1996, inter alia, seeks relief that pending the hearing and final disposal of the arbitration proceedings and until enforcement of the award the respondent No. 1 should be restrained from in any manner invoking and/or realising and/or encashing the Bank Guarantee bearing No. 36/P/23 dated 4-10-2002 as extended by letter dated 29-9-2003.

2. The aforesaid relief is sought on the facts which are briefly set out as under:--

3. The firm of the petitioner M/s Ganesh Automobiles was appointed as a dealer of the 1st respondent company. The 2nd respondent is a Bank who has given bank guarantee which is the subject matter of the present petition. Petitioner No. 1 was appointed as a dealer for promotion, sale and service of the Fiat branded car in the notified territory under an agreement dated 20-5-1999. The said

agreement was initially for a period of three years with an option of renewal as per the mutual agreement by and between the parties. On 26-12-2001, the said dealership agreement was renewed for a further period of three years. This renewed agreement of dealership contains an arbitration clause which reads as under:--

"17. ARBITRATION

Any dispute, controversy or claim arising out of or relating to this Agreement or any related agreement or other document, that is or may be executed in pursuance hereof or the validity, interpretation, breach or termination thereof (A "Dispute"), including claims seeking redress or asserting rights under applicable law, shall, subject to the provisions of Section 17 of the Indian Arbitration and Conciliation Act, 1996 be resolved and finally settled in accordance with the provisions of the Indian Arbitration and Conciliation Act, 1996 as may be amended from time to time or its re-enactment (the "Arbitration Act)". The parties consent to a single, consolidated arbitration for all disputes that may at the time exist. In connection with, any dispute, the parties expressly waive and forego any right, to the extent otherwise applicable, to punitive, exemplary, statutorily enhanced or similar damages. The arbitral tribunal shall be composed of one arbitrator selected by mutual agreement of the parties, or in the absence of such an agreement within 30 days after a party first proposes an arbitrator, the arbitral tribunal shall be composed of three arbitrators, one of whom shall be appointed by each party within 30 days after expiry of the first 30 day period. The third arbitrator shall be selected by the mutual agreement of the first two arbitrators within 30 days after the last of the first two arbitrators has been appointed. In the event that the initial two arbitrators fail to agree on a third arbitrator, the third arbitrator shall be chosen by the President/Chairman of the any Chamber of Commerce located in Mumbai, India.

The arbitration proceedings shall be concluded in the English language and any document not in English submitted by any party shall be accompanied by an English translation. The arbitration shall be conducted in Mumbai. The provisions of the Indian Evidence Act, 1872 shall apply to the said proceedings. A written transcript of the proceedings shall be made and furnished to the parties. The arbitral tribunal shall not appoint any experts u/s 26 of the Arbitration Act.

The parties agree to be bound by any award or order resulting from any arbitration conducted hereunder and further agree that:

- i) in the context of an attempt by either party to enforce an arbitral award or order, any defenses relating to the parties capacity or the validity of this Agreement are hereby waived; and
- ii) judgment on any award or order resulting from an arbitration conducted hereunder may be entered and enforced in any court, in any country, having jurisdiction thereof or having jurisdiction over any of the parties or any of their assets.

The prevailing party in any arbitration conducted hereunder shall be entitled to recover from the other party (as part of the arbitral award or order) its attorneys' fees and other costs of arbitration."

3. The said agreement also contains an addendum to Clause 4 of the terms and conditions of the said agreement. This addendum under Clause 9, inter alia, provides for furnishing of bank guarantee which shall be irrevocable and equivalent to 100% of the assigned plafond as a security. The said Clause 9 reads as under :--

"9. As condition of validity of the provisions set forth in this form of payment, the Dealer shall furnish to the Company an irrevocable bank guarantee or any other security that the Company may specify, equivalent to 100% of the assigned plafond, as a security against the correct and punctual fulfilling of the obligations of payment of the amounts due by the Dealer to the Company.

The bank guarantee should be issued in favour of the Company by a reputable bank accepted by the Company, or a value equivalent to the amount of the assigned plafond and with the condition that the Company could invoke the guarantee at any time with a simple written request, presenting to the bank the documentation relating to the invoices that are due and not paid by the Dealer and without any exceptions."

Under the terms and conditions of the said agreement, a bank guarantee was issued by Bank of Baroda, the 2nd respondent herein, for a sum of Rs. 50 lacs. The said bank guarantee is unconditional and irrevocable and obliges the 2nd respondent to make payment without demur. The relevant portion of the said Bank Guarantee reads as under --

"We BANK OF BARODA (Main), Udaipur hereby irrevocably and unconditionally guarantee to pay to the Company an amount not exceeding in the aggregate unconditionally guarantee to pay to the Company an amount not exceeding in the aggregate Rs. 50 lakhs (Rupees fifty lakhs only)."

"The Bank hereby guarantees and undertakes to pay the said amount due and payable under this guarantee without any protest or demur and merely on a demand from the Company stating that the amount claimed has become due. Any such demand made on the bank by the Company shall be conclusive as regards the amount due and payable under this guarantee for an amount not exceeding Rupees fifty lacs only." "This Guarantee shall not be determined or affected by the liquidation or winding up, dissolution or change of constitution or insolvency of the Dealer or change in the constitution of either the Dealer or the Bank but shall in all respects and for all purpose be binding and operative until satisfactory performance of all its obligations by the Dealer towards the Company in terms of the Dealership Agreement." "The Bank hereby waives all rights at any time that may be inconsistent with the terms of this Guarantee and the obligations of the Bank in terms hereof shall not in any way be affected or suspend for any reason of any dispute having been raised by the Dealer relating

thereto or any denial of liability by the Dealer purporting to stop or prevent any payment by the Bank to the Company in terms hereof."

"The beneficiary shall as far as possible assess and quantify the actual loss/damage suffered before invocation and invoke the guarantee accordingly. If it is/was not possible for the beneficiary to furnish the actual loss/damage suffered at the time of invocation, then the Bank shall pay the amount in terms of invocation by the beneficiary. The beneficiary shall, nevertheless, at least after receipt of the Guarantee money from the Bank, assess and finally quantify the actual loss/damage and while settling the accounts of the contractor/supplier viz., Fiat India Private Limited, shall pay the residual dues payable to the contractor/supplier (all relating to the contract in respect of which the guarantee has been issued and at least to the extent of payment/s made by the Bank) to/through the bank and shall not pay the dues, in any event, directly to the contractor/supplier."

"We, BANK OF BARODA (Main), Udaipur undertake not to revoke this guarantee during its tenure except with the previous consent of the Company in writing."

4. There have been disputes and differences by and between the parties. It has been the case of the petitioner that the accounts between the petitioners and the respondent No. 1 have in fact been settled and such settlement has been accepted unconditionally by the respondent No. 1. The petitioner relies upon a letter dated 4-1-2003 (Exhibit "D" to the petition) in support of his contention. He also contends that the acknowledgement of the respondent No. 1 on the 2nd page of letter is indicative of such a settlement. It is further case of the petitioner as pleaded in paragraph 10 of the petition that in view of the differences and disputes between the parties, a meeting was held on 14-10-2003 when two of the officers of respondent No. 1 visited Udaipur for settlement of the accounts by and between the parties. It is also the case of the petitioner that at the meeting held on 14-10-2003 the matter was settled, figures were worked out and towards the balance liability, the petitioner handed over four post dated cheques to respondent No. 1 for an aggregate amount of Rs. 9,48,029.00. The details of the cheques and the working of the figures are set out in paragraphs 10 to 12 of the petition. Thus, it is the case of the petitioner that on 14-10-2003 the accounts having been settled, the cheques having been handed over, the respondent No. 1 handed over the original bank guarantee to the petitioner in discharge of their liabilities under the said guarantee. This case put forward by the petitioner has been strongly denied by respondent No. 1. Though the respondent No. 1 admits that there was a meeting on 14-10-2003 but according to respondent No. 1, no settlement was arrived at in the said meeting. The respondent No. 1 have also denied any handing over of the said four cheques as mentioned in paragraph 10 of the petition. It has been denied by the respondent No. 1 that they handed over the original bank guarantee to the petitioner. It is the case of the respondent No. 1 that on 14-10-2003 when two of the officers of the respondent No. 1 visited the office of the petitioner at Udaipur in the morning at around 8.30, the petitioner took the respondent No. 1's officers from Airport

to the office of the petitioner in his car. It is further case of respondent No. 1 that a bag containing the file of the original bank guarantee which was in the car was not brought to the meeting place in the office of the petitioner and when inquired, they were informed that the car had gone at some other place and car will be returning soon. It is the further case of the respondent No. 1 that the car did arrive back after about an hour but the file containing the bank guarantee was missing from the briefcase. It is the further case of the respondent No. 1 that in the aforesaid circumstances, neither any discussion took place pertaining to the settlement of accounts nor the accounts were settled by and between the parties. It is also denied that the petitioner handed over the four cheques as mentioned in paragraph 12 of the petition. It is the case of the respondent No. 1 that as soon as they found that the brief case is missing, on the very same day on 14-10-2003 the respondent No. 1 lodged a complaint with the police in respect of the loss of the file. The respondent No. 1 is relying upon copy of the complaint which is annexed to the affidavit in reply which inter alia indicates that the complaint was filed on 14-10-2003 at around 10.15 a.m. regarding loss of file containing bank documents. It is the further case of the respondent that in the aforesaid circumstances on 14-10-2003 itself the respondent No. 1 invoked the bank guarantee by tendering the letter dated 14-10-2003 which was tendered at about 3.00 p.m. to the Bank of Baroda. The said letter dated 14-10-2003 being Exhibit-1 to the affidavit in reply is relied upon in that behalf.

5. On the other hand, it is the case of the petitioner that on 14-10-2003 after the accounts were settled the petitioner had addressed a letter to the Bank inter alia informing the bank of the settlement and requesting the Bank to discharge the bank guarantee. The said letter dated 14-10-2003 which forms part of Exhibit F to the petition was delivered to the Bank at around 4.45 p.m. on 15-10-2003 as is indicated from the endorsement on the said letter. It was further case of the petitioner that in view of the 1st respondent insistence to invoke the bank guarantee and terminate the said agreement, the petitioner filed a suit on 18-10-2003 before the Civil Judge, Junior Division, Udaipur for a permanent order and injunction restraining the respondent No. 1 from invoking and encashing the said bank guarantee.

6. On 22-10-2003 the respondent No. 1 moved an application in the Court of Civil Judge, Junior Division, Udaipur for referring the subject matter of the suit to arbitration u/s 8 of the Arbitration and Conciliation Act, 1996, inter alia, on the ground that there is an arbitration agreement by and between the parties and therefore, the Hon"ble Court has no jurisdiction to try the said suit. By order dated 3-12-2003, the application u/s 8 of the Arbitration and Conciliation Act, 1996 was allowed holding that the Hon"ble Civil Judge, Junior Division, Udaipur has no jurisdiction to entertain the said suit.

7. On 29-10-2003, respondent No. 1 has terminated the said dealership agreement and according to respondent No. 1 there has been due and payable by the petitioner to the respondent No. 1 a sum of Rs. 78,97,933/-. This claim is

made in respect of the outstanding amount due and payable under the dealership agreement by the petitioner to the respondent No. 1 herein.

8. The petitioner herein preferred a revision application being Revision Application No. 1334 of 2003 before the Hon''ble High Court at Rajasthan at Jodhpur against the order of the learned Civil Judge, Junior Division, Udaipur dated 3-12-2003. The Hon''ble High Court issued the show cause notice to the respondent No. 1 and in the meanwhile granted a stay of the invocation of the said bank guarantee till further orders. Ultimately, by an order dated 10-2-2004 the Hon''ble High Court of Rajasthan directed the matter to be referred to arbitration and appointed an arbitral tribunal in terms of the agreement between the parties. Thus, there is an arbitral tribunal constituted under the order passed by the Hon''ble High Court of Rajasthan at Jodhpur who is seized of the disputes and differences between the parties. However, while passing the said order, on the submission made by the petitioner herein that they have certain rights u/s 9 of the Arbitration and Conciliation Act, 1996, the Hon''ble High Court of Rajasthan had permitted the parties to approach appropriate forum for necessary reliefs. Thereafter, the petitioner has approached this Hon''ble Court by filing the present arbitration petition u/s 9 of the Arbitration and Conciliation Act, 1996 for seeking stay of invocation of the bank guarantee which is the subject matter of the present petition.

9. The learned counsel appearing for the petitioner before me has inter alia submitted that there has been a fraud committed by respondent No. 1 by invoking the bank guarantee by a letter dated 14-10-2003 because according to the learned Counsel for the petitioner, the matter was fully and finally settled by and between the parties in a meeting dated 14-10-2003 and necessary cheques were issued by the petitioner to the respondent No. 1 towards discharge of the liabilities which were ascertained at the sum of Rs. 9,48,029/-, It is further contended that the respondent No. 1 thereafter handed over the original bank guarantee to the petitioner herein in discharge thereof and thus, there was nothing due and payable by the petitioner to the respondent No. 1 and invocation of the bank guarantee for the sum of Rs. 50 lacs by the respondent No. 1 by their letter dated 14-10-2003 is thus a fraud played upon the petitioner.

10. It is the contention of the learned counsel for the petitioner that even if the bank guarantee issued is valid still if there is a fraudulent invocation of the bank guarantee, then, the Court has jurisdiction to grant injunction by classifying such cases either under fraud or a special equity. The learned counsel for the petitioner also inter alia contended that at this prima facie stage of the matter, the fact that the original bank guarantee is in possession of the petitioner herein itself suffices to indicate that there has been a due discharge of the said bank guarantee by respondent No. 1. The learned counsel has relied upon the provisions of Section 114 of the Evidence Act particularly illustration (i) thereof, inter alia, for canvassing his point that there is a rebuttable presumption u/s 114 of the Evidence Act which provides that when the original document is in the

hands of obligor then Court can presume due discharge of obligor under such a document. It is, therefore, contended by the learned Counsel for the petitioner that invocation of the bank guarantee after the accounts were settled by and between the parties is a fraudulent invocation and there has been a complete discharge given by the respondent in favour of the petitioner by handing over the bank guarantee and, therefore, the Court should restrain the respondent No. 1 from invocation of the said bank guarantee.

11. The other point contended by the learned counsel for the petitioner is that assuming that there is no fraud then also invocation of the bank guarantee by the respondent is not in accordance with the terms and conditions of the bank guarantee prescribed by the agreement. The learned counsel has drawn my attention to Clause 9 of the dealership agreement which, inter alia, requires that the company could invoke the guarantee at any time with the simple written request presenting to the bank the documentation relating to the invoices i.e. due and not paid by the dealer and without any exceptions. It is, therefore, contended by the learned counsel for the petitioner that the invocation letter dated 14-10-2003 does not set out any such outstanding amount relating to the invoices which are not paid by the dealer and, therefore, the invocation made by respondent No. 1 is invalid and illegal and contrary to the terms and conditions of invocation arrived at by and between the parties and, therefore, this Court should issue injunction restraining the respondent No. 1 from invoking the said bank guarantee.

12. On the other hand, the learned Counsel for the respondent No. 1 has contended that it is now well settled law that injunction cannot be granted restraining the respondent No. 1 from invoking or encashing the bank guarantee even if strong prima facie case is made out. It has been further contended on behalf of the respondent No. 1 that a case of fraud which is required to be pleaded for the purpose of seeking injunction restraining the bank from encashing the bank guarantee is the fraud committed at the time of the issuance of the bank guarantee by the beneficiary and only in that class of cases that the injunction can be granted by the Court. The learned counsel for respondent No. 1 in support of his contention has relied upon an unreported Judgment of Dr. D. Y. Chandrachud, J. in Arbitration Petition (Lodg.) No. 499 of 2002 in which the Hon'ble Court while construing the bank guarantee which is in identical terms as in the present case has refused to grant injunction on the ground that the terms of the guarantee are very clear and the bank is bound and liable to make payment. The learned Judge has also held on the facts of that case that no case of fraud has been made out. The learned counsel for the respondent No. 1 has also relied upon a judgment of the Hon'ble Supreme Court of India in Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works (P) Ltd., and another, . My attention has been drawn in particular to paragraphs 21, 28 and 29 of the petition by the learned Counsel for respondent No. 1. The Hon'ble Supreme Court while dealing with the argument of fraud in that case has, inter alia, held that the fraud which is an exception carved out in connection with the bank

guarantee should be such that it should vitiate the very foundation of the said bank guarantee. While considering the aforesaid position, the Hon''ble Supreme Court of India has referred to the earlier judgments of the Supreme Court of India. In the said judgment it has been held as under :--

"Dealing with the question of fraud it has been held that fraud has to be an established fraud. The following observations of Sir John Donaldson, M. R. in *Bolivinter Oil SA v. Chase Manhattan Bank* are apposite :

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

The aforesaid passage was approved and followed by this Court in *U. P. Coop. Federation Ltd. v. Singh Consultant and Engineers (P) Ltd.* It is, therefore, contended by the learned counsel for respondent No. 1 that the so called case of fraud pleaded by the petitioner in the present case on basis of alleged discharge of the bank guarantee is baseless and without any merits. On merits, the learned counsel for respondent No. 1 submitted that no prima facie case has been made out by the petitioner of any alleged discharge. The learned counsel for respondent No. 1 further submitted that the evidence on facts indicates that the case of so-called discharge is unbelievable at least at the prima facie stage. It has been further contended that the conduct on the part of the 1st respondent to file a police complaint for a missing file on 14-10-2003 at 10.15 a.m. and invocation of the bank guarantee by respondent No. 1 on 14-10-2003 itself indicates that the case of respondent No. 1 of alleged discharge is baseless and cannot be accepted. It has been further contended that no cheques were handed over by the petitioner to the respondent No. 1 as stated in paragraph 12 of the petition and the said fact has been duly denied by respondent No. 1.

13. On considering the arguments advanced by both the parties and on perusal of the documents which are on record firstly prima facie I find that no case of fraud or a special equity has been made out by the petitioner for seeking an injunction as prayed for in the present petition. The contention raised that there has been a fraud committed in invocation of the bank guarantee cannot be a ground for granting of an injunction as in a series of judgment of the Hon''ble Supreme Court of India and more particularly the judgment in the case of *Dwarikesh Sugar Industries Ltd.*, referred to hereinabove, indicates that to fall within the exception of fraud there should be a fraud in obtaining or availing of the bank guarantee and fraud should be between the beneficiary and the bank and not the alleged fraud between the parties to the underlined contract. This is because it has been held by the Hon''ble Supreme Court of India that an

underlined contract is an independent to the contract of guarantee which is between the beneficiaries and the bank and, therefore, a fraud in the underlined contract would not give any ground for seeking injunction restraining the bank from fulfilling its obligation under the bank guarantee which is an independent contract. The learned counsel for the petitioner has relied upon a judgment of the Hon''ble Supreme Court of India in the case of Hindustan Steel Works Construction Ltd. Vs. Tarapore and Co. and another, particularly the observations of the Hon''ble Supreme Court of India in paragraph 18 of the judgment which read as under :--

"It may be pointed out that fraud which is recognised as an exception is the fraud by one of the parties to the underlying contract and which has the effect of vitiating the entire underlying transaction. A demand by the beneficiary under the bank guarantee may become fraudulent not because of any fraud committed by the beneficiary while executing the underlying contract but it may become so because of subsequent reason why the Courts should not restrain a person making such a fraudulent demand from enforcing a bank guarantee."

I have perused the said judgment of the Hon''ble Supreme Court of India particularly paragraph 18 thereof. On perusal of the earlier paragraphs namely paragraphs 15, 16 and 17 of the said judgment, it is clear that what was considered by the Hon''ble Supreme Court of India was whether the fraud is the only exception for the purpose of granting injunction in respect of encashment of the bank guarantee. The Hon''ble Supreme Court of India in paragraph 18 were considering the earlier judgment in the case of U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd., and particularly paragraph 34 of the said judgment. The Hon''ble Supreme Court of India in paragraph 18, which has been relied upon by the petitioner herein, have held that the fraud is not the only exception but party approaching the Court can also establish the special equity in his favour for granting injunction. It has been further held that fraud should be of such a nature vitiating the entire underlying transaction thus, making the demand by the beneficiary under the bank guarantee become fraudulent and not because of any fraud committed by the beneficiary while executing the underlying contract or it may become vitiated by virtue of subsequent events or circumstances. In my prima facie view, the judgment of the Hon''ble Supreme Court of India do not lay down a proposition of law that a dispute as to the settlement of the accounts between the parties could be ground for injuncting a party from invocation of a Bank Guarantee on the ground of fraud. Even on merits prima facie, I am satisfied that no case of fraud is made out by the petitioner herein. The contention of the petitioner that there was settlement of accounts and reliance placed on handing over of four cheques which is disputed by respondent No. 1 by itself cannot indicate that accounts are settled by and between the parties and the bank guarantee has been handed over pursuant thereto. Furthermore, it is also unbelievable that respondent No. 1 will hand over the original bank guarantee by taking four cheques as mentioned in paragraph 12 of the petition which are postdated and are yet to be encashed.

The bank guarantee which is immediate encashable security would normally not be handed over against the post dated cheques even before the encashment thereof. Apart therefrom, there is no material evidence or circumstances produced by the learned counsel for the petitioner to indicate that there has been a due and valid discharge of the bank guarantee. On the other hand, the respondent No. 1 has in their affidavit not only produced the police complaint which has been filed on 14-10-2003 in respect of the missing documents at 10.15 a.m. itself as well as invocation of the bank guarantee by respondent No. 1 on 14-10-2003 itself, but the respondent No. 1 has further stated in his affidavit that as soon as the suit was filed before the Civil Judge, Junior Division, Udaipur, they came to know that the bank guarantee was in possession of the petitioner herein and therefore immediately they have filed a second police complaint accusing the petitioner herein of theft of the said bank guarantee. The respondent No. 1 has also relied upon a copy of the said complaint. The respondent No. 1 has also further relied upon police records as well as the order passed on the bail application of the petitioner before the Hon'ble High Court of Rajasthan at Jodhpur in which while rejecting the said bail application, the Court has observed that from the investigation diary of the police it reveals that there is no document showing that the bank guarantee was ever returned to the petitioner. They have also not stated on what date and at which meeting the bank guarantee has been returned.

14. Apart therefrom, the terms and conditions of the bank guarantee specifically require that the bank guarantee cannot be discharged unless the consent of the respondent No. 1 company is obtained in writing. Admittedly, there is no consent in writing from the respondent No. 1 discharging the bank guarantee. Furthermore, admittedly neither the cheques which are alleged to have been handed over by the petitioner to the respondent No. 1 were ever presented to the bank nor encashed. It is thus, not possible at least at this prima facie stage to believe the case of the petitioner that there was valid and legal handing over of the original bank guarantee by the respondent No. 1 to the petitioner in effect discharging the petitioner from encashing the said bank guarantee. It is also the admitted position that the said bank guarantee which is in the possession of the petitioner is not cancelled by defacing the same on the face of the bank guarantee. In the aforesaid circumstances, I am of the prima facie view, that it is not possible to accept the case of the petitioner and, therefore, no injunction can be granted restraining the respondent No. 1 from encashing the bank guarantee either on the ground of fraud or special equity.

15. Insofar as the argument based on Section 114 of the Indian Evidence Act, 1872 is concerned, I am not impressed with the same for more than one reasons. Firstly, the provisions of Section 114 would apply at the stage of trial and not at the interim stage. Secondly, the provisions of Section 114 are discretionary and have rebuttable presumption. Thirdly, insofar as illustration (i) is concerned, it has no application on the facts of the present case because illustration (i) applies where documents creating an obligation is in the hands of

the obliger i.e. if the bank guarantee is taken as a document then it should be in the hands of not the petitioner but in the hands of the bank, the 2nd respondent herein, who is the obliger under the document to discharge the obligation as and when called upon. In the light of the aforesaid facts, I find no merits in the argument based on Section 114 of the Evidence Act is concerned.

