(2006) 04 DEL CK 0123

In the Delhi High Court

Case No : Regular First Appeal 578 of 2004 and CM 14291 of 2004

Punj Lloyd Insulations Ltd. APPELLANT

Vs

State Bank of India and Another RESPONDENT

Date of Decision : 27-04-2006

Acts Referred:

Citation : AIR 2006 Delhi 256 : (2006) 1 CTLJ 209

Hon'ble Judges : Swatanter Kumar, J;S.L. Bhayana, J

Bench : Division Bench

Advocate : Non, for the Appellant; Rajiv Kapur, for R1 and Manish Singhvi, for R2, for the Respondent

Final Decision : Dismissed

Judgement

Swatanter Kumar, J.—Punj Lloyd Insulations Limited is a company duly registered under the Companies Act, 1956 filed a suit for injunction praying for grant of a decree for permanent injunction in favor of the plaintiff and against defendant No. 2, restraining him from encashing the bank guarantee dated 8.11.99 which was valid up to 30th September, 2001. Separate injunction is prayed for against the bank/defendant No. 1 for making any payment under the said bank guarantee to defendant No. 2. In the plaint it was stated by the plaintiff that they had entered into an agreement for supply and application job of thermal insulation to the equipment and pipe work for the Paradeep Phosphate Fertilizer of the defendant No. 2. On 6.11.99 the work was awarded to the plaintiff. The plaintiff was required to furnish bank guarantee towards mobilisation advance and performance of the contract to the extent of 10% and 5% respectively of the agreed value of contract which was Rs. 2.50 crores. The plaintiff furnish two bank guarantees issued by defendant No. 1 towards the mobilisation advance and the performance bank guarantees valid up to 17th May, 2000 with invocation period up to 17.11.02. It is the case of the plaintiff that during the execution of the work defendant No. 2 changed the scope of the work and the work material requirement was revised by the plaintiff from time to time to suit the need of defendant No. 2 in the suit. The work done by the plaintiff beyond the scope of the contract was duly informed to the concerned defendant and financial implication in the performance of extra item was agreed between the parties. The plaintiff''s claim to have performed the contract to the satisfaction of the concerned defendant and the entire work was completed by the plaintiff on 30th March, 2000. Due to the amendments to the scope of the work total value of the work was increased to Rs. 2,73,28,681.47 which was also certified by the defendants. In fact, on 12th April, 2000 the defendant issued a certificate of completion of work and it was certified that the work and the project was carried out in a very professional manner with intricate planning. Complete amount of mobilisation advance was duly recovered by defendant No. 2 and the plaintiff requested defendant No. 2 to return the bank guarantee towards mobilisation advance duly discharged by defendant No. 2. The plaintiff had also requested for release of the balance payment. The mobilisation bank guarantee was returned to the plaintiff on 17th May, 2000. Vide letter dated 13th June, 2000 the value of the contract was increased and the plaintiff requested defendant No. 2 for release of its balance payment of Rs. 84,75,437.75. After various meetings a sum of Rs. 25 lacs was released on 1st December, 2000 but the balance amount of Rs. 8,12,421.87 was not paid. The plaintiff had been writing to the defendants for release of the payments and had so stated vide their letter dated 23rd July, 2001. It was also requested that the bank guarantee which had been submitted toward 12 months performance period, which had expired on 31st March, 2001 be also returned duly discharged to the plaintiff. But defendant No. 1 on 30th July, 2001 found that the defendant No. 2 had made a claim dated 26th July, 2001 for encashment of the bank guarantee alleging that the plaintiff had failed to fulfill the terms of the purchase order in question. According to the plaintiff, the defendants had no right whatsoever keeping in view the certificate, release of mobilisation advance, settlement of other accounts and keeping in view that still some amount was due from the defendants there was no justification whatsoever with the defendants to encash the bank guarantee and in any case there could be no breach of terms and conditions of the contract as the letter of invocation was beyond the terms of the bank guarantee. On these facts the suit for injunction was filed. The suit was contested by the defendants particularly defendant No. 2 who stated that the bank guarantee was an independent contract and defendant No. 1 was bound to pay the said amount without delay as the bank guarantee was unconditional and unequivocal. Relying upon the clauses of the bank guarantee and the letter of invocation, it is submitted that the defendants always had a right to invoke the bank guarantee. The case of the plaintiff was stated to be not falling in any of the exception which could be made for seeking an order of injunction for encashment of bank guarantee. In terms of the bank guarantee the defendant has all the right to invoke the same. The plaintiff has deceived the Defendant and has fraudulently received excess payment in execution of the contract and has thereby failed to observe and fulfill terms of the works contract dated 6.11.1999 with its amendments from time to time. While making reply on merits, in reply to Para 6 & 7 the defendants submitted as under :

The contents of para 6-7 are wrong and are denied. In this para the plaintiff has deliberately and intentionally suppressed certain material facts in order to mislead this Court. It is submitted that the plaintiff had completed the work by 31.03.2000 only in respect of the original contract dated 06.11.1999. It is an admitted case that the scope of the contract dated 06.11.1999 was enhanced from time to time and last such enhancement took place on 11.06.2000, which is a date much after the alleged completion date of 13.03.2000. In fact no completion certificate can be valid which is issued even before complete execution of contract. The alleged completion certificate has been procured by the plaintiff in connivance and collusion with some of the staff members of the Defendant. So far as the allegation of certification by the answering Defendant is concerned, it was only with respect to initial contract dated 06.11.1999 and has no bearing and/or as far as the agreement of bank guarantee is concerned. The plaintiff has not only failed to perform the entire contract but have also fraudulently and in collusion received excess payment.

2. Keeping in view the above pleadings of the parties, the learned Trial Court vide judgment and decree dated 2.11.04 dismissed the suit of the plaintiff. The plaintiff aggrieved from the said judgment and decree of the Trial Court has filed the present appeal.

3. The learned trial court while dismissing the suit of the plaintiff relied upon the judgments in the cases of Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineering Works (P) Ltd. and anr. 1997(2) ALR 350 , Hindustan Steel Works Construction Ltd. Vs. Tarapore and Co. and another, and National Highway Authority of India Vs. Ganga Enterprises and Another, and found that the terms of the bank guarantee were conclusive and the bank was bound to honour the invocation. The court also while noticing the judgments relied upon by the plaintiff in the cases of Hindustan Construction Co. Ltd. Vs. State of Bihar and Others, and Gujarat Optical Communication Ltd. v. Department of Telecommunication and Anr. 87(2000) DLT 859 found that the case of the plaintiff was not covered under any of the exceptions provided and as such, no injunction could be issued.

4. Before the court can examine the merit or otherwise of the impugned decree, reference to the terms of the bank guarantee would be necessary as that is the moot point for determination. There is no dispute to the fact that the appellant had furnished a performance guarantee. The performance guarantee dated 17.11.1999 was obviously for adhering to the terms and conditions of the contract in terms of performance for the work covered under the contract. In the recitals of the bank guarantee, there is merely a reference to the terms of the contract to the extent that the company was furnishing the bank guarantee to the extent of Rs. 12,50,000/- and the relevant clauses having bearing on the controversy in issue read as under:-

1. In consideration of the premises and your placing the said Contract on the contractor, the Bank hereby unconditionally and irrevocably guarantees to the owner due and faithful observance and fulfilment and performance by the contractor of the terms of the said contract and the said Scope of work and of the performance warranty which is a part of the said Contract and agrees to undertake that, if the owner notifies to the Bank that the Contractor has failed to observe, perform and fulfill the terms of the said Contract and/or the performance warranty, then the Bank shall immediately pay to the owner, on the owner''s mere demand, such sum or sums of money to the extent of Rs. 12,50,000/- being 5% of the value of the said Contract on account of losses and damages suffered by the owner as may be claimed by the owner by reason of such non-observance and non-fulfilment by the contractor as aforesaid and shall also indemnify the owner against all losses and damages which may be suffered by the owner as aforesaid and against all costs, charges, expenses which may be incurred by the owner in connection herewith. The Bank shall pay the said amount to the owner without demur or protest or without recourse to the Contractor. Any such demand placed on the Bank shall be conclusive with respect to the amount due and payable by the Bank under this guarantee.

2. This guarantee is a continuing guarantee and not revocable except with the previous written consent of the owner, and save as aforesaid, it will continue in force until the Contractor has fulfilled the said performance warranty and all other terms and conditions of the said Contract i.e. on or before 17.05.2000.

3. The owner may, without affecting Bank''s liabilities and obligations hereunder and without reference to the Bank grant time or other indulgence to or compound with the contractor or enter into any agreement or agree to forbear to enforce any of the terms and conditions of the said Contract against the Contractor or agree to vary any of the terms and conditions of the said Contract.

7. This Guarantee shall continue to be in force notwithstanding the discharge of the contractor by operation of law and shall cease only on payment of the full amount by the Bank to the owner of the amount hereby secured and on the claim of the owner against the contractor in respect of the said Contract being satisfied.

5. Vide letter dated 26th July, 2001, the beneficiary had invoked the bank guarantee in terms of the bank guarantee and the relevant extract of the said letter reads as under:-

This has reference to Bank Guarantee No. 0480399BG000184 dated 08.11.99 and its Amendment dated for Rs. 13,65,476/-(Rupees Thirteen Lacs Sixty Five Thousand Four Hundred Seventy Six only), photocopy of the Guarantee is enclosed, issued by you in our favor on behalf of M/s. Punj Lloyd Insulations Ltd., 18,Nehru Place, New Delhi -110 019.

We hereby notify & confirm to you that the said supplier has failed to perform and fulfill the terms of the Purchase Order No. OCFL/INSUL/ND/571 dated 6th

November, 1999. In exercise of the terms of the Bank Guarantee, we hereby make a claim on you for full payment of Rs. 13,65,476/- secured to be paid to us under the above said Bank Guarantee.

You are requested to issue and send us a Cheque in favor of Oswal Chemicals & Fertilizers Ltd. for Rs. 13,65,476/- payable at New Delhi. On receipt of the above Cheque we will surrender the original Bank Guarantee to you in the manner as may be desired by you.

6. The bare reading of the terms and conditions of the bank guarantee conveys that they are unconditional, unequivocal and recourse to the company furnishing the bank guarantee prior to its invocation was not the requirement of the contract. Furthermore, the breach of terms and conditions of the contract is a matter which the court is precluded from examining in a suit for injunction relating to encashment of the bank guarantee. Breach of terms and conditions would, thus, be beyond the scope of judicial scrutiny in such matters. According to the beneficiary, the company has committed breach of the terms and conditions of the agreement while according to the company it has satisfactorily performed the contract. There is no doubt that the certificate dated 12.4.2000 was issued by the beneficiary. The short question is whether despite issuance of this certificate, they still have a right to invoke the bank guarantee or not?

7. As we have discussed above and it has specifically been referred to by the respondents in the appeal that the work scope was enlarged and the respondents were continuing to perform the enlarged work in relation to which they have committed various breaches. The basic ground taken by them is fraudulent receipt of excess payment and not performing the contract (extended work) as per the terms and conditions of the contract. It will not be appropriate for the court to examine the merit of these two contentions. The controversies arising from the terms and conditions of the contract would apparently be beyond the purview and scope of the suit. The certificate dated 12.4.2000 was furnished in relation to the work awarded under the contract dated 6.11.99 and where-after it is an admitted case between the parties that scope of the work was extended and the complaint/breaches are relatable to such extended work which was duly accepted and carried on by the present appellant. From the record before the learned trial court, we have perused various documents and it is clear even from the letter dated 3.2.2001 written by the appellant to the beneficiary company stating that the work awarded for supply and application of thermal insulation to the equipment and pipe work for Paradeep Phosphatic fertilizer project at Paradeep, Orissa was only for the value of Rs. 250 lacs. But after review meeting the scope was finalized and thereafter they were asked to execute some more area in DAP train A & B. The appellant was asked to submit final bill for the work done till 31st March 2000 and thereafter according to the appellant they were asked to execute some extra work/rework during commissioning of the plant and again in April and May, 2000 they were asked to do some extra rework and even amended order dated 13.6.2000 for a total value of Rs. 2,78,41,634/- was issued

to them. The relevant part of this letter can be usefully referred at this stage:-

We were again asked to do some extra rework arising due to commissioning activities in SAP train B, SAP train A, DAP train A and accordingly we had completed the job in time as per your schedule & submitted our bill No. PLIL/0072/RA-1 dated 29.05.2000 for the work done up to 12.5.2000. Accordingly we were issued an Amendment No. -IV dated 13.06.2000 for a total value of Rs. 2,78,41,634.00.

As explained above, if any perceived delay in completion of job, it is solely attributable to delays in release of work fronts.

8. In face of the above case of the appellant themselves, they can not be permitted to argue that the certificate issued on 12.4.2000 was for completion of the work awarded to them and would serve as a clearance certificate depriving the beneficiary company of right to encash the bank guarantee for performance breach of the terms and conditions of the contract. The argument raised on behalf of the respondents is with some merit as at the very time of their filing the written statement in para 6 & 7 of reply on merits they had clearly stated about the extended work. They had raised the specific plea that no completion certificate can be valid which is issued even before completion of the execution of the contract.

9. In order to more appropriately examine the intent of the submissions made by the learned Counsel appearing for the parties, reference is made as under to the law relating to invocation of the bank guarantee which was examined by this Court in its recent judgment in the case of M/s. Sanrachna Multipurpose Consultancy Services Pvt. Ltd. v. National Highways Authority of India (NHAI), OMP 311/2005 decided on 8.12.2005:-

Before merits of the above contentions are discussed, it will be useful to refer to a recent judgment of this Court in the case of M/s. Hindustan Construction Co. Ltd. and Anr. v. Satluj Jal Vidyut Nigam Ltd. (OMP 213/2005) decided on 24.11.2005, where the Court after discussing various judgments of the Supreme Court and this Court, held as under :-

10. The learned Counsel appearing for the applicants while relying upon the judgments in the cases of Hindustan Construction Co. Ltd. Vs. State of Bihar and Others, and Hindustan Steel Works Construction Ltd. Vs. Tarapore and Co. and another, has emphasized that the respondent has acted contrary to the terms of the contract and the prescribed performance period having not expired, they have no jurisdiction to encash the bank guarantees and they are causing irretrievable injustice and injury to the plaintiffs/applicants by invoking those guarantees. In fact, such actions, if permitted to mature would entirely frustrate the determinative findings recorded by the prescribed Forums. All this being a fraudulent act of the respondents, they would be liable to be injuncted and the applicants would be entitled to the protection by grant of an interim order.

11. On the contrary, the learned Counsel appearing for the respondent while relying upon the judgments in Daewoo Motors India Ltd. Vs. Union of India (UOI) and Others, , Federal Bank Ltd. Vs. V.M. Jog Engineering Ltd. and Others, Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works (P) Ltd., and another, , AIR 1997 1644 (SC) , Hindustan Steel Works Construction Ltd. Vs. Tarapore and Co. and another, and a judgment of Delhi High Court in the case of Neeman Medical International v. Dr. Guillermo Rodriguez Gomez and Ors. in CS(OS) No. 2193/2003 dated 13th August, 2004 strongly contended that bank guarantee is an independent contract between the beneficiary and the bank. The bank guarantee is unconditional and the respondent has already invoked the same, thus, the obligation on the part of the bank to pay the amount on demand is absolute and the case of the applicants does not fall in the exceptions carved out in the case of AIR 1997 1644 (SC) . It is also contended that the terms of the bank guarantee have to be examined with the letter invoking the bank guarantee and reference to other documents would be unnecessary. The petitioners have not pleaded any fraud in connection with the execution of the bank guarantee or the principal contract and the respondent has invoked the bank guarantee in its terms. The commitment of the bank has to be honoured free from the interference by the court and in any case, the case of the petitioners does not fall even in the classes stated by the Supreme Court in the case of Hindustan Steelworks Construction Ltd. (supra). While relying upon this judgment, it is also contended that even if the disputes have been referred to arbitration and are pending adjudication then it cannot be stated that amounts are not due and payable by the contractor to the respondent until pronouncement of the award.

12. The various judgments relied upon by the learned Counsel appearing for the parties would show that the law in relation to encashment of bank guarantee has attained wider dimensions with the passage of time. Originally, the only exception carved out to encashment of bank guarantee unconditionally was, fraud. However, subsequent judicial pronouncements have extended this scope by adding other class of cases which would fall in this exception - Cases of irretrievable injury, fraud, extraordinary special equities and invocation of bank guarantee being not in terms of the bank guarantee itself. It is very difficult to draw any straitjacket formula which would universally apply to all the cases. The Court would have to examine each case in order to find out whether the case falls in any or more of the afore-stated classes.

13. In the case of Hindustan Steelworks Construction Ltd. (supra), the Supreme Court stated the principle that in case of an unconditional bank guarantee, the nature of obligation of the bank is absolute and not dependent upon any dispute or proceeding between the party at whose instance the bank guarantee is given and the beneficiary. The only two exceptions were - fraud, which was not pleaded in that case, and the other was special equities. Special equities were claimed on the basis as to who had committed breach of the contract. Determination of disputes was stated to be not a factor which would be sufficient to make the case as exceptional case justifying interference by the court restraining invocation of

the bank guarantee.

14. In the case of Ansal Engineering Projects Ltd. Vs. Tehri Hydro Development Corporation Ltd. and Another, , the Supreme Court further added the principle of irreparable injury by proof of special equity to the existing two classes of cases where the court could restrain the encashment of a bank guarantee. It was also stated that at the stage of invocation of bank guarantee, the need for final adjudication and decision on the amount due and payable by the petitioner would not be a condition precedent as it would run contrary to the terms of the special contract i.e. the bank guarantee.

15. In the case of UP State Sugar Corporation (supra), the Supreme Court after detailed discussion of the law on the subject while spelling out the principles guiding invocation of bank guarantee and the circumstance where the court would or would not grant an injunction held as under:-

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 (1984) 1 All ER 351

The wholly exceptional case where in 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 realisation of the bank guarantee.

13. The same question came up for consideration before this Court in Svenska Handelsbanken Vs. M/s. Indian Charge Chrome and others, . This Court once again reiterated that a confirmed bank guarantee/irrevocable letter of credit cannot be interfered with unless there is established fraud or irretrievable injustice involved in the case. Irretrievable injury has to be of the nature noticed in the case of Itek Corporation. v. First National Bank of Boston 566 Fed Supp 1210 . On the question of fraud this Court confirmed the observations made in the case of U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd., and stated that the fraud must be that of the beneficiary, and not the fraud of anyone else.

14. On the question of irretrievable injury which is the second exception to the

rule against grating 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 Corporation Case 566 Fed Supp 1210. 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 favor 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 purchaser 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 566 Fed Supp 1210 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.

15. Our attention was invited to a number of decisions on this issue/ among them, to Larsen and Toubro Limited Vs. Maharashtra State Electricity Board and others, and Hindustan Steel Workers Construction Ltd. Vs. G.S. Atwal and Co. (Engineers) Pvt. Ltd., as also to National Thermal Power Corporation Ltd. Vs. M/s. Flowmore Private Ltd. and another, . The latest decision is in the case of State of Maharashtra and another Vs. M/s. National Construction Company, Bombay and another, where this Court has summed up the position by stating: (SCC p.741, para 13)

The rule is well established that a bank issuing a guarantee is not concerned with the underlying contract between the parties to the contract. The duly of the bank under a performance guarantee is created by the document itself. Once the documents are in order the bank giving the guarantee must honour the same and make payment ordinarily unless there is an allegation of fraud or the like. The courts will not interfere directly or indirectly to withhold payment, otherwise trust in commerce internal and international would be irreparably damaged. But that does not mean that the parties to the underlying contract cannot settle the disputes with respect to allegations of breach by resorting to litigation or arbitration as stipulated in the contract. The remedy arising ex contractu is not barred and the cause of action for the same is independent of enforcement of the guarantee.

The other recent decision is in Hindustan Steel Works Construction Ltd. Vs. Tarapore and Co. and another, .

16. Clearly, Therefore, the existence of any dispute between the parties to the contract is not a ground for issuing an injunction to restrain the enforcement of bank guarantees....

16. In the case of Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineering works (P) Ltd. and Anr. (supra), the Supreme Court held as under:-

21. Numerous decisions of this Court rendered over a span of nearly two decades have laid down and reiterated the principles which the courts must apply while considering the question whether to grant an injunction which has the effect of restraining the encashment of a bank guarantee. We do not think it necessary to burden this judgment by referring to all of them. Some of the more recent pronouncements on this point where the earlier decisions have been considered and reiterated are Svenska Handelsbanken Vs. M/s. Indian Charge Chrome and others, , Larsen and Toubro Limited Vs. Maharashtra State Electricity Board and others, , Hindustan Steel Workers Construction Ltd. Vs. G.S. Atwal and Co. (Engineers) Pvt. Ltd., and AIR 1997 1644 (SC) . The general principle which has been laid down by this Court has been summarised in the case of AIR 1997 1644 (SC) as follows: (SCC p.574, para 12)

The law relating to invocation of such bank guarantees is by now well settled. When the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, Therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take the advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country.

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 (1984) 1 All ER 351, CA 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. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd., .

22. The second exception to the rule of granting injunction, i.e., the resulting of irretrievable injury, has to be such a circumstance which would make it impossible for the guarantor to reimburse himself, if he ultimately succeeds. This will have to be decisively established and it must be proved to the satisfaction of the court that there would be no possibility whatsoever of the recovery of the amount from the beneficiary, by way of restitution.

17. In the case of Hindustan Construction Co. Ltd. (supra), the Supreme Court while specifying the need for invoking the bank guarantee strictly as per terms of the bank guarantee and by the authority competent to do so held as under:-

8. Now, a bank guarantee is the common mode of securing payment of money in commercial dealings as the beneficiary, under the guarantee, is entitled to realise the whole of the amount under that guarantee in terms thereof irrespective of any pending dispute between the person on whose behalf the guarantee was given and the beneficiary. In contracts awarded to private individuals by the Government, which involve huge expenditure, as for example, construction contracts, bank guarantees are usually required to be furnished in favor of the Government to secure payments made to the contractor as "advance" from time to time during the course of the contract as also to secure performance of the work entrusted under the contract. Such guarantees are encashable in terms thereof on the lapse of the contractor either in the performance of the work or in paying back to the Government "advance", the guarantee is invoked and the amount is recovered from the bank. It is for this reason that the courts are reluctant in granting an injunction against the invocation of bank guarantee, except in the case of fraud, which should be an established fraud, or where irretrievable injury was likely to be caused to the guarantor. This was the principle laid down by this Court in various decisions. In U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd., the law laid down in Bolivinter Oil SA v. Chase Manhattan Bank (1984) 1 All ER 351 was approved and it was held that an unconditional bank guarantee could be invoked in terms thereof by the person in whose favor the bank guarantee was given and the courts would not grant any injunction restraining the invocation except in the case of fraud or irretrievable injury. In Svenska Handelsbanken Vs. M/s. Indian Charge Chrome and others, , Larsen and Toubro Limited Vs. Maharashtra State Electricity Board and others, , Hindustan Steel Workers Construction Ltd. Vs. G.S.

Atwal and Co. (Engineers) Pvt. Ltd., , National Thermal Power Corporation Ltd. Vs. M/s. Flowmore Private Ltd. and another, , State of Maharashtra and another Vs. M/s. National Construction Company, Bombay and another, , Hindustan Steel Works Construction Ltd. Vs. Tarapore and Co. and another, as also in AIR 1997 1644 (SC) the same principle has been laid down and reiterated.

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

21. As pointed out above, bank guarantee constitutes a separate, distinct and independent contract. This contract is between the Bank and the defendants. It is independent of the main contract between HCCL and the defendants. Since the bank guarantee was furnished to the Chief Engineer and there is no definition of "Chief Engineer" in the bank guarantee nor is it provided therein that "Chief Engineer" would also include Executive Engineer, the bank guarantee could be invoked by none except the Chief Engineer. The invocation was thus wholly wrong and the Bank was under no obligation to pay the amount covered by the "performance guarantee" to the Executive Engineer.

18. Still further, in the case of Federal Bank Ltd. (supra), the Supreme Court while cautioning the court not issuing injunction restraining encashment of a bank guarantee, specified the same principles i.e. fraud and irretrievable damage as exception to the Rule and further clarified that relationship between the bank issuing letter of credit or paying bank is that of principal and agent. It was affirmed that to bring the case within the exception of fraud, the averment should be clear and that there was knowledge to the bank of the fraud played.

19. In the case of Daewoo Motors India Ltd. (Supra), the Supreme Court held that for encashment of bank guarantee, the bank cannot have any valid resistance, except of course, in a case of fraud. The bank guarantee furnished by the bank is an unconditional and absolute bank guarantee. It was also stated that once it becomes apparent that there was default to fulfill its obligation as specified in the bank guarantee, invocation of bank guarantee would be proper.

20. On the analysis of the above law laid down by the Supreme Court in its different judgments, it is clear that injunction against encashment of bank guarantee is an exception and not the rule. Cases of such exceptions would have to be evidenced by documents and pleadings on record and compulsorily should fall within any of the following limited categories:-

i) If there is a fraud in connection with the bank guarantee which would vitiate the very foundation of such guarantee and the beneficiary seeks to take advantage of such fraud.

ii) The applicant, in the facts and circumstance of the case, clearly establishes a case of irretrievable injustice or irreparable damage.

iii) The applicant is able to establish exceptional or special equities of the kind which would prick the judicial conscience of the court.

iv) When the bank guarantee is not invoked strictly in its terms and by the person empowered to invoke under the terms of the guarantee. In other words, the letter of invocation is in apparent violation to the specific terms of the bank guarantee.

21. The exceptional cases would be few but it could never be stated as an absolute proposition of law that under no circumstances the court could injunct encashment/invocation of a bank guarantee which might have been furnished by a party as an independent contract. A beneficiary is not vested with an unquestionable or unequivocal legal right to encash the bank guarantee on demand. The obligation of the bank furnishing the bank guarantee to pay would be subject to a limited exceptional circumstance afore-noticed. As a matter of rule, the bank would be under obligation to encash the bank guarantee, once it is invoked in its terms. The exceptions afore-noticed are merely indicative of the kind of cases where the court may injunct encashment of a bank guarantee. It is neither possible nor permissible to exhaustively classify the cases where the court would not interfere and where the court would judicially intervene in such matters. Every case would have to be decided keeping in view its peculiar facts and circumstances. Despite the principal contract and bank guarantee being Ejusdem negotii, the bank guarantee is an independent and self-contained contract enforceable on its own terms. Except in the exceptional cases where definite material is available before the court to prima facie satisfy itself that on the basis of the pleadings of the parties; documents supporting has such a plea; the case falls in one or more of the categories afore-indicated, the bank guarantee would be encashable per se. It has an obligation which is not dependent upon adjudication of main disputes. The concept of irretrievable injustice, or damages, or special equities would come into play where the parties to a contract having been provided with internal adjudicative mechanism, attempts to frustrate results of such an internal adjudication by recourse to encashment of bank guarantee, particularly when under the terms and conditions of the contract, including the terms of the guarantee, such determination is ''final'', of course subject to the limitations spelled out in such contracts. An attempt to over-reach the process of adjudication with intent to cause irreparable prejudice to the other side would be a circumstance which would influence the decision or tilt the special equities in favor of the applicant before the Court.

10. The learned Counsel appearing for the respondents rightly placed reliance

upon the judgment of the Supreme Court in the case of BSES Ltd. BSES Ltd. (Now Reliance Energy Ltd.) Vs. Fenner India Ltd. and Another, to contend that the bank guarantee was unconditional and satisfaction of work was in the discretion of the beneficiary and the court would not examine the extent, quality or performance. Once the beneficiary claims breach of terms of the contract, then ex facie, there could hardly be a case of irretrievable injury or irretrievable injustice.

11. It is obligatory upon the appellant before they could pray before the court to exercise judicial discretion in their favor in conformity with the parameters of granting prohibitory injunction to show that their case falls in one of the exceptions afore-referred. In the plaint of the plaintiff, there is no pleadings of a fraud, irretrievable injustice and/or exceptional or special equities. The only argument sought to be raised before the court is that invocation of the bank guarantee is not as per the terms of the bank guarantee inasmuch as they have completed the work which is established by the certificate dated 12.4.2000. This argument, as we have already noticed, is without any merit. The bank guarantee has been encased as per the terms and conditions of the contract. It was neither obligatory nor necessary for the beneficiary company to refer the matter to the appellant before invoking the bank guarantee. Just using one word in the paragraph of the plaint relating to cause of action that ''defendant No. 2 fraudulently sought to encash the bank guarantee'' would, in no way, satisfy the requirement of law. A plea of fraud must be categorical by specific language of the events. Which according to the plaintiff constitutes a fraud should be stated in the plaint and the party should lead evidence in support of such averments. In the present case, neither there is a specific pleading nor is any evidence of fraud. The extended work was admittedly treated by the parties as part of the original contract and that is the precise reason that the appellant had made no effort for return of the bank guarantee after the letter dated 12.4.2000 and in fact, took no legal steps. The present suit was filed in July, 2001 when the beneficiary company actually intended to invoke the bank guarantee by writing letter dated 26.7.2001. If the subsequent work was not a part of the original contract, we see no reason why the appellant should have waited for such a long time for return of a bank guarantee to the extent of Rs. 12,50,000/-. May be the learned trial court has not stated the reasons in detail but the conclusion arrived at by the trial court does not suffer from any infirmity of law.

12. We see no reason to interfere in the said judgment and decree of the trial court. The present appeal is dismissed while leaving the parties to bear their own costs.

13. The appeal and CM 14291/2004 are finally disposed of.

