

(2006) 12 DEL CK 0088
In the Delhi High Court
Case No : O.M.P. No. 265 of 2006

Rattan Singh Associates Pvt. Ltd.

APPELLANT

Vs

Gill Power Generation Co. P. Ltd. and Another

RESPONDENT

Date of Decision : 18-12-2006

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 5

Citation : (2007) 1 ARBLR 311

Hon'ble Judges : Gita Mittal, J

Bench : Single Bench

Advocate : S.V. Kulkarni, for the Appellant; Ashok Sethi and Hari Mohan for Defendant No. 1, for the Respondent

Final Decision : Dismissed

Judgement

Gita Mittal, J.—By this petition u/s 9 of the Arbitration & Conciliation Act, 1996, the petitioner has raised an issue that the respondent has invoked the bank guarantee provided by it with the intention to cause "irretrievable financial loss to the petitioner which cannot be compensated in any manner" and consequently has sought the relief of injunction against such invocation. The issue to be answered Therefore, is as to whether "irretrievable financial loss" would entitle a petitioner to an injunction against an invocation of an unconditional bank guarantee.

2. The undisputed facts which are necessary to be noticed for the purposes of adjudication are noticed hereafter. By an agreement dated 19th April, 2003, the petitioner agreed to execute the civil construction work of the Babehalli Hydro Electric Project, Punjab at a contract rates of Rs. 6,09,82,995/-. The petitioner had issued a letter of acceptance dated 1st April, 2003 accepting the contract which formed part of the agreement dated 19th April, 2003 between the parties. The petitioner had agreed to furnish a performance security in the form of a bank guarantee as mentioned in the agreement for an amount which is equivalent to Rs. 30,50,000/-. Such guarantee was to be furnished within 21 days of the

receipt of letter of acceptance and was required to be valid up to 28 days from the date of the expiry of the defects liability period. The petitioner was required to complete the entire contracted work within a period of one year.

3. As per the agreement, the date of start of work was supposed to be 15 days from the date of issue of the notice to proceed with the work which was issued on 19th of April, 2003. Intended date of completion of the whole work was 12 continuous months from the start date. The site possession date was required to be 7 days from the date of issue of the notice to proceed with work. The defect liability period was supposed to be 365 days. Therefore, the petitioner was required to keep the bank guarantee alive uptill 3rd June, 2005 i.e. a period of 28 days from the date of expiry of the defect liability.

4. There is no dispute that on behalf of the petitioner, a bank guarantee as performance guarantee for Rs. 30.50 lakhs was furnished by the respondent No. 2/bank. This guarantee was in the nature of performance security on behalf of the petitioner and did not relate to any other matter. The respondent No. 1 served a notice dated 19th April, 2003 upon the petitioner to commence the work.

5. My attention has been drawn to the manner in which disputes between the parties which would include the disputes regarding payments, work done, payments certificates etc. were required to be undertaken. The contract dated 19th April, 2003 between the parties includes certain conditions of contract. According to clause 24 of the conditions of contract, disputes regarding payments etc. were required to be referred to the adjudicator namely Col. G.L. Bajpai within 14 days of the engineers' decision and the site engineer of the respondent No. 1 was required to certify and take a decision on the bills submitted by the petitioner.

The adjudicator was required to give a decision in writing within 28 days of the receipt of the dispute.

6. Clauses 24 to 26 of the conditions of contract which are binding on the parties reads thus:

24.0 Disputes

24.1 If the contractor believes that a decision taken by the Engineer was either outside the authority given to the Engineer by the Contract or that the decision was wrongly taken, the decision shall be referred to the adjudicator within 14 days of the notification of the Engineer's decision.

25.0 Procedure for disputes

25.1 The adjudicator shall give a decision in writing within 28 days of receipt of a notification of a dispute.

25.2 The adjudicator shall be paid daily at the rate specified in the contract data and the cost shall be divided equally between the employer and the contractor,

whatever decision is reached by the adjudicator. Either party may refer a decision of the adjudicator to an arbitrator within 28 days of the adjudicator's written decision. If neither party refers the dispute to arbitration within the above 28 days, the adjudicator's decision will be final and binding.