16. The second contention raised by the learned Counsel for the petitioner that the invocation of the bank guarantee does not comply with condition No. 9 of the addendum Clause 4 to the dealership agreement which inter alia stipulates that the company can invoke the guarantee at any time with a simple request presenting to the bank the documentation relating to the invoices that are due and not paid by the dealer and without any exceptions. The case of the petitioner that details relating to the invoices are not set out in the invocation letter dated 14-10-2003 cannot be accepted for the simple reason that the invocation has to be in terms of the bank guarantee itself and not the contract between the parties. The bank guarantee stipulates that the company i.e. respondent No. 1 herein can invoke the bank guarantee merely on a demand from the company stating that the amount claimed has become due. It further states that in fact the said demand made by the company on the bank shall be conclusive as regards the amount due and payable under the guarantee not exceeding Rs. 50 lacs. In the light of the said clause in the bank guarantee, in my prima facie view, it is not necessary for respondent No. 1 to stipulate specifically in the invocation letter giving details about the invoices and the amount outstanding under such invoices. In my prima facie view, the invocation by the respondent No. 1 by the letter dated 14-10-2003 is prima facie legal, correct and valid and, therefore, no injunction can be granted at this stage for invoking the bank guarantee.

17. Lastly, it is contended by the petitioner that the respondent company is already a sick company and a reference is required to be made to the BIFR as its entire share capital has been wiped out. It has been further contended that, therefore, it is in the interest of justice that the injunction should be granted because if the amount is allowed to be encashed by the respondent No. 1 and in the event the company is going to be declared as a sick company then in that event an irretrievable injustice is likely to be caused even if the petitioner succeeds in the arbitration proceedings. A reliance is placed by the learned counsel for the petitioner on annexure to the notice which is annexed as Exhibit to the affidavit in rejoinder while putting forth the aforesaid contentions. On the other hand, the respondent has contended that the company is not a sick company. The explanatory statement only states that it is potentially sick. It has been further urged by the respondent No. 1 assuming without admitting that the respondent No. 1 is a sick company still no ground is made out for an injunction in favour of the petitioner insofar as the bank guarantee is concerned. The learned counsel for respondent No. 1 in support of this contention has relied upon a judgment of the Hon''ble Supreme Court of India in the case of AIR 1997 1644 (SC) particularly the following observations :--

"Before us, however, in the course of argument, the learned advocate for the respondent urged for the first time that in this case there would be irretrievable injustice to the respondent if the bank guarantees are allowed to be realised because the appellant is a sick industrial company in respect of which a reference is pending before the Board for Industrial and Financial Reconstruction under the Sick Industrial Companies (Special Provisions) Act, 1985. The respondent contends that even if it succeeds before the Arbitrator it will not be able to realise its claim from the appellant. The mere fact that a reference under the Sick Industrial Companies (Special Provisions) Act, 1985 is pending before the Board, is, in our view, not sufficient to bring the case in the ambit of the "irretrievable injustice" exception."

I have considered the aforesaid submissions. Firstly, the reliance placed on the document is a document which indicates that the company is likely to be potentially sick u/s 23 of the Sick industrial Companies (Special Provisions) Act, 1985. This does not indicate in any manner a reference as contemplated u/s 15 or 16 of the Sick Industrial Companies (Special Provisions) Act, 1985. Furthermore, in my view the reliance placed on the judgment of the Supreme Court by respondent No. 1 is a complete answer. Merely because a company is likely to be declared a sick industrial undertaking is not a ground of a special equity or an irretrievable injustice and thus no ground is made out for grant of injunction on this ground also. I, therefore, reject the said contention of the petitioner in respect thereof.

18-19. In the aforesaid circumstances, I find that there is no merit in the present petition u/s 9 seeking injunction from invocation of the bank guarantee and thus I dismiss the same. However, there will be no order as to costs.

Petitioners seek stay of the judgment so as to enable him to prefer an appeal before the Hon"ble Division Bench.

20. The learned counsel appearing for the respondents have cited the judgment and order of the Division Bench in the case of Appeal Lodging No. 30/01 H and K Rolling Mill Engineering P. Ltd., v. Malvika Steel Ltd., and Ors., dated 17th January 2001. Particularly my attention is drawn to paragraphs 9, 10 and 11 of the said judgment and it has been contended that an ad interim order which is operative till today in this matter should not be continued any further. After hearing both the parties, I find that since the ad interim order is operative in this present petition since 25th February, 2004 as extended on 1st March, 2004, I stay the judgment for a period of 2 weeks and continue the ad interim order which shall come to an end on 2nd April 2004.

21. Parties to act on ordinary copy of this order duly authenticated by the Private Secretary of this Court.