

(1990) 05 MP CK 0010

In the Madhya Pradesh High Court

Case No : Miscellaneous Appeal No. 136 of 1989

Rachita Builders and Financiers Pvt. Ltd.

APPELLANT

Vs

Chetak Construction Ltd. and Another

RESPONDENT

Date of Decision : 04-05-1990

Acts Referred:

Arbitration Act, 1940 — Section 34

Citation : (1990) 05 MP CK 0010

Hon'ble Judges : R.K. Verma, J

Bench : Single Bench

Final Decision : Partly Allowed

Judgement

R.K. Verma, J.—This is an appeal filed by defendant No. 1 against the order dated May 5, 1989, passed by the Eighth Additional Judge to the Court of the District Judge, Indore, in Civil Suit No. 8-A of 1989 whereby the learned judge has passed an ex parte temporary injunction stopping payment due on two bank guarantees furnished by defendant No. 2--State Bank of Indore, at the instance of the plaintiff.

2. The material facts giving rise to this appeal, briefly stated, are as follows :

The appellant-defendant No. 1 and the plaintiff-respondent No. 1 are building contractors. They entered into a provisional agreement which was executed on February 2, 1989, to be replaced by a final detailed agreement before expiry of 90 days. Under the terms of the agreement, two bank guarantees were furnished in favour of the appellants by respondent No. 2-bank at the instance of respondent No. 1. The first bank guarantee No. 4 of 1989 for Rs. 12,13,750 was furnished on February 4, 1989, and it was to remain in force up to May 3, 1989. The second bank-guarantee No. 10 of 1989 for Rs. 13,50,000 was furnished on February 25, 1989, and it was to remain in force up to May 3, 1989. The appellant invoked the bank guarantees by giving due notice to respondent No. 2-bank. On coming to know of the invocation of the bank guarantees, the plaintiff-

respondent No. 1 filed the instant suit for a permanent injunction along with an application under Order 39, Rule 3, and another application under Order 39, Rules 1 and 2 read with Section 151 of the Code of Civil Procedure. The trial court granted an ex parte temporary injunction by the impugned order on the same day.

3. Being aggrieved by the ex parte order of temporary injunction passed by the trial court, defendant No. 1 has filed this appeal.

4. Learned counsel for the appellant has submitted that the learned lower court has ignored the existence of an arbitration clause in the contract and that the appellant desires to move an application u/s 34 of the Arbitration Act before the court and because of grant of an ex parte temporary injunction in favour of plaintiff-respondent No. 1, the appellant cannot participate in the proceedings before the lower court. This apprehension of learned counsel does not appear justified in view of the principles of law laid down in *Food Corporation of India v. Yadav Engineer and Contractor* AIR 1982 SC 1302, wherein it has been held that the defendant, contesting interlocutory orders or filing application for setting aside ex parte interim injunction, does not become disentitled from claiming the stay. It has been laid down that, unless the steps alleged to have been taken by the party seeking to enforce an arbitration agreement are such as would display an unequivocal intention to proceed with the suit and acquiesce in the method of resolution of dispute adopted by the other party, namely, filing of the suit and thereby indicate that it has abandoned its right under the arbitration agreement to get the dispute resolved by arbitration, any other step would not disentitle the party from seeking relief u/s 34 of the Arbitration Act. Contesting the application for an interim injunction or for appointment of a receiver or for interim relief by itself without anything more would not constitute such steps as would disentitle the party to an order u/s 34 of the Arbitration Act.

5. The main contention of learned counsel for the appellant in this appeal, however, is that the learned lower court has granted an ex parte temporary injunction restraining invocation and honouring of the bank guarantees against the principles of law laid down by the Supreme Court in that behalf, and on a consideration of urgency without examining the case on the touchstone of prima facie case, balance of convenience and irreparable injury.

6. A perusal of the impugned order granting ex parte temporary injunction does show that the learned court has not discussed the question of grant of injunction with reference to the settled principles of law having a bearing on the question of courts' interference in the matter of invocation of bank guarantees. The learned lower court has observed that, if the guarantee is allowed to be invoked, the plaintiff will be deprived of a substantial amount and would not be able to secure a final contract and thus, the plaintiff would be put to irreparable loss. The reason for granting a temporary injunction ex parte as given in the order is that, if the grant of injunction is deferred, the object of temporary injunction would-be frustrated.

7. Learned counsel for respondent No. 1 has cited the decision in *Gunnabala Chowdhurani v. Hemnalini Chowdhurani* AIR 1918 Cal 495 to submit that, in a suit for a permanent injunction, a temporary injunction ought not to be refused where the refusal would defeat the object of the suit and amount to denial of justice. Learned counsel has also submitted that it was not necessary for the plaintiff to make out a *prima facie* case before the grant of *ex parte* temporary injunction and what is to be seen by the court is whether there was a serious question to be tried in the case. He placed reliance on a decision of the House of Lords in the case of *American Cyanamid v. Ethicon Ltd.* [1975] 1 All ER 504. The relevant observations therein are as follows (p.) :

"There was no rule of law that the court was precluded from considering whether, on balance of convenience, an interlocutory injunction should be granted unless the plaintiff succeeded in establishing a *prima facie* case or a probability that he would be successful at the trial of the action. All that was necessary was that the court should be satisfied that the claim was not frivolous or vexatious, i.e., that there was a serious question to be tried."

8. Learned counsel for the appellant has submitted that the bank guarantees in favour of the appellant which have not been allowed to be invoked and honoured by the respondent-bank by issuance of an *ex parte* temporary injunction are in the nature of an unconditional undertaking to pay on demand by the beneficiary on his mere stating that the amount claimed is due by way of loss or damage suffered by him by reason of breach by the contractor of any of the terms or conditions contained in the agreement. Learned counsel has also submitted that the law of injunction developed in relation to bank guarantees and letters of credit, envisage non-interference by the courts so that the fabric of trading operation and trust in commerce are not jeopardised. Learned counsel for the appellant has further submitted that it is only in exceptional cases where fraud has been committed or where special equities arise in favour of the plaintiff that a *prima facie* case for grant of temporary injunction can be said to have been made out and that the instant case does not fall in that category of exceptional cases.

9. Learned counsel for respondent No. 1 has further submitted that, since the impugned order is an order of *ex parte* injunction and the appellant, instead of showing cause against the *ex parte* injunction order in the lower court, has filed this appeal, the appellant cannot be allowed to show cause against the impugned order of injunction in this appeal on any new material which was not before the trial court when the plaintiff filed the suit. In support of his submission, learned counsel has cited a decision of this court in *Chhaganlal Vs. Niwasdas Goyal*, wherein the relevant observations are as follows (headnote) :

"Where an order of temporary injunction is issued *ex parte* under Order 39, Rule 3, CPC without notice to the opposite party that order is nonetheless an order under Rule 1 or 2 of Order 39 and would as such be appealable under Order 43, Rule 1(r). But the appellate court in such appeal will not be bound to apply its

mind to all those matters which the original court is bound to consider on cause shown by the party affected by the ad interim order. To do so would amount to holding proceedings pursuant to the reply to the show-cause notice in the appellate court,"

10. It is, however, not disputed that this appeal against the issuance of an order of temporary injunction ex parte is maintainable.

11. Before examining the merits of the rival contentions raised by learned counsel against and in support of the impugned order of ex parte temporary injunction, it would be proper to notice the decisions cited before me, laying down the law on the subject of injunction in relation to bank guarantees and letters of credit. Next, it would also be necessary to notice the relevant provisions of the agreement dated February 2, 1989, and the facts appearing from the subsequent correspondence between the appellant-employer and the contractor which the plaintiff has filed along with the plaint in order to test the legality and propriety of the impugned order.

12. Turning to the case-law cited before me on the subject of temporary injunction to restrain invocation of bank guarantees, I propose to extract the relevant observations from the decisions cited which may have a bearing on the question to be decided in the present case.

13. Learned counsel for the appellant has placed reliance on a decision of the Supreme Court in U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd., wherein it has been held that, in a works contract wherein a bank guarantee has been executed by the bank on behalf of the contractor in favour of the principal, the court cannot issue an injunction u/s 41 of the Arbitration Act read with Rules 1 and 2 of Order 39, Civil Procedure Code, restraining the principal from invoking and encashing the guarantee except in cases of fraud or apprehension of irretrievable injustice to the contractor. The relevant observations made in paragraphs 21, 22, 28, 34 and 43 on which reliance has been placed by learned counsel are extracted hereunder (pp. 293, 295, 297, 299 of 65 Comp Cas) :

"The respondent was not to suffer any injustice which was irretrievable. The respondent can sue the appellant for damages. In this case, there cannot be any basis for apprehension that irretrievable damages would be caused. I am of the opinion that this is not a case in which injunction should be granted. An irrevocable commitment either in the form of a confirmed bank guarantee or irrevocable letter of credit cannot be interfered with except in case of fraud or in case of question of apprehension of irretrievable injustice has been made out. This is the well-settled principle of law in England. This is also a well-settled principle of law in India, as I shall presently notice from some of the decisions of the High Courts and decisions of this court.

1In the instant case, there was no fraud involved and no question of irretrievable injustice was involved . . .

In order to restrain the operation either of an irrevocable letter of credit or of a confirmed letter of credit or of a bank guarantee, there should be serious dispute and there should be a good prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Otherwise the very purpose of bank guarantees would be negated and the fabric of trading operations will get jeopardised. . .

On the basis of these principles I reiterate that commitments of banks must be honoured free from interference by the courts. Otherwise trust in commerce internal and international would be irreparably damaged. It is only in exceptional cases that is to say in case of fraud or in case of apprehension of irretrievable injustice that the court should interfere . . .

The question of examining the prima facie case or balance of convenience does not arise if the court cannot interfere with the unconditional commitment made by the bank in the guarantees in question."

14. In the case of United Commercial Bank Vs. Bank of India and Others, which has been cited before me, it has been held that courts should refrain from granting injunctions restraining performance of contractual obligations arising out of a letter of credit or a bank guarantee between one bank and another. In that case, the order passed by the High Court granting a temporary injunction restraining the appellant-bank from recalling a payment made "under reserve" from respondent No. 1, was set aside on a finding that it was difficult to say on the material on record that the plaintiffs had a prima facie case and that the plaintiffs had failed to establish that they would be put to irreparable loss unless an interim injunction was granted and that the balance of convenience clearly lay in allowing the normal banking transaction to go forward.

15. A case of enforcement of conditional bank guarantee furnished in relation to a construction contract, viz., Banerjee and Banerjee Vs. Hindusthan Steel Works Construction Ltd. and Others, has been cited before me. The relevant observations enunciating the general principle of non-interference by courts in respect of enforcement of bank guarantees and letters of credit contained in paragraphs 17, 24 and 29 of that judgment may usefully be reproduced as under (pages 354, 357 and 359 of 68 Comp Cas) :

"A wrongful or fraudulent enforcement of the bank guarantee will vitally affect the contractor. Hence if the guarantee is enforced by fraud, misrepresentation, deliberate suppression of material facts or the like, that will give rise to a special equity in favour of the contractor who will then have the right to stop its enforcement by obtaining an order from the court. But for obtaining an order from the court, a very strong prima facie arguable case in support of the contention must be made out. The courts will not interfere with the enforcement of unconditional or conditional bank guarantees or letters of credit on the mere allegation of fraud or special equity.

Therefore, whether a bank guarantee has become enforceable or not will depend

on its terms and the language of the letter of demand. If the document is unconditional and irrevocable, the bank must pay whenever the demand is made by the beneficiary in accordance with its terms, unless the contractor sets up a strong prima facie case of fraud or special equity. But if the guarantee is a conditional one, it becomes enforceable upon fulfilment of the conditions stipulated and the beneficiary must allege in the demand letter that the conditions have been fulfilled. Otherwise the bank will not be liable to pay. As a matter of fact, if the conditions are not fulfilled, it is the duty of the bank to refuse payment.

Although in the petition, there is no allegation of fraud, I venture to say that this wilful false representation by the beneficiary that the entire guaranteed amount has become due and payable by suppressing the facts of recovery already made, is a factor, which must be treated on the same footing as "fraud" giving rise to special equity and must be treated as an exception to the general rule that the court should not interfere in these mattersl."

16. Another case cited on the subject is a decision in Vinay Engineering Vs. Neyyeh Ligonite Corporation Limited and Another, wherein the relevant observations are as follows (headnote) :

"If the bank guarantees are unconditional, the bank has no defence when its guarantee is sought to be enforced. It is the document of guarantee that has to be scanned to ascertain whether the guarantee is conditional or otherwise and whether it is an autonomous contract by itself. Ordinarily, the court shall not grant an injunction restraining enforcement of such bank guarantee says where there is a clear case of fraud of which the bank had notice and where the special equity was in favour of the beneficiary under the bank guarantee there is no absolute fetter on the court to grant injunction."

17. The plaintiff-respondent No. 1 has filed with the plaint a provisional agreement called the provisional builders contract agreement which was executed on February 2, 1989, by the appellant Rachita Builders and Financiers (P.) Ltd., New Delhi (described in the agreement as the "employer") and respondent No. 1, Chetak Constructions Ltd., New Delhi (called "the contractor"), as per memorandum of agreement filed with the plaint. It has been stated in the agreement that the Non-Resident Indian (NRI) Housing Corporation have duly and irrevocably appointed and assigned Rachita Builders and Financiers (P.) Ltd., New Delhi, as their agent and organiser with powers to contract, appoint, employ, deploy and negotiate with any Government authority, contractor, architect, enterprise or person for the purpose and interest in the development of the housing project. The housing project in question is for emigrating African and European citizens of Indian origin (referred to in the agreement as "the NRI emigrants") for the purpose of resettlement and rehabilitation in India. The agreement is in relation to the housing project comprising approximately 200 houses of three categories for residential accommodation with general common public amenities.

18. The appellant-employer appointed and assigned Chetak Construction Company as the contractor to execute works for the purposes of the said housing project on the terms and conditions as stated in the agreement dated February 2, 1989.

19. The said agreement stipulated that it was a provisional builders agreement and that, within 90 days of signing this agreement, a more detailed agreement shall be signed between the parties concerned, thus superseding the said agreement.

20. Clause 2 of the agreement provided for earnest money and Clause 3 provided for funding. Sub-clause 2.1.1 and 2.1.3 which are relevant for the purpose of the present case reads as under :

"2.1.1 At the time of joint signature of this agreement by the employer and the contractor, the contractor shall pay in the following manner, 0.5 % of the contract sum as mentioned in the Clause 3.1.2 to the employer :

(a) A bank guarantee for Rs. 12,13,750 of a nationalised bank on 4th February, 1989.

(b) A demand draft of a nationalised bank for Rs. 12,13,750 by 28th. February, 1989.

2.1.3 Absolute confidentiality is to be maintained to safeguard the long-term interests of the employer at all times. The employer shall have full rights to forfeit the earnest money, if contravention to the Clauses of this agreement takes place."

21. In fulfilment of the terms contained in Clause 2.1.1(a) of the provisional memorandum of agreement, the "contractor" furnished bank guarantee No. 4 of 1989 dated February 4, 1989, for Rs. 12,13,750 in favour of the "employer"-beneficiary Rachita Builders and Financiers (P.) Ltd., for the period from February 4, 1989 to May 3, 1989, the last date of lodgment of claim by the beneficiary being May 3, 1989. By the said bank guarantee, the contractor, Chetak Construction Ltd., has undertaken to pay to the employer, Rachita Builders and Financiers (P.) Ltd., an amount not exceeding Rs. 12,13,750 against any loss or damage caused to or suffered by the "employer" by reason of any breach by the said contract of any of the terms or conditions contained in the said agreement.

22. The said bank guarantee is an unconditional guarantee to pay the amount due and payable under the guarantee, merely on a demand from the employer, stating that the amount claimed is due by way of loss or damage caused to or that would be caused to or suffered by the employer by reason of breach by the contractor of any of the terms or conditions contained in the said agreement. The fact that the nature of the bank guarantee is unconditional is evidenced by Clauses (2) and (3) of the said guarantee which are reproduced as under :

"2. We, State Bank of Indore, do hereby undertake to pay the amount due and

payable under this guarantee without any demur merely on a demand from the employer stating that the amount claimed is due by way of loss or damage caused to or could be caused to or would be caused to or suffered by the employer by reason of breach by the contractor of any of the terms or conditions contained in the said agreement or by reason of the contractor's failure to perform the said agreement, any such demand made on the bank shall be conclusive as regards the amount due and payable by the bank under this guarantee. However, our liability under this guarantee shall be restricted to an amount not exceeding Rs. 12,13,750 only.

3. We undertake to pay to the employer any money so demanded notwithstanding any dispute or disputes raised by the contractor in any suit or proceeding pending before any Court or Tribunal relating thereto our liability under this present being absolute and unequivocal. The payment so made by us under this guarantee/bond shall be a valid discharge of our liability for payment thereunder and the contractor shall have no claim against us for making such payment."

23. As regards Sub-clause (b) of Clause 2.1.1 of the agreement relating to earnest money, requiring a demand draft of a nationalised bank for Rs. 12,13,750 to be furnished by the contractor by February 28, 1989, no compliance in terms of the said Clause (b) was made by the contractor.

24. The case of the plaintiff-contractor as per the averment made in para 5 of the plaint is that, later on the term No. 2.1.1(b) for demand draft of Rs. 12,13,750 by February 28, 1989, was amended by conversation over the telephone on or about February, 1989, and in that connection, the defendant No. 1-Rachita Builders and Financiers (P.) Ltd. wrote a letter dated February 11, 1989, to the plaintiff and, accordingly, another bank guarantee No. 10 of 1989 dated February 25, 1989, for Rs. 13,50,000 was issued by the State Bank of Indore defendant No. 2, at the instance of the plaintiff-contractor to remain in force up to May 3, 1989, which was accepted by the employer-defendant No. 1.

25. The letter dated February 11, 1989, referred to in the averment made in para 5 of the plaint has been filed by the plaintiff. This letter makes a mention of bank guarantee No. 4 of 1989 dated February 4, 1989, executed by the State Bank of Indore and also refers to the other bank guarantee to be submitted on or before February 28, 1989, in the following words :

"The other bank guarantee (in lieu of demand draft to be submitted on or before 28th February, 1989) in which the beneficiary is JI Consultants, New Delhi, for the equivalent amount has not been forwarded. Kindly expedite the same."

26. A photo copy of the bank guarantee No. 10 of 1989 executed on February 25, 1989, which the plaintiff has filed with the plaint is almost in identical language as the bank guarantee No. 4 of 1989 and the beneficiary is stated to be Rachita Builders and Financiers (P.) Ltd. and not JI Constructions, New Delhi, as stated in the aforesaid letter dated February 11, 1989.

27. It appears that the bank guarantee No. 10 of 1989 dated February 25, 1989, was sent by the contractor to the employer along with the forwarding letter dated February 26, 1989, filed with the plaint. The said letter states that the bank guarantee No. 10 of 1989 was given in lieu of a bank draft for Rs. 12,13,750 provided in clause "earnest money 2.1.1(b)" of the agreement, in accordance with the request made during the telephone discussion. The contractor requested the employer in the said letter to issue an amendment to the relevant clause of the agreement entered into between the contractor and the employer about the acceptance of the bank guarantee in lieu of the bank draft. But there is no material placed on record to show that the employer issued an amendment to Clause 2.1.1(b) as requested by the contractor.

28. On March 10, 1989, the employer addressed a letter to the contractor reiterating the provisions of the agreement as regards the earnest money criterion and further stated therein that the contractor, Chetak Construction Ltd., was to give a demand draft for Rs. 12,13,750 on February 28, towards earnest money deposit but, as the managing director of the employer could arrange the said earnest money through internal sources, the contractor had been requested to furnish a bank guarantee for Rs. 13,50,000 in lieu of bank draft which was required to be placed with the employer as earnest money deposit. But, after return of the managing director from London, an NRI client of the employer observed that the entire earnest money is to be placed in the form of a bank draft only. It was stated in the letter that it was not possible to arrange the funds here and hence, the contractor was requested to give a demand draft for Rs. 10,77,500 in favour of the employer as earnest money against which the employer would furnish a bank guarantee from the Canara Bank through its branch Okhla, Kalkaji branch, Delhi. The contractor was urged to do the needful by March 18, and it was stated that, otherwise, the contract may run into rough weather. The contractor was made aware that the project was in a very advanced stage of being implemented and was requested to do the needful at the earliest.

29. The plaintiff has filed another letter dated March 18, 1989, sent by the contractor to the employer wherein it is stated that the contractor, Chetak Construction Ltd., made a request to its bankers, the Bank of India, for issue of a demand draft for Rs. 10,77,500 against the bank guarantee to be furnished by the employer-company. The request for extending the date for fulfilling the commitment of earnest money up to March 24, 1989, is also made in the said letter.

30. A letter dated March 18, 1989, addressed by the employer to the contractor on the subject of fulfilment of earnest money states that the employer is requesting its overseas client to grant necessary extension of time for fulfilment of the deficiency in the earnest money by March 24, 1989. A letter dated March 28, 1989, addressed to the contractor by the employer filed along with the plaint makes a query about furnishing a demand draft for Rs. 10,77,500 as fulfilment towards earnest money and further states that :

"As the extension period for the due date has expired effective from March 24, 1989, we shall request you to clarify the matter, as our overseas client needs to be intimated for taking a decision in the matter."

31. By another letter dated April 17, 1989, addressed to the contractor, the employer has pointed out the failure on the part of the contractor to submit a demand draft for Rs. 10,77,500 as fulfilment of earnest money criterion and it has been stated in the said letter that, on account of failure of the contractor to make good the deficiency of earnest money criterion before the deadline of March 18, 1989 and March 24, 1989, the contractor's offer became subject to review and a decision in that regard would be taken at a joint meeting of the contractor employer and the employer's overseas client. It has also been pointed out in the said letter that another deficiency in the earnest money of the contractor's offer is the validity period and it has been stated that the proposed review can take place only if the validity of earnest money is extended by at least two months. As such, a request was made in the said letter to extend the validity of the bank guarantee by at least two months latest by April 22, 1989.

32. On April 26, 1989, the employer addressed a letter to the contractor wherein it instated that as the contractor had neither extended the validity of the subject bank guarantee nor furnished a demand draft for Rs. 10,77,500, they had contravened the principal term of the agreement and, in the circumstances, the employer rescinded the same with immediate effect reserving the right to take such legal steps or other steps against the contractor as may be advised in this regard for damages and/ or losses suffered by the employer.

33. The impugned order of injunction has been passed ex parte on March 5, 1969, whereby the defendants, namely, the employer Rachita Builders and Financiers (P.) Ltd. and the State Bank of Indore have been restrained from invoking the bank guarantees Nos. 4 of 1989 and 10 of 1989 and from making payment under the said bank guarantees. Both the bank guarantees cover the period up to May 3, 1989, and the last date for lodgment of claim with the bank is May 3, 1989, as per Clause (4) of the bank guarantees.

34. As per the plaint averment in Clause (g) of para 17 of the plaint, the plaintiff received on May 2, 1989, the employer's letter dated April 26, 1989, alleging breach of the provisional agreement by the plaintiff and rescinding the same. The employer has apparently lodged the claim with the State Bank of Indore, defendant No. 2 for encashment of the bank guarantees and it is not alleged on behalf of the bank in this court that the lodgment of the claim is beyond time.

35. A copy of the letter dated April 26, 1989, for invocation of bank guarantee No. 4 of 1989 for Rs. 12,13,750 which has been filed by the appellant in this court states that the contractor has committed breach of the principal term of its agreement with the employer, thereby causing loss and/or damage to the employer and that, in the circumstances, the employer, by this letter, invoked the aforesaid guarantee to make immediate payment under the guarantee. A similar

letter dated April 26, 1989, is addressed by the employer to the contractor for invocation of the other bank guarantee No. 10 of 1989 for Rs. 13,50,000.

36. The law relating to courts' interference by injunction restraining invocation of the bank guarantee has been settled by the various decisions of the Supreme Court and other courts and the relevant observations have been extracted from the decisions of the Supreme Court and other courts cited before me in the foregoing paragraphs.

37. It is clear from the said decisions that courts will not interfere with enforcement of bank guarantees or letters of credit unless a case of fraud or a case of apprehension of irretrievable injustice has been made out so that either there should be a good prima facie case of fraud or of special equities in the form of preventing irretrievable injustice between the parties.

38. In the instant case, learned counsel for the contractor has sought to support the impugned order by raising a contention that there is a case of fraud and special equity in favour of the contractor. But from a perusal of the plaint averment, there does not appear to be any case of fraud or special equity made out. As has been observed in the case of Banerjee and Banerjee Vs. Hindusthan Steel Works Construction Ltd. and Others, courts will not interfere with the enforcement of unconditional or conditional bank guarantees or letters of credit on mere allegation of fraud or special equity. If the document is unconditional and irrevocable, the bank must pay whenever the demand is made by the beneficiary in accordance with its terms.

39. The bank guarantees in the instant case are unconditional as is apparent from Clauses (2) and (3) of the said bank guarantees as noticed earlier. If the bank guarantees are unconditional, the bank has no defence when its guarantees are sought to be enforced as has been observed in the case of Vinay Engineering Vs. Neyyeh Ligonite Corporation Limited and Another,

40. The principle of non-interference by courts in the matter of enforcement of bank guarantees except on the ground of fraud or special equity arising in the case to prevent injustice is based on the well-founded consideration that the purpose of a bank guarantee would be negated and the fabric of trading operations will get jeopardised if the commitments of banks were not allowed to be honoured free from interference by courts. In this state of law, the balance of convenience is apparently in favour of a situation where the commitments of banks are allowed to be honoured free from interference by courts in cases where no prima facie case of fraud or of special equity exists.

41. There can also be no case of irreparable injury in the absence of involvement of fraud or apprehension of irretrievable injustice since damages can always be claimed, if enforcement is found to be wrongful in the ultimate result.

42. In the instant case, the ex parte temporary injunction granted by the learned lower court does not appear to be justified on the touchstone of either prima

facie case or balance of convenience or irreparable injury. In fact, the bank guarantees in the present case being unconditional in nature, the observations made in paragraph 43 of the judgment in the Supreme Court case of U.P. Co-operative Federation Ltd. [1989] 65 Comp Cas 283 apply fully. As observed therein, the question of examining the prima facie case or balance of convenience does not arise if the court cannot interfere with the unconditional commitment made by the bank in the guarantees in question.

43. In view of the discussion aforesaid, it cannot be doubted that the bank guarantee No. 4 of 1989 dated February 4, 1989, furnished by the contractor in fulfilment of the earnest money Clause 2.1.1(a) of the agreement is enforceable on a claim being lodged in time by the employer and the amount thereunder becomes payable to the employer.

44. It was submitted on behalf of the respondent-contractor that the condition of earnest money clause had been fully complied with and there was no breach of the term of furnishing a demand draft contemplated in Clause 2.1.1(b) since that term had been modified by the employer who had accepted a bank guarantee No. 10 of 1989 dated February 25, 1989. But this submission made on behalf of the contractor does not appear to be correct on a perusal of the aforesaid correspondence between the employer and the contractor the relevant portions of which have been stated in the foregoing paragraphs.

45. It is true that the employer had shown a helpful attitude to consider substitution of a bank guarantee in place of a demand draft as compliance with the earnest money Clause 2.1.1(b) of the agreement on account of difficulty shown by the contractor in furnishing a demand draft in time. But the consideration shown on the part of the employer appears to be in the stage of negotiations only without a finality being reached in favour of the contractor and that is why the employer does not appear to have issued any amendment of Clause 2.1.1(b) which had been sought in the letter dated February 26, 1989, addressed by the contractor as stated hereinbefore.

46. In respect of the bank guarantee No. 10 of 1989 dated February 25, 1989, the position as regards employer's claim of its enforcement is not the same as in the case of bank guarantee No. 4 of 1989. The reason is obvious. The employer has alleged breach of the term of earnest money Clause 2.1.1(b) of the agreement because of non-submission of a demand draft by the contractor and that when there is a breach on account of submission of the bank guarantee instead of a demand draft, it cannot be said that the employer had accepted the bank guarantee No. 10 of 1989. On the contrary, that demand draft had been rejected finally by the employer, when it insisted on submission of demand draft only. The employer is, thus, not justified in claiming encashment of bank guarantee No. 10 of 1989, if it complains of breach of term of agreement because of submission of that bank guarantee instead of a demand draft.

47. In the result, this appeal is partly allowed inasmuch as the order of injunction

passed by the learned lower court restraining enforcement of bank guarantee No. 4 of 1989 is liable to be set aside and is hereby set aside, while there remains no case for interference with the lower court's order of injunction restraining enforcement of the bank guarantee No. 10 of 1989. There shall, however, be no order as to costs of this appeal in the circumstances of this case.