25.3 The arbitration shall be conducted in accordance with the arbitration procedure stated in the Special Conditions of Contract.

26.0 Replacement of adjudicator

26.1 Should the adjudicator resign or die, or should the employer and the contractor agree that the adjudicator is not fulfilling his functions in accordance with the provisions of the contract, a new adjudicator will be jointly appointed by the employer and the contractor. In case of disagreement between the employer and the contractor, within 30 days, the adjudicator shall be designated by the appointing authority designated in the contract data at the request of either party, within 14 days of receipt of such request.

7. There is no dispute that this scheme has not been adhered to by the petitioner. The petitioner has stated that vide its letter dated 25th August, 2004, it has submitted the fourth and fifth running bills of the work done up to 30th June, 2004 and 31st of July, 2004. Reminders for payment of outstanding bills which according to the petitioner were to the tune of Rs. 58,73,662/- and a legal notice dated 9th March, 2005 are alleged to have been sent to the respondent No. 1. The petitioner claims that these were not paid.

8. The respondent No. 1 has disputed even the receipt of any of these communications. According to the respondent No. 1, the petitioner failed to perform the contract from the very commencement and it was unable to de-water the land by excavating as required under the contract. It did not improve its performance despite repeated entreaties. Instead of trying to overcome the technical problem of de-watering, it started reducing the labour force which was assigned to the project. up to 31st of March, 2004, the petitioner is stated to have submitted three bills which were paid by the respondent No. 1. However, as on 31st March, 2004, the respondent No. 1 has claimed that there was a credit balance in its favor in the accounts of the petitioner to the tune of Rs. 56 lakhs. The respondent claims that the petitioner has concealed the factum of the receipt of an advance of Rs. 55 lakhs by the respondent No. 1 to the petitioner. The respondent No. 1 has stated that a few bills which were submitted by the petitioner after 31st March, 2004 were found to be forged and rejected by the project engineer since the claimed work had not actually been done. According to the respondent No. 1, the work has suffered tremendously for the failure of the petitioner to do the work as contracted and that in fact, it had not done any work after 31st of March, 2004.

9. The respondent No. 1 has claimed that, on the other hand, the petitioner was approaching it for financial assistance which was refused. So far as the bank guarantee of Rs. 30.50 lakhs is concerned, this guarantee was extended three

times by the petitioner. However, between the period, 3rd December, 2005 to 14th January, 2006, the bank guarantee had not been extended according to the petitioner.

10. The main plank of the petitioner's case rests on the minutes of the meeting held between the parties on 20th May, 2005. According to the petitioner, in these meetings, the respondent No. 1 substantially admitted the claim of the respondent No. 1 when it agreed to check up the accounts and bills and quantities and to effect payments of amounts to the petitioner. It has been stated that the respondent No. 1 in this meeting also agreed to pay a portion of the amount to be incurred on the bank guarantee and that it was on account of such settlement that all legal notices already served and communications to the arbitrator would stand withdrawn. However, perusal of the minutes of the meetings shows a position to the contrary. These minutes quite clearly refer to amounts up to 31st of March, 2004 as per photocopy of the bills submitted by the respondent. No bills thereafter are referred to. Para 1 of the minutes records that the bills were checked and it was pointed out that only two items relating to embankment quantities mentioned in para 2 and the de-watering rates were agreed to be re-checked. The respondent No. 1 had agreed to pay 12% on certain specified extra billing items.

11. It has been pointed out by respondent No. 1 that on account of the failure of the petitioner to discharge its contractual liabilities, the respondent No. 1 had required the petitioner to enhance the performance security substantially if it wanted to carry out the further work. The respondent No. 1 has indicated the figure of the enhanced bank guarantee as Rs. 3 crores. As the petitioner had indicated the inability to bear the costs of furnishing such an enhanced bank guarantee and that they could bear the bank charges for such enhancement only up to Rs. 2 crores and not beyond, para 6 of these minutes recorded thus:

6. The cost of bank guarantee to be extended to the extent of Rs. 200 lakhs (2 crore) to be born by RSA and balance by G.P.G.P.L.

