

(2013) 05 BOM CK 0049

In the Bombay High Court

Case No : Arbitration Petition (L) No. 626 of 2013

Karam Chand Thapar and Bros. (Coal Sales) Ltd.

APPELLANT

Vs

Hindustan Construction Company Limited

RESPONDENT

Date of Decision : 09-05-2013

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9
Contract Act, 1872 — Section 31, 32

Citation : (2014) 3 BomCR 302 : (2013) 4 MhLj 306

Hon'ble Judges : R.D. Dhanuka, J

Bench : Single Bench

Advocate : Milind Sathe, assisted with Mr. Zal Andhyarujina assisted with Ms. Jyoti Singh and Mr. K. Dastoor instructed by Phoenix Legal, for the Appellant; D.J. Khambatta a/w. Mr. Rohan Cama and a/w. Mr. Rakesh Mandavkar instructed by . M/s. Harish Joshi and Company, for the Respondent

Final Decision : Dismissed

Judgement

R.D. Dhanuka, J.—Mr. D.J. Khambatta, learned Senior Counsel appearing on behalf of the respondent states that respondent would proceed on the basis of the denial. The statement is accepted. By consent of parties taken up for final hearing at the admission stage. By this petition filed u/s 9 of the Arbitration and Conciliation Act, 1996, petitioner seeks injunction against respondent from encashing Performance Bank Guarantee of Rs. 15.95 crores issued by HSBC Bank on their behalf and also seeks return of the said Performance Bank Guarantee. Some of the relevant facts for the purpose of deciding this petition are setout hereinafter:-

i) In July 2010, by a defender notice Sardar Sarovar Narmada Nigam Limited invited tenders for the work of constructing Canal Earthwork, Canal Lining, Structures and Services Roads of the distributaries and minors of Limbdi Canal including Maintenance and Operation for a period of five years. The respondent submitted their bid and were awarded the said contract by issuing a Letter of

Acceptance cum Work Order on 20th April, 2011 by the said Sardar Sarovar Narmada Nigam Limited. The said Sardar Sarovar Narmada Nigam Limited thereafter executed a contract in favour of the respondent on 26th April, 2011. On 9th August, 2011 out of the said work awarded to the respondent by the said Sardar Sarovar Narmada Nigam Limited the respondent awarded a portion of the said work i.e. for the distributaries LD-1 to LD-12 and minors MO-01 to MO-03 to the petitioners by Work Order dated 9th August, 2011 on the terms and conditions recorded therein. Pursuant to the said award of the work in favour of the petitioner on 19th August, 2011 the petitioner executed the Performance Bank Guarantee in the sum of Rs. 13.15 crores. The amount of bank guarantee was subsequently enhanced to 15.95 crores without any change in the terms and conditions on 22nd September, 2011.

ii) Clause 25.2 of the Work Order issued by the respondent to the petitioner provided that "If Employer i.e. Sardar Sarovar Narmada Nigam Limited terminates the original contract with the Contractor i.e. the respondent herein, subsequently the contract with the sub-contractor will be automatically terminated.

iii) On 27th February, 2012 the said Sardar Sarovar Narmada Nigam Limited issued a notice proposing termination of contract between them and the respondent. On the apprehension of the petitioner that in view of the proposed action on the part of the said Sardar Sarovar Narmada Nigam Limited to terminate the contract, petitioner filed a petition in this Court u/s 9 of the Arbitration and Conciliation Act, 1996 for seeking similar interim measures. By an order dated 4th May, 2012 passed by this Court, the said Arbitration Petition (L) No. 606 of 2012 filed by the petitioner came to be dismissed. It is not in dispute that the respondent did not invoke and/or encash the said bank guarantee inspite of order dated 4.5.2012 passed by this Court dismissing the Arbitration Petition filed by the Petitioner.

iv) On 10th May, 2012 the said Sardar Sarovar Narmada Nigam Limited terminated the contract between them and the respondent. It is the case of the petitioner that inspite of the said termination off the contract between the Sardar Sarovar Narmada Limited and the respondent, petitioner continued to mobilize the resources on site and demobilized only in the month of February, 2013 and thereafter submitted final bill for payment to the respondent. Dr. Sathe, the learned senior counsel appearing on behalf of the petitioner invited my attention to the order passed by this Court rejecting the earlier petition filed by the petitioner u/s 9. The learned senior counsel submits that when the said order was passed by this court, there was no termination of contract by the said Sardar Sarovar Narmada Nigam Limited. In view of the termination subsequently by the Sardar Sarovar Narmada Nigam Limited on 10.5.2012 the petitioner apprehends that the respondent would now encash the bank guarantee. It is submitted that the respondent thereafter filed a Writ Petition challenging the said termination effected by Sardar Sarovar Narmada Nigam Limited before the Gujarat High

Court. By order dated 2nd November, 2012 passed by the Gujarat High Court, Sardar Sarovar Narmada Nigam Limited was directed to consider the representation made by the respondent. The learned senior counsel submits that in view of the said order passed by the Gujarat High Court, the parties again negotiated for revival of the contract. The learned Senior Counsel submits that though by a letter dated 29th/31st January, 2013 now issued by the Sardar Sarovar Narmada Nigam Limited the termination order dated 10.5.2012 is withdrawn, the said order is conditional subject to compliance of various conditions. It is submitted by the said letter Sardar Sarovar Narmada Nigam Limited has called upon the respondent to execute Supplementary Agreement. It is submitted that the respondent not having executed any further agreement in furtherance of letter dated 29th/31st January, 2013 the termination order dated 10.5.2012 does not stand revived. It is submitted that in view of this situation the work order issued in favour of the petitioner which was depending on the existence of the contract between the respondent and Sardar Sarovar Narmada Nigam Limited also does not stand revived. The learned senior counsel invited my attention to the clauses of the bank guarantee. The relevant clauses of the bank guarantee are extracted as under:-

In accordance with the provisions of the terms and conditions of the said Letter of Intent, the Subcontractor shall deposit with the Beneficiary, a Bank Guarantee as Security for his proper performance and fulfillment of the terms and conditions of Letter of Intent for an amount of Rs. 13,15,00,000/- (Rupees Thirteen Crores and Fifteen Lacs Only).

Now that we, the Hongkong and Shanghai Banking Corporation Limited, a company incorporated under the Companies Ordinance of the Hong Kong Special Administrative Regions (HKSAR), having its registered office at 1, Queen's Road Central, Hong Kong and acting through its branch at 25, Barakhamba Road, New Delhi-110 001 (hereinafter referred to as "the Bank" which expression shall include its successors and assigns) as instructed by the Subcontractor agree unconditionally and irrevocably to guarantee as primary obligator and not as surety merely, the payment to the Beneficiary, on his first written demand received on or before 30/09/2015, without whatsoever right of objection on our part and without his first claim to the Subcontractor in the amount not exceeding of Rs. 13,15,00,000/- (Rupees Thirteen Crores and Fifteen Lacs Only).

We the bank do hereby undertake to pay the amounts due and payable under this guarantee without any demur, merely on demand from the Beneficiary stating that the amount claimed is due by way of loss or damage caused to or suffered to would be caused to or suffered by the Beneficiary by reason of any breach and/or failure to perform the obligations of Subcontract or any part thereof. Any such demand made on the bank shall be conclusive, as regards the amount due and payable by the bank under this guarantee.

We, the Bank undertake to pay to the Beneficiary any money so demanded notwithstanding any dispute or disputes raised by the Subcontractor in any suit

or proceedings, pending before any Court or Tribunal relating thereto, our liability under this presents being absolute and unequivocal.

We, the Bank, further agree that no change or addition to or other modification of the terms of the order or of works to be performed there under or any of the documents or correspondence which may be made between the Beneficiary and the Subcontractor shall in any way release us from any liability under this guarantee, and we hereby waive notice of any such change, addition or modification.

2. It is submitted that the respondent can invoke the said bank guarantee only if any loss and damage is caused to or suffered by the respondent by reason of any breach and/or failure to perform the obligations of Sub-Contract or any part thereof. The learned senior counsel submits that since the contract itself is not in existence the question of performing any part of the contract or any breach and/or failure on the part of the petitioner to perform the obligations under the said contract does to arise. It is submitted that in view of the such clause in the bank guarantee, which according to the learned senior counsel is a conditional bank guarantee and the condition not having being satisfied the respondent cannot invoke the bank guarantee. It is submitted that the petitioners are relieved of their obligations under the said bank guarantee and the same shall be returned the petitioner.

3. The learned senior counsel placed reliance on the Judgment of the Supreme Court in the case of Hindustan Construction Co. Ltd. Vs. State of Bihar and Others, and particularly paragraph no. 14 thereof which reads thus:

14. This condition clearly refers to the original contract between HCCL and the defendants and postulates that if the obligations, expressed in the contract, are not fulfilled by HCCL giving to the defendants the right to claim recovery of the whole or part of the "advance mobilisation loan", then the Bank would pay the amount due under the guarantee to the Executive Engineer. By referring specifically to clause 9, the Bank has qualified its liability to pay the amount covered by the guarantee relating to "advance mobilisation loan" to the Executive Engineer only if the obligations under the contract were not fulfilled by HCCL or HCCL has misappropriated any portion of the "advance mobilisation loan". It is in these circumstances that the aforesaid clause would operate and the whole of the amount covered by the "mobilisation advance" would become payable on demand. The bank guarantee thus could be invoked only in the circumstances referred to in clause 9 whereunder the amount would become payable only if the obligations are not fulfilled or there is misappropriation. That being so, the bank guarantee could not be said to be unconditional or unequivocal in terms so that the defendants could be said to have had an unfettered right to invoke that guarantee and demand immediate payment thereof from the Bank. This aspect of the matter was wholly ignored by the High Court and it unnecessarily interfered with the order of injunction, granted by the Single Judge, by which the defendants were restrained from invoking the bank

guarantee.

4. It is submitted that the bank guarantee being conditional and conditions not having been satisfied, the petitioner deserves to be granted injunction from the encashment of the said bank guarantee.

5. Mr. Khambatta, learned senior counsel appearing on behalf of the respondent on the other hand invited my attention to the terms of the bank guarantee and submits that ex-facie the bank guarantee is unconditional and irrevocable bank guarantee and payable on demand without raising any dispute by the bank. It is submitted that whether by virtue of letter dated 29th/31st January, 2013 issued by Sardar Sarovar Narmada Nigam Limited, the work order issued in favour of the petitioner is revoked or not or stood terminated is a matter on merits which can be decided by the learned Arbitrator. It is submitted that all the submissions advanced by Dr. Sathe in this proceedings have already been considered by this Court while rejecting the Arbitration Petition (L) No. 606 of 2012. It is not in dispute that though the petitioner has filed an Appeal against the order dated 4.5.2012 passed by this Court, the said order dated 4.5.2012 has not been set aside so far nor any injunction has been granted in favour of the petitioner. The learned senior counsel invited my attention to paragraph nos. 9, 12 and 13 of the said order which reads as under:-

9.... the present case, from a careful reading of the two clauses of the PBG, which are reproduced hereinabove, it is clear that the Guarantee is unconditional and irrevocable and can be invoked by the Respondent who is the beneficiary under the Bank Guarantee even in the case of a possible future loss or damage, which was likely to be caused or suffered by the beneficiary by reason of any breach or failure to perform obligations of the said contract. It is obvious that whether in fact there is any breach or failure committed by the Petitioner or not as subcontractor is not a matter which can be gone into or enquired into by the Bank and the apprehension or satisfaction of the Respondent that there was a breach or there could be a breach is sufficient for invocation of Bank Guarantee.

12. The Law in relation to the grant of injunction against invocation of Bank Guarantee is thus well settled. There are only 2 exceptions, namely, fraud and irretrievable damage. In the present case, the second exception is not even sought to be invoked by the petitioner. In so far as first exception of fraud is concerned, from the aforesaid Judgment, it is clear that the fraud has to be to the knowledge of the concerned bank. It is not even the case of the Petitioner that the HSBC had knowledge of the alleged fraud. A careful perusal of the averments in the Petition shows that it does not establish even a prima-facie case of fraud.

13. Even if the Bank Guarantee is invoked and the amounts are recovered by the Respondent, the Petitioner can always establish in the arbitration proceedings between the parties that the invocation was wrongly and in such a case, the Petitioner will be entitled to get an award for refund of the amount together with

interest. In this view of the matter, it is not possible to hold that an irreparable loss or injury would be caused to the petitioner, if injunction as prayed for, is not granted.

6. It is submitted that this Court has already interpreted the terms of the said bank guarantee and has rendered a finding that the said bank guarantee was unconditional and irrevocable and can be invoked by the respondent who is the beneficiary under the said bank guarantee even in the case of any possible future damage or loss which is likely to be caused or suffered by the beneficiary by reason of any breach or failure to perform obligations of the said contract.

7. The learned Senior Counsel also placed reliance upon Judgment of the Supreme Court in the case of AIR 1997 1644 (SC) and particularly paragraph no. 12 and 14 thereof which reads thus:-

12. 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 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 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. In the case of U.P. Coop. Federation Ltd. v. Singh Consultants and Engineers (P) Ltd. which was the case of a works contract where the performance guarantee given under the contract was sought to be invoked, this 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, this Court in the above case quoted with approval the observations of Sir John Donaldson, M.R. in *Bolivinter Oil SA v. Chase Manhattan Bank* (All ER at p. 352):(at SCC p. 197).

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.

This Court set aside an injunction granted by the High Court to restrain the realization of the bank guarantee.

14. On the question of irretrievable injury which is the second exception to the rule against granting of injunctions when unconditional bank guarantees are sought to be realised the court said in the above case that the irretrievable injury must be of the kind which was the subject matter of the decision in the *Itek Corpn. Cas.* In that case an exporter in USA entered into an agreement with the Imperial Government of Iran and sought an order terminating its liability on stand by 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 licenses 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 purchase if decreed by the American Courts would not be executable in Iran under these circumstances and realisation of the bank guarantee/letters of credit would cause irreparable harm to the plaintiff. This contention was upheld. To avail of this exception, therefore, exceptional circumstances which make it impossible for the guarantor to reimburse himself if he ultimately succeeds, will have to be decisively established. Clearly, a mere apprehension that the other party will not be able to pay, is not enough. In *Itek* case there was a certainty on this issue. Secondly, there was good reason, in that case for the Court to be *prima facie* satisfied that the guarantors i.e. the bank and its customer would be found entitled to receive the amount paid under the guarantee.

8. The learned counsel also placed reliance on the Judgment of this court (R.D. Dhanuka, J.) delivered on 17th January, 2013 in Arbitration Petition (L) No. 67 of 2013 in support of the plea that in case of unconditional bank guarantee, no injunction can be granted. The learned senior counsel placed reliance upon

paragraph nos. 47 to 55 of the said Judgment, which read thus:-

47. On perusal of the mobilization bank guarantee and also retention amount bank guarantee, it is clear that the bank had irrevocably and unconditionally guaranteed to pay the amount due and payable to the company without any demur and contestation and merely on demand from the company irrespective of the validity and effects of the said contract. The demand made by the beneficiary is conclusive and binding on the bank notwithstanding any difference between the petitioner and the beneficiaries.

48. Clause 5 is clear which provides that the beneficiary is entitled to invoke the bank guarantee against the bank even without first instance proceedings against the contractor or making any demand upon the contractor to pay and notwithstanding any security or other guarantee that the beneficiary may be possessed of in relation to the contractor's liabilities either in relation to this contract or otherwise. In my view, thus even if bill of the petitioner is pending with the respondent no. 3, that cannot be a ground for grant of injunction from encashment of the bank guarantees.

49. Clause 8 provides that the bank had agreed that any such notice of invocation shall be deemed to be correct and shall not be disputed or questioned by the bank but shall pay in any manner referred to in the bank guarantee forthwith and without delay. From the perusal of the terms and conditions of the bank guarantee, it is thus clear that bank guarantees furnished by the petitioner were not conditional bank guarantees. The beneficiary thus having invoked it, the bank was liable to honour the same without any dispute or demand. The bank guarantees are independent and separate contract between the Bank and the beneficiary and are absolute in nature, the bank are not concerned with the dispute between the contractor and the beneficiary. Under the terms of the bank guarantee, the beneficiary is the best judge to decide as to when and for what reasons the bank guarantee should be encashed.

50. The Supreme Court in case of BSES Ltd. (supra) has referred to the judgment in case of General Electric Technical Services Co. Inc. vs. Punj Sons (P) Ltd. 5 in which after considering the terms of the unconditional bank guarantee held that the right to recover the amount under the running bills has no relevance to the liability of the Bank under the guarantee. The liability of the Bank remained intact irrespective of the recovery of mobilization advance or the non-payment under the running bills. It is held that failure on the part of the beneficiary to specify the remaining mobilization advance in the letter for encashment of bank guarantee is of little consequence to the liability of the bank under the guarantee. It has been held that the petitioner can succeed only if the case can be brought under the two accepted exceptions to the general rule against intervention. It is held that as there is no egregious fraud so as to fall within the first exception or there is no special equities in favour of the plaintiff. The Supreme court in case of BESE Limited (Supra) after considering the terms of the bank guarantee as unconditionally held that the justice can always be

rendered to the parties, if he succeeds before the Arbitrators.

51. Supreme Court in case of State Bank of India and another (supra) rejected the plea of the plaintiff that the bank guarantee must be construed in the light of other purported contemporaneous documents. In my view as the terms and conditions of the bank guarantees are clear and without any ambiguity, correspondence referred to and relied upon by both the parties would be of no relevance. The Supreme Court has held that it is beyond any cavil that a bank guarantee must be construed on its own terms and considered as a separate transaction.

52. On perusal of judgments in case of State Bank of India (supra) and Larsen and Turbo Limited (supra) relied upon by the petitioner it is clear that in both the matters the bank guarantee furnished by the plaintiffs were conditional bank guarantees and the invocation of such bank guarantees were not in accordance with terms of the bank guarantees. However, the bank guarantees under consideration in this petition are unconditional bank guarantees. The beneficiary was not bound to disclose any reason as to why the bank guarantees were required to be invoked. The letter of invocation produced by the petitioner for perusal of this court shows that the letter did not indicate any reason. The terms of the bank guarantee does not require any reason or justification or quantification of the amount due to be disclosed in the letter invoking bank guarantee. In my view, the letter invoking bank guarantee by the 3rd respondent is inconsonance with the terms of the bank guarantee. In my view case of the petitioner does not fall under any exception carved by the Supreme Court i.e. fraud or irretrievable injustice.

53. As far as judgment in case of Western Coalfields Limited (supra) relied upon by the petitioner is concerned, in support of the proposition that the purpose for invocation of the bank guarantees cannot be other than the purpose for which such bank guarantees were furnished and that the principle debtor also have locus standi to complain about non-fulfillment of the bank guarantee is concerned, from the perusal of the facts before this court in case of Western Coalfields Limited (supra) it is clear that it was one of the terms of the bank guarantees that the bank was liable to honour the bank guarantee on demand stating that amount claimed by the beneficiary was due and payable by the contractor for the reasons of failure/negligence in performing the terms and conditions contained in the contract by the buyer and to unconditionally pay the amount claimed by the company on demand without any demur to the extent stated therein. Considering these terms and also considering the letter invoking the bank guarantees, this court took a view that the obligation of the bank to make the payment of the amount covered by the bank guarantee arose only on the demand to be made in writing which must state exactly the amount assessed as due and payable by the parties furnishing bank guarantees for the reason of failure/negligence of such party in performing certain specified terms and conditions contained in the contract between the plaintiff and the beneficiary. It

is held that If the demand was not in writing stating the actual amount which was assessed and found to be due and payable for the reason stated in the Bank guarantees, then there was no obligation to make payment. It is held that unless there was a failure/negligence in performing the terms and conditions of contract, the amount which becomes due and payable by the beneficiary could not be assessed and claimed. Considering these facts, this court took a view that such bank guarantee was contingent contract as defined u/s 31 of the Contract Act and it becomes enforceable only upon happening of the event specified therein, as per Section 32 of the Contract Act. This court took a view that there was no demand in writing as envisaged in the bank guarantee in question. The beneficiary in its invocation letter had not stated the amount due and payable from the plaintiff according to the beneficiary for such letter. It is also held that there was nothing to show that the events specified for invocation of Bank guarantees had occurred. This court took a view that invocation was not in accordance with the terms and conditions prescribed and was therefore bad and unenforceable. In that context, this court took a view that the bank guarantee could not be invoked for the purpose other than for which the bank guarantee was furnished by the plaintiff in favour of the beneficiary.

54. On perusal of the terms and conditions of the bank guarantee in this case furnished by the petitioner, it is clear that each of such bank guarantees is absolutely unconditional and the bank was under obligation to honour the same on demand issued by the beneficiary. There was no such condition provided in the bank guarantee which obligates any recording of reasons or quantifying the claim while invoking such bank guarantee. It is not in dispute that in the invocation letter addressed by the 3rd respondent, no reason of any nature whatsoever is given.

55. In my view, other correspondence exchanged between the parties need not be dealt with for the purpose of deciding whether the intent of the beneficiary to invoke the bank guarantee was for any other purpose other than for which such bank guarantee was furnished. Issue raised by Mr. Kamdar, the learned senior counsel appearing for the petitioner that the petitioner has to recover substantial amount from the respondents or the issue raised by Dr. Sathe, the learned senior counsel appearing for the respondents that the petitioner had committed breaches of the contract and in view of the termination of the contract, respondents would be entitled to get the balance work done at the risk and cost of the petitioner and would have counter claim against the petitioner are concerned, I am of the view that both these issues can't be decided in the present proceedings while considering application for injunction in respect of the unconditional bank guarantee and such issues in my view can be decided only by the Arbitral Tribunal.

