(2011) 07 MAD CK 0303

In the Madras High Court

Case No : O.S.A. No''s. 9 and 10 of 2011 and M.P. No''s. 1 of 2011

Omni Agate Systems Private Limited — APPELLANT

Vs

Southern Railway and The Manager IDBI Bank — RESPONDENT

Date of Decision : 01-07-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9
Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2

Citation : (2011) 07 MAD CK 0303

Hon'ble Judges : V. Periya Karuppiah, J;R. Banumathi, J

Bench : Division Bench

Advocate : S.R. Rajagopal, for the Appellant; Vellaisamy, for R.1, Suresh, for Sivakumar Suresh, for R2, for the Respondent

Judgement

R. Banumathi, J.—These appeals are filed challenging the order dated 15.11.2010 dismissing the applications -O.A. Nos. 653 and 657 of 2010 filed u/s 9 of the Arbitration and Conciliation Act and declining to grant injunction restraining the 1st Respondent -Southern Railway from invoking the Bank guarantee given by the Appellant for Rs. 6,00,000/- and Rs. 2,77,200/- respectively.

2. Brief facts are as follows:

The 1st Respondent -Southern Railways had invited tenders for erection of 3 LED screens in Chennai Central Railway Station and 2 LED screens in Egmore Railway Station for a period of three years and the place of installation was notified. Appellant was declared as a successful tenderer and awarded the contract for three years - 2008-2011 on payment of licence fee. The licence fee, security deposit and performance guarantee required to be furnished for the works at Chennai Central and Egmore are as follows:

Name of the Place

Licence fee

Security Deposit

Performance Guarantee

Chennai Central Railway Station

Rs.40,00,000/- per annum payable in 3 Instalments

Rs.6,00,000/-

Rs.6,00,000/-

Egmore Railway station

Rs.18,48,000/- per annum payable in 3 Instalments

Rs.2,77,200/-

Rs.2,77,200/-

(ii) The tender notification was on 4.12.2007, technical bid was opened on 4.1.2008, financial bid was opened on 3.2.2008, contract was awarded to the Appellant on 11.4.2008 and the Southern Railway issued a letter of acceptance to the Appellant on 15.5.2008. By communication dated 17.6.2008, the first Respondent informed the Appellant about the sudden developments arising out the proceedings in W.P. No. 7143 of 2006 and the Divisional Office is constrained to temporarily suspend the acceptance of the offer made in respect of the advertisement location on the facade of the Station Buildings, both at the Chennai Central as well as Egmore Railway Stations. In so far as Chennai Central Railway Station, for two other locations, the Appellant was called upon to pay proportionate licence fee of Rs. 32,72,227/- . The Appellant sought to re-work the contract and requested the Southern Railway to facilitate speedy permissions to instal LE Ds at suitable locations. After correspondences and discussions, the locations were re-fixed and for the Central, for 3 locations, the original licence fee of Rs. 40,00,000/- was restored and the re-locations are as under:

Sr. No.

LOCATION

QTY

1

At the entrance to PF.Nos.12 & 11 facing MMC car park area Chennai Central

1 No.

2

At New concourse Facing booking counters near Luggage office Chennai Central

1 No.

3

At the entrance to PF No.6 (Instead of facade of the Station Building)

1 No.

In Egmore:

Sr. No.

LOCATION

QTY

1

On platform No.3 near SSE/AC coach office facing SMR room

1 No.

2

Near the exit of the car parking Area (Instead of facade of the Station Building)

1 No.

(iii) The Appellant remitted first year licence fee of Rs. 40,00,000/- for Chennai Central Railway Station and Rs. 18,48,000/- for Egmore Railway Station. For Chennai Central Railway station, the Appellant furnished Bank guarantee for Rs. 6,00,000/- (dated 22.9.2008) by the covering letter dated 24.9.2008. In so far as Egmore Railway Station, the Appellant furnished Bank guarantee dated 7.2.2008. By the letter dated 24.9.2008, the Appellant sought for permission to proceed with the work approved. By the letter dated 29.9.2008, the 1st Respondent - Southern Railway permitted the Appellant to execute the work and informed the 1st Respondent about the date of completion of work.

(iv) The case of Appellant is that the installation work has been delayed and that they have been sending communications to the Railways to extend the time for installation. By their letter dated 1.9.2008, the Appellant informed the 1st Respondent about the delay in execution of the work in Egmore and requested the first Respondent to permit the Appellant to carry out the work for erection of the structure for installation and operation. By the letter dated 10.11.2008, Appellant informed the 1st Respondent about the completion of LED installation at Chennai Central.

(v) The case of Appellant is that after series of deliberations, the screens could be installed much later and the screens could be put in place only in the 1st week of January 2009. Appellant has further averred that they have been sending communications that having regard to the flow of events to re-consider the agreement and "start date". The 1st Respondent sent notice to the Appellant stating that for Chennai Central, the contract period of three years commenced on 28.8.2008 and that the second year licence fee is payable on 28.8.2009. In so far as Egmore Station, it was informed that three years contract period commenced from 28.10.2008 and that the second year instalment of licence fee is payable on 28.10.2009. The 1st Respondent issued show cause notice on 8.12.2009 alleging that the Appellant has not paid the second year licence fee and that why the contract awarded should not be terminated for breach of the tender conditions. In response to the show cause notice, Appellant had sent the reply stating that they have been making personal representations and sending various letters requesting for re-fixation of contract period and requesting them to condone the delay. The 1st Respondent issued termination notice dated 17.3.2010 terminating the contract and informing the Appellant that after deducting the Bank Guarantee the balance due to be remitted by the Appellant is Rs. 17,86,667/- for Chennai Central and Rs. 4,52,760/- for Chennai Egmore. On the same day, service connection is said to have been disconnected and also sought to invoke the bank guarantee.

(vi) At that point, the Appellant had filed Section 9 applications in O.A. Nos. 653 and 657 of 2010 seeking for injunction restraining the 1st Respondent from in any manner invoking bank guarantee issued by the 2nd Respondent/IDBI Bank for Rs. 6,00,000/- and Rs. 2,77,200/- respectively. The Appellant averred that without considering the request of the Appellant to revise the terms of the agreement and without accepting any of the explanations given by the Appellant, the 1st Respondent threatened to invoke the bank guarantee and the 1st Respondent cannot act unilaterally and there is a bonafide dispute between the parties and the said dispute is subject to arbitration. The Appellant averred that due to the notices of termination, only Appellant is entitled to rescind the contract and seek for appropriate damages. Appellant averred that taking advantage of their dominant position the 1st Respondent threatened to invoke the bank guarantee without showing any actual loss or damage caused. Stating that the Appellant is intending to initiate arbitration proceedings and that Appellant has a prima facie case, Appellant has filed applications under Sections 9 of Arbitration and Conciliation Act.

(vii) The 1st Respondent resisted the applications contending as follows:

After the letter of acceptance was given, the Appellant sought for permission for new locations and in the mean time the 1st Respondent received notice in W.P. No. 7143 of 2006 on 22.4.2008 directing to remove all hoardings covering the facade of historic buildings in Chennai including Chennai Central and Egmore Railway Stations and therefore the acceptance was kept in abeyance. It was further stated that suspension was only in respect of one location and in respect of other locations, the 1st Respondent directed the Appellant to pay licence fee. In respect of the said location (facade of the building), the alternative places were shown at the entry point in platform No. 6 of the Chennai Central Railway Station and near the exit of the car parking area in Egmore Railway Station. A fresh letter of acceptance was issued with advice to pay the licence fee and therefore there was no loss caused to the Appellant and the Appellant should have commenced the work immediately. According to the 1st Respondent, by virtue of change of one location due to the Order of the High Court, the commencement of contract in respect of other two locations was not affected and as per the terms of the tender conditions, only 30 days time was granted for the purpose of execution of the contract and therefore the contract period was fixed from 28.8.2008 to 27.8.2011 for Chennai Central and from 28.10.2008 to 27.10.2011 for Egmore. Due to non-payment of licence fee for the second year and non-signing of the copy of the agreement, the Administration issued show clause notice and the reply received was not acceptable and therefore the contract was terminated on 17.3.2010 and final notice was sent to clear the dues. After the contract was terminated, the administration took steps to enforce the bank guarantee by writing to the 2nd Respondent - IDBI Bank on 12.4.2010, but the Appellant requested for 14 days time for making payment and in view of the same, the 1st Respondent requested IDBI Bank to wait until further advice. Subsequently, the Appellant requested 15 days time and finding that it was only dilatory tactics the 1st Respondent sent a demand in writing to IDBI Bank to enforce the bank guarantee and credit the same into Railway account. The 1st Respondent further alleged that the Appellant has not given any proper notice of arbitration proceedings. According to the 1st Respondent, that even after adjusting bank guarantee, amount of Rs. 22,39,427/- is still outstanding for Chennai Central and Rs. 8,77,200/- for Egmore.

3. After referring to irrevocable bank guarantee furnished by 1st Respondent and extracting clauses 10(b) 10(e) of the Tender notification, the learned single Judge held that as per Clause 11, failure on the part of the contractor in paying yearly licence fee will be treated as breach of contract and the Administration can either impose fine or terminate the contract forfeiting the amount without prejudice to the claim of damages. After extracting the terms of Bank guarantee and finding that Bank guarantee is irrevocable and unconditional, the learned single Judge further held that notwithstanding any dispute raised in the contract or suit, the liability of the Bank is absolute and unequivocal. After referring to the various decisions of the Supreme Court viz., Mahatma Gandhi Sahakra Sakkare Karkhane Vs. National Heavy Engg. Coop. Ltd. and Another, and Vinitec Electronics Private Limited Vs. HCL Infosystems Limited, and other decisions, the learned single Judge held that for granting injunction against encashment of unconditional bank guarantee, the two exceptional instances for granting injunction against invocation of Bank guarantee viz., (i) fraud and (ii) irretrievable injury are not made out by the Appellant, the learned single Judge declined to grant injunction. The learned single Judge further observed that in the absence of any plea of fraud in obtaining Bank guarantee and when the terms of Bank guarantee are independent, the Appellant is not entitled for the injunction claimed in the applications.

4. Being aggrieved by the refusal to grant injunction, the Appellants have preferred these appeals. The learned Counsel for the Appellant strenuously contended that the 1st Respondent has wantonly suppressed the order passed by

the High Court of Madras in W.P. No. 7143 of 2006 prohibiting the installation of LED display on the facade of the Station Buildings, which were heritage building. It was further contended that re-location of the place for installation of LED screens caused hardship and delay in commencement of installation and 1st Respondent is guilty of suppressio veri and suggestio false and is not entitled to invoke the bank guarantee and encash the same. The learned Counsel would further contend that the learned judge failed to note that the "start date" or date of commencement of the contract was never resolved between the parties despite several representations made by the Appellant and 1st Respondent arbitrarily fixed the contract period of three years i.e., from 28.8.2008 to 27.8.2011 for Chennai Central and from 28.10.2008 to 27.10.2011 for Egmore and fixed commencement of contract as 27.8.2008 for Central Station and 28.10.2008 for Egmore Station and thus the order of termination is unilateral and tinged with malafides. It was further contended that the learned Judge failed to note that the Appellant has invoked the arbitration clause in the contract to settle the dispute, but however, the 1st Respondent, being the appointing authority, has not honoured the request and the 1st Respondent has failed to appoint an arbitrator within 30 days and since the 1st Respondent has failed to perform their obligation, the Appellant is entitled to the interim injunction. In so far as encashment of bank guarantee, it was submitted that the Appellant has demonstrated that fraud was played on them and in the event of bank guarantee is encashed, irretrievable injury would be caused to the Appellant and therefore the learned single Judge ought to have granted interim injunction.

5. Contending that economic duress amounting to coercion and special equities, arisen from a particular situation like fraud, irretrievable injustice are some of the recognised exceptions available to the Plaintiff seeking injunction, the learned Counsel placed reliance upon a judgment of the single Judge of Bombay High Court in Dai-Ichi Karkaria Pvt. Ltd. Bombay v. Oil and National Gas Commission AIR 1992 Bombay 309). It was further submitted that the Bank guarantee is a conditional one and unless the condition precedent for enforcement of the bank guarantee is satisfied, the Appellant cannot be permitted to invoke the bank guarantee. Reliance was placed upon Mahatma Gandhi Sahakra Sakkare Karkhane Vs. National Heavy Engg. Coop. Ltd. and Another, .

6. Mr. Vellaisamy, learned Counsel for the 1st Respondent submitted that since the Appellant has not paid the licence fee at the start of the second year nor had executed the agreement, as per Clause 10(a) of General conditions of the tender and on account of failure of the terms, Railway Administration has rightly terminated the contract reserving its right to dispose of all the materials. It was further submitted that the Appellant had issued two performance bank guarantees - BG. No. 20080051BGPO321 dated 22.9.2008 for Rs. 6,00,000/- for Chennai Central and B.G. No. 20081291BGP0002 dated 7.2.2008 for Rs. 2,77,200/- for Egmore Railway Station and the Bank guarantees were invoked by the 1st Respondent and since no injunction was granted Bank had released the amount by way of Pay Order dated 29.12.2010 for Rs. 6,00,000/- for Chennai

Central and Rs. 2,77,200/- for Egmore Railway Stations. The learned Counsel would further submit that since the Bank guarantee amounts were already released to the 1st Respondent and in view of the subsequent development the present appeals are not maintainable against the 1st Respondent.

7. There is no denying that the agreement contains arbitration clause. Clause 21(1)(i) of the General Conditions of Contract deals with Demand for Arbitration. As per the said clause, in the event of any dispute or difference between the parties as to the construction or operation of the contract or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account, on demand, as stated in the said clause, the dispute or difference be referred to arbitration.

8. In the instant case, differences have arisen between parties as to the "start date" and as to the "validity of termination of the contract". As pointed out earlier, the Appellant offered for installation and operation of 3 Nos. of LED screens at Chennai Central Railway Station for a period of three years at a licence fee of Rs. 1,20,00,000/- (Rs. 40,00,000/- for each year) apart from security deposit of Rs. 6,00,000/- and Performance Guarantee of Rs. 6,00,000/- and the same was accepted by the Southern Railway by its communication dated 11.4.2008. As per the said communication, the contract period will commence from the date of actual display of advertisement or the 30th day from the date of acceptance of the contract whichever is earlier. In so far as Egmore, for installation of 2 LED screens, the Appellant offered licencee fee of Rs. 55,44,000/- (Rs. 18,48,000/- for each year), security deposit of Rs. 2,77,200/- and performance guarantee of Rs. 2,77,200/- .

9. By its letter dated 15.5.2008, the Appellant had sent "Letter of Acceptance". As stated above, the contract period will commence from the date of actual display of advertisement or the 30th day from the date of acceptance of the contract (15.5.2008), which ever is earlier. But by the letter dated 17.6.2008, the 1st Respondent informed the Appellant that owing to sudden developments arising out of the proceedings in W.P. No. 7143 of 2006, the Divisional Office is constrained to temporarily suspend the acceptance of Appellant''s offer made in respect of the advertisement location on the top of the Station Buildings at Chennai Central and Egmore and calling upon the Appellant to pay proportionate licence fee of Rs. 32,72,727/- for two locations in Chennai Central.

10. Again by its letter dated 30.7.2008, the 1st Respondent has re-fixed the locations as stated in paragraph No. 2(ii). Likewise, for Egmore Station, the location was re-fixed i.e., instead of facade of the Station, it was relocated near the exit of the car parking area. After relocation of the area for Chennai Central, on 19.8.2008, the Appellant has paid the first year licence fee of Rs. 40,00,000/- for the period 2008-2009 and also the security deposit for the said period. Submission of Performance Guarantee as per Clause 10(b) of General Conditions of the tender reads as under:

The successful tenderer should give a Performance Guarantee in the form of an irrevocable bank guarantee amounting to 5% of the total contract value worked out for three years. The bank guarantee should be valid up to 6 months in excess of the expiry of the contract period.

11. In compliance with Clause 10(b), the Appellant submitted Performance Bank Guarantee for Chennai Central dated 22.9.2008 issued by IDBI. In so far as Egmore, Bank guarantee dated 7.2.2008 was furnished by the Appellant by its covering letter dated 14.2.2008. Thus, after the change of location, Performance of Bank Guarantee for Chennai Central was submitted by the Appellant on 22.9.2008 and the 1st Respondent - Southern Railway permitted the Appellant to instal and operate 3 Nos. of LED screens at Chennai Central and 2 Nos. of LED screens at Chennai Egmore in the locations by its letter dated 29.9.2008. Since the Appellants were permitted to execute the work and installation only on 29.9.2008, going by the earlier correspondences, we feel from the said date i.e., 29.9.2008, 30 days time ought to have been given to the Appellant to enable the Appellant for installation of LED screens and execution of the work. We also feel that the date of expiry of 30 days from 29.9.2008 i.e., 28.10.2008 ought to have been fixed as the "start date". Notwithstanding the subsequent developments and change of locations, the 1st Respondent appears to have fixed the "start date" for Chennai Central as 28.8.2008 itself. On the said date, Railways had not even given the permission to instal LED screens in re-fixed locations. Of course, for Egmore, the 1st Respondent has fixed the "start date" as 28.10.2008, but according to the Appellant, due to "natural force and certain unavoidable reasons", the work has been delayed and requested for extension of time for installation, which, of course, is a matter to be decided by the arbitrator.

12. According to the 1st Respondent, in W.P. No. 7143 of 2006, and in the subsequent proceedings on 24.4.2008, the Madras High Court passed the orders for removing of hoardings covering facade of the historic buildings in Chennai Central and Chennai Egmore Railway Stations and Administration accordingly informed the Appellant of the developments. Further case of 1st Respondent is that as the letter of acceptance for the other two locations remains unaffected by the orders of the High Court, it was only lawful for the 1st Respondent to expect the Appellant/licensee to execute the contract and complete the payment formalities as per the time frame given in the tender in respect of the other two locations. The merits of the contention of the 1st Respondent is also a matter to be decided by the arbitrator.

13. After issuing show cause notice, by the letter dated 17.3.2010, the 1st Respondent issued termination notice stating that:

(i) for Chennai Central, the contract period of three years has commenced from 28.8.2008 and that the second year of the contract period of three years commenced on 28.8.2009, but the Appellant has not remitted the second year fee nor executed the agreement as per Clause 10(a) of the General conditions of the tender.

(ii) The contract period for Egmore Chennai has commenced from 28.10.2008 and the second year of the contract period of three years commenced on 28.10.2009 and that the Appellant had not remitted the second year licence fee and also not executed the agreement as per Clause 10(a) of the General Conditions of the tender.

14. In response to the termination notice, the Appellant had sent a detailed reply (dated 10.5.2010) stating that:

In view of the flow of events and subsequent developments, Appellant was repeatedly requesting the 1st Respondent to revise terms of agreement and that hardship was caused due to the change of location and delay in issuing the letter granting permission.

The Appellant could commence operations only on 29.12.2008 both in Chennai Central and Egmore stations.

Requesting to waive the charges for the period from 28.8.2008 till 28.12.2008 in so far as Chennai Central Station is concerned and for the period from 28.10.2008 till 28.12.2008 in so far as Egmore Railway Station and to withdraw the termination notice.

15. Because of the change of location and the time taken in issuing the letter granting permission (29.9.2008), we are of the view that the Appellant has genuine dispute as to:

(i) start date and

(ii) validity of the termination notice, which are to be decided only by the arbitrator. According to the Appellants, they had difficulties in erecting LED screens and that they have been corresponding with the 1st Respondent seeking its guidance and compliance of further formalities and they have been requesting to revise the terms of contract. In our considered view, the Appellant has made out a case for referring the matter to arbitration.

16. The learned single judge referred to various clauses in the tender notification and also referred to Clause 11, which deals with the termination and the said Clause 11 reads as under:

The Licence fee quoted for three years shall be divided into three equal parts and the first part should be paid for the first year in full, in advance before the commencement of the contract. The second part of the License fee shall be paid in full at the start of the Second year and third part should be paid in full at the start of the third year. Any failure in this regard will be reckoned as breach of contract on the part of the licensee and Railway Administration shall have the right to take action deemed fit including imposition of fine, termination of contract duly forfeiting the amounts paid in advance without prejudice to its rights to claim ascertained liquidated damages.

Clause 16 deals with termination of the contract, which reads as under:

In the event of the successful Tenderer not complying with any of the conditions stipulated to the satisfaction of the Railway Administration, the Railway administration shall have the right to terminate the contract and take any action deemed fit including forfeiture of all amount paid in advance without prejudice to its right to claim damages from the successful Tenderer.

Having regard to the limited scope involved in these appeals, we do not propose to go into the contentions raised as to the validity of the termination. Suffice it to note that we are of the view that what ever be the observations of the learned single Judge as to the clauses of the tender Notification, those observations shall be subject to the findings of the arbitrator, if any, to be appointed for resolving the dispute/differences between the parties.

17. In so far as the application u/s 9 of the Arbitration and Conciliation Act, the Appellant seeks for injunction restraining the 1st Respondent from invoking the bank guarantee. After referring to various clauses, the learned single Judge proceeded to hold that invoking of bank guarantee is independent and irrevocable. After extracting clauses 3 and 4 of the Bank guarantee, the learned single Judge held that the undertaking by the Bank to pay to the 1st Respondent on demand is notwithstanding any dispute raised in the contract or suit and the Bank''s liability is absolute and unequivocal.

18. In an application u/s 9 of the Arbitration and Conciliation Act, while considering the question of grant of interim relief, the underlying principles for grant of injunction as applicable in a proceedings under Order 39 Rules 1 and 2 of the CPC would be applicable. For the Court to grant an injunction, it must be broadly satisfied as to three conditions - existence of prima facie case, balance of convenience and irreparable loss or injury. Even if a prima facie case existed in favour of a party, the Court will grant no injunction if there is no irreparable loss or injury.

19. Mr. S.R. Rajagopal, learned Counsel appearing for the Appellant has contended that even though it is well settled principle that Courts would not normally grant injunction to restrain encashment of Bank guarantees, there are certain exceptions carved out to the said well settled principles. Placing reliance upon a decision of single Judge of Bombay High Court in the case of Dai-ichi Karkaria Private Ltd., Bombay Vs. Oil and Natural Gas Commission Bombay and another, , it was contended that economic duress amounting to coercion, special equities arising from a particular situation, fraud, irretrievable injustice are some of the recognised exceptions available to the Plaintiff seeking injunction. It was further submitted that in view of flow of events and change of locations, the 1st Respondent caused delay in issuing permission for erection, which has caused undue hardship to the Appellant. It was further submitted that even though the 1st Respondent was aware of the order passed by the High Court in W.P. No. 7143 of 2006 prohibiting the erection of LED screens/advertisements in the facade of the heritage buildings, suppressing the same, the 1st Respondent proceeded to issue the tender and thus by its fraudulent conduct the 1st

Respondent is guilty of suppressio veri and suggestio false and therefore this is an appropriate case, where the learned single Judge ought to have exercised discretion in granting injunction restraining the 1st Respondent from invoking the bank guarantee.

20. The above decision of the learned single Judge of the Bombay High Court is much prior to the various decisions of the Supreme Court. The facts of the case before the learned single Judge of the Bombay High Court were different from the case on hand and therefore the Appellant cannot rely upon the views of the learned single Judge as the same cannot be applied to the case on hand.

21. Considering the scope of grant of injunction from invoking the bank guarantee, in Ansal Engineering Projects Ltd. Vs. Tehri Hydro Development Corporation Ltd. and Another, , the Supreme Court held as follows:

A bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction and the primary contract between the person at whose instance the bank guarantee is given and the beneficiary.... 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. Commitment of banks must be honoured free from interference by the courts and it is only in exceptional cases, that is to say, in case of fraud or in a case where irretrievable injustice would be done if bank guarantee is allowed to be encashed, the court should interfere....

22. In the case of Federal Bank Ltd. v. V. Mjog Engineering Ltd. and Others (2001) 10 SCC 663), the Supreme Court held as under:

Courts ought not to grant injunction to restrain encashment of bank guarantees or letters of credit. Two exceptions have been mentioned - (i) fraud, and (ii) irretrievable damage. If the Plaintiff is prima facie able to establish that the case comes within these two exceptions, temporary injunction under Order 39 Rule 1 CPC can be issued. The contract of the bank guarantee or the letter of credit is independent of the main contract between the seller and the buyer.... In case of an irrevocable bank guarantee or letter of credit the buyer cannot obtain injunction against the banker on the ground that there was a beach of the contract by the seller. The bank is to honour the demand for enactment if the seller prima facie complies with the terms of the bank guarantee or the letter of credit, namely, if the seller produces the documents enumerated in the bank guarantee or the letter of credit....

23. In Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Company, , the Supreme Court held as under:

While dealing with an application for injunction in the course of commercial dealings, and when an unconditional bank guarantee or letter of credit is given or accepted, the beneficiary is entitled to realise such a bank guarantee or a letter of credit in terms thereof irrespective of any pending disputes relating to the terms of the contract. In the matter of invocation of a bank guarantee or a letter of credit, it is not open to the bank to rely upon the terms of the underlying contract between the parties. The bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. Since a bank guarantee or a letter of credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of bank guarantees or letters of credit.

The courts should be slow in granting an order of injunction to restrain the realisation of a bank guarantee or a letter of credit. There are two exceptions for grant of an order of injunction to restrain the enforcement of an unconditional bank guarantee or a letter of credit: (i) fraud of an egregious nature committed in the notice of the bank which would vitiate the very foundation of the guarantee or letter of credit and the beneficiary seeks to take advantage of the situation; and (ii) injustice of the kind which would make it impossible for the guarantor to reimburse himself or would result in irretrievable harm or injustice to one of the parties concerned. Except under these circumstances, the courts should not readily issue injunction to restrain the realisation of a bank guarantee or a letter of credit.

So far as the first exception is concerned i.e., of fraud, one has to satisfy the court that the fraud in connection with the bank guarantee or letter of credit would vitiate the very foundation of such a bank guarantee or letter of credit. 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....

To avail of the second exception, it has to be decisively established that there exist exceptional circumstances which would make it impossible for the guarantor to reimburse himself if he ultimately succeeds. Clearly, a mere apprehension that the other party will not be able to pay, is not enough.

24. The position of law regarding enforcement of bank guarantee is fairly well settled. Enforcement is in terms of the guarantee. Then the Courts must not interfere with the enforcement of Bank guarantee. The Court can grant injunction restraining enforcement of bank guarantee only in two exceptional circumstances viz., (i) fraud and (ii) irretrievable injury. Except under those circumstances, the Courts should not readily issue injunction restraining the realisation of a bank guarantee.

25. Even though on behalf of Appellant it was contended that the 1st Respondent played fraud by suppressing the facts about the Writ Petition, as seen from the

various correspondences, the Appellant also agreed for re-location of the place instead of the facade of the Chennai Central and Egmore Railway Stations and the Appellant also agreed for re-location of the place for erection of LED screens. The Appellant was communicating with the 1st Respondent to revise the terms of the agreement and re-fix the "start date". The Appellant seeks for relief of injunction mainly on the equitable grounds that by change of location, execution work was delayed. The special circumstances, which had been pleaded in this case, are that there is a serious dispute on the question as to who was responsible for the delay and as to "start date" and "validity of termination". But on those equitable grounds, the Court cannot grant injunction in respect of commitment made by the Bank in Bank guarantee. The guarantee furnished by the Bank is independent and irrevocable.

26. As discussed earlier, indeed, the Appellant has raised a genuine dispute and it is a fit case for arbitration. But the undertaking of the Bank to pay to the Southern Railway on demand is notwithstanding any dispute raised in the contract or suit etc., and the liability is absolute and unequivocal. Having regard to the unequivocal undertaking by the Bank, the learned single Judge rightly declined to grant injunction. In so far as irretrievable injury, it is not the case of the Appellant that in the event of its succeeding before the arbitration, it would not be in a position to recover the amount from the 1st Respondent - Railway Administration so as to establish a case of balance of convenience in granting injunction against invoking the Bank guarantee.

27. After dismissal of the applications, the 1st Respondent - Railway Administration is also said to have encashed both the performance bank guarantees - BG. No. 20080051BGPO321 dated 22.9.2008 for Rs. 6,00,000/- for Chennai Central and B.G. No. 20081291BGP0002 dated 7.2.2008 for Rs. 2,77,200/- for Egmore Railway Station and since no injunction was granted, Bank had released the amount by way of Pay Order dated 29.12.2010 for Rs. 6,00,000/- for Chennai Central and Rs. 2,77,200/- for Egmore Railway Stations. Since the amounts were received by the 1st Respondent, prayer for injunction has now become redundant. The learned Counsel would further submit that since the Bank guarantee amounts were already released to the 1st Respondent and in view of the subsequent development, the present appeals are not maintainable against the 1st Respondent.

28. Accepting the contention of Appellant that the LED screens require periodical maintenance and that they should be operational, by our order dated 15.06.2011, we directed the 1st Respondent to permit the Appellant to remove the LED screens and the equipments and further directed the 1st Respondent to comply with the Order before 22.06.2011. Later, on 22.06.2011, the 1st Respondent has submitted that the 1st Respondent has a claim of more than Rs. 22,00,000/- from the Appellant and therefore sought for appropriate guarantee for the said amount. By our Order dated 22.06.2011, we have extended time for removal of LED screens and other accessories till 27.06.2011. On 27.06.2011,

we have heard arguments in the main appeals itself and in such view of the matter, we have reserved the judgment in the main appeals and our Orders dated 15.06.2011 and 22.06.2011 were directed to be kept in abeyance.

29. Before we part with the mater, one aspect needs to be mentioned. As pointed out earlier, the Appellant has made out a genuine case for referring the matter to arbitration. Learned Counsel for Appellant submitted that inspite of the Appellant''s request for arbitration, the 1st Respondent has not referred the matter to arbitration. Therefore, considering the facts and circumstances of the case, we of the considered view that if any such request for referring the matter to arbitration was already made by the Appellant, it would be appropriate for the 1st Respondent to immediately refer the matter to arbitration. If no such request has been made sofar, the Appellant is at liberty to make such request to refer the matter to arbitration. On such request being made, notwithstanding the time prescribed in the terms of the agreement, the 1st Respondent shall refer the matter to arbitration.

30. In the result, the appeals are disposed of with the observation that the realisation of amount by invoking Bank guarantee is subject to the outcome of the arbitration proceedings. As observed in paragraph No. 29, we direct the 1st Respondent to refer the matter to arbitration if any request was already made by the Appellant for arbitration. If no such request has been made by the Appellant sofar, the Appellant is at liberty to make a demand for referring the matter to arbitration within a period of four weeks from the date of receipt of copy of this order and the 1st Respondent is directed to refer the matter to arbitration notwithstanding the time prescribed in the terms of the agreement between the parties. However, there is no order as to costs. Consequently, the connected miscellaneous petitions are closed.