12. In para 9 of this Memorandum of Understanding, the respondent No. 1 had agreed to pay Rs. 30,000/- to the petitioner as rent of motors.

13. So far as the Memorandum of Understanding is concerned, the admitted position is that the respondent No. 1 failed to provide the enhancement of the bank guarantee even by the amount of Rs. 2 crores. The respondent No. 1 has admittedly paid the amount of Rs. 30,000/- on the 2nd of June, 2005. The receipt in this behalf has been placed by the petitioner on record on the 4th of October, 2006. The receipt does not show that it was towards any enhanced bank guarantee. The only stipulation whereby the respondent No. 1 was required to make payment of Rs. 30,000/- is to be found in para 9 of the MOU dated 20th May, 2005 which clearly indicates that the same was payable towards rent of motors.

14. There is nothing to support the submission that the petitioner took any steps

towards the provision of the enhanced bank guarantee. For this reason as well, the occasion for the respondent No. 1 to pay any amount towards this end never arose.

15. In this background on or around 24th of April, 2006, the petitioner filed an Arbitration Application No. 242/2006 u/s 11(6) of the Arbitration & Conciliation Act, 1996 seeking appointment of the arbitrator. The petitioner has contended that after filing of this petition, the respondent No. 1 has dishonestly invoked the bank guarantee furnished by the petitioner by way of a letter dated 27th May, 2006 as a counter blast to its petition.

16. In para 9 of the present petition, the petitioner has stated that the bank guarantee is being invoked to pressurise and to cause irretrievable financial loss which cannot be otherwise recovered from respondent No. 1 as already pending bills to the tune of Rs. 58 lacs or so are still payable to it and for which the appointment of arbitrator is being sought from this Hon"ble Court. The action of respondent No. 1 is patently mala fide and unauthorized and also clear indication of fraudulent intentions. On the one hand in the MOU, the respondent No. 1 agreed to settle and sort out the pending disputes and without any further sincere efforts and upon receipt of the notice of arbitration appointment petition, the respondent has sought to invoke the bank guarantee. All such actions on the part of the respondent No. 1 are fraudulent in nature and also with the intention to cause irretrievable financial loss to the petitioner which cannot be compensated in any manner.

17. On these averments, the present petition has been filed u/s 9 of the Arbitration and Conciliation Act, 1996 praying for a stay against the encashment of the bank guarantee dated 9th/10th April, 2003 which is on the ground that the same comes within the purview of fraud having been committed by the respondent No. 1 vitiating the very foundation of the guarantee resulting in irretrievable harm and injustice of a kind which would make it impossible for the guarantor to reimburse itself.

In support of its submissions, strong reliance has been placed on behalf of the petitioner on the several pronouncements of the Apex Court reported in AIR 1997 1644 (SC) and (2000) 6 SCC 728 BSES Ltd. (now Reliance Energy Ltd.) v. Fenner India Ltd. and Ors.

18. This petition has been vehemently opposed on behalf of the respondent by Mr. Ashok Sethi, learned Counsel for respondent No. 1, who has submitted that financial loss does not fall within the purview of irretrievable fraud or injustice as would entitle a person to an injunction against invocation and encashment of an unconditional bank guarantee in the light of the principles laid down by the Apex Court.

19. Learned counsel has placed strong reliance on the earlier pronouncements of the Apex Court in Svenska Handelsbanken Vs. M/s. Indian Charge Chrome and others, . in support of the contention that even assuming that the petitioner had

any right to recover money under running bills, the same would be irrelevant for the purposes of consideration of grant of an injunction for the invocation of the bank guarantee.

20. My attention has also been drawn to the pronouncement of the Apex Court in General Electric Technical Services Company Inc. Vs. M/s. Punj Sons (P) Ltd. and another, wherein the court laid down that the only condition upon satisfaction of which the court may grant an injunction prohibiting encashment of the bank guarantee.