9. Mr. Khambata also invited my attention to the correspondence entered into between the parties prior to the date of the termination of the contract to demonstrate that the petitioner had already committed breach of the work order

issued by the respondent. The respondent in those correspondence has already alleged slow progress on the part of the petitioner and also breaches. The learned senior counsel also invited my attention to the correspondence entered into between the parties which indicates that the petitioner was on site even after the letter of termination dated 10.5.2012 was issued. Learned senior counsel invited my attention to the email of respondent dated 7th February, 2013 informing that Sardar Sarovar Narmada Nigam Limited had now withdrawn the termination letter and requested the petitioner to confirm the Execution of the complete original scope of work as agreed by the petitioner as per the existing work order dated 2.11.2012 and demanded the submission of additional 5% Performance of Bank Guarantee. The learned senior counsel submits that no case is made out for grant of interim measures.

10. On perusal of the bank guarantee dated 19th August, 2011, I am of the opinion that the bank guarantee was unconditional and irrevocable payable to the respondent on written demand by the bank. I am of the opinion that even if there would be any change in condition or other modification of the terms of the said work order issued in favour of the respondent or of the works, the nature of the bank guarantee being unconditional and irrevocable would not be affected. I am inclined to accept the submissions of Dr. Sathe, the learned senior counsel for the petitioner that during the course of the negotiations between the parties prior to termination of the contract the respondent had offered to modify the terms of the earlier contract or that in view of the termination of the contract, rights and obligations of the respondent under the said bank guarantee would stand lapsed.

11. In my view, the bank guarantee itself is separate and independent contract. The bank is bound to comply with its obligation as per provisions of the bank guarantee. The bank guarantee being unconditional, bank cannot refuse to honour its commitment under such bank guarantee. It is well settled principle of law that court should be slow in granting an injunction to restrain encashment of the bank guarantee. There are only two exceptions. If fraud is committed in obtaining bank guarantee, it would vitiate the issuance of such bank guarantee. Such fraud must be to the knowledge of the bank. Another exception is when encashment of such bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. In my view, none of these exceptions carved out by the Supreme Court in catena of decisions apply to the facts of this case. The bank guarantee being unconditional and is due and payable without any demur merely on demand from the beneficiary, no injunction can be granted by this court in this situation. Petitioner has not even sought to invoke second exception. In earlier order passed by this Court it is already held that petition does not establish even a prima facie case of fraud.

12. In my view whether by virtue of letter dated 29th/31st January, 2013 issued by the Sardar Sarovar Narmada Nigam Limited read with clause 25.2 of the work order, said work order stood revived automatically or stood terminated on

10.5.2012 or not is the issue which can be decided by the learned Arbitrator and cannot be gone into in this proceedings.

13. In so far as the submissions of Dr. Sathe that the bank guarantee is conditional bank guarantee and in view of the contract having come to an end on 10.5.2012 and that there is no question of any further performance of contract by the petitioner and thus there is no question of the respondent seeking any loss/damage from the petitioner is concerned, I am of the view that the bank guarantee in question has already been interpreted by this Court and this argument have been already rejected. The order passed by the learned Single Judge of this Court has admittedly not been set aside so far. As far as reliance on judgment of Supreme Court by Dr. Sathe in case of Hindustan Construction Co. Ltd. (Supra) is concerned, after considering the terms of conditional bank guarantee and on interpretation thereof, Supreme Court came to the conclusion that the condition of the said conditional bank guarantee not having been complied with, the beneficiary was not entitled to invoke the said bank guarantee in the facts of that case and granted injunction restraining the beneficiary from encashing the bank guarantee. In my view the condition of the bank guarantee furnished by the petitioner however being unconditional and irrevocable bank guarantee, reliance placed by Dr. Sathe on the Judgment of the Supreme Court in the case of Hindustan Construction Co. Ltd. (Supra) would be of no assistance to the petitioner. In my view the law on injunction on encashment of bank guarantee has been summarized by the Supreme Court in the case of Uttar Pradesh State Sugar Corporation (Supra) and also by this Court in the case of M/s. ANCL & Co. (India) Pvt. Ltd., v/s. Corporation Bank and Ors. In my view the facts of this case are identical to the facts of these two Judgments. I am respectfully bound by these Judgments. I am of the view that no case is made out for grant of interim measures and therefore I pass the following Order:-

ORDER

- i) Arbitration Petition is dismissed.
- ii) No order as to Costs.