21. On facts, it has been urged that the petitioner has failed to make out a prima facie case for grant of an injunction. It has been contended that the petitioner is guilty of suppression of material facts having concealed the complete conditions which govern the contract between the parties; the receipt of Rs. 55 lakhs as an advance from respondent No. 1; and further the factual position with regard to its financial solvency and placement.

Mr. Ashok Sethi, learned Counsel for respondent No. 1 has placed reliance on the terms on which the bank guarantee dated 10th April, 2003 was issued by the respondent No. 2 rendering the right of the petitioner to payment there under absolute and unconditional upon its invocation.

22. Having heard learned Counsel for the parties and perused the record as well as the law cited at the Bar, I find it necessary to consider the terms on which the bank guarantee dated 10th April, 2003 bearing No. 2/03 was furnished.

23. It would be useful to notice some of the stipulations therein in extenso. The bank guarantee notices that the same is "at security for compliance with his obligations in accordance with the contract". Thereby, it is clearly indicated that the bank guarantee was in the nature of a performance guarantee furnished by the petitioner.

24. So far as the specific terms therein are concerned, the same read as under:

NOW Therefore we hereby affirm that we are the Guarantor and responsible to you, on behalf of the contractor, up to a total of Rs. 30,50,000/- (Rupees Thirty Lakhs Fifty Thousand only) such sum being payable in the types and proportions of currencies in which the contract price is payable and we undertake to pay you, upon your first written demand and without cavil or argument, any sum or sums within the limits of Rs. 30,50,000/- as aforesaid without your needing to prove or to show grounds or reasons for your demand for the sum specified therein.

We hereby waive the necessity of your demanding the said debt from the Contractor before presenting us with the demand.

We further agree that no change or addition to or other modification of the terms of the contract or of the works to be performed there under or of any of the contact documents which may be made between you and the contractor shall in any way release us from any liability under this guarantee and we hereby waive

notice of any such change, addition or modification.

The petitioner has not contested the position that this bank guarantee was unconditional and cast an absolute liability upon the respondent No. 2/bank to pay upon receipt of the first written demand from the respondent No. 1, a sum up to Rs. 3.50 lakhs without anything further.

25. So far as the Memorandum of Understanding dated 20th May, 2005 is concerned, it evidences an agreement by the respondent merely to re-check certain items of billing which were furnished up to 31st March, 2004 and nothing further. The petitioner has certainly agreed to provide an enhanced bank guarantee of up to Rs. 2 crores which it failed to do so. There is an admission on behalf of the petitioner in the petition that no work has been done after 2004. An amount of Rs. 30,000/- paid by the petitioner as the payment towards the costs of providing the enhanced bank guarantee is not supported by the receipt which has been executed. In the light of the nature of the receipt dated 2nd June, 2005 placed by the petitioner on record, the sum of Rs. 30,000/- purports to be the amount mentioned in para 9 of the MOU dated 20th May, 2005 towards rent of the motors.

26. There is no dispute that the mechanism for dispute redressal as provided in clauses 24-26 of the specific conditions of the contract has not been invoked by the petitioner.

In the petition, the petitioner has admitted in para 2 of the petition that the bank guarantee has been in the nature of a performance bank guarantee and consequently did not relate to any amounts towards the running bills or the payment of bills of the petitioner in respect of which the petitioner has raised the dispute. The petitioner has accepted the validity and bindingness of the contract dated 19th April, 2003 and there is no allegation by the petitioner that there was any fraud either in the contract which was executed between it and the respondent No. 1 or the provision of the bank guarantee by the respondent No. 2.

In the light of the above, even the execution of the MOU does not further the case of the petitioner as has been laid down before this Court.

27. The only ground on which the petitioner has pleaded fraud and irretrievable injustice is on the ground that it would suffer financial loss which cannot be retrieved. The petitioner has not been able to support its contention that the invocation of the bank guarantee was after the filing of A.A. No. 242/2006 or receipt of the notice thereof by the respondent No. 1.

Even assuming that the same has been done after the receipt of the notice, in my view, the same would not further the case of the petitioner in the instant case in any manner. In any case, it is well settled that courts would be reluctant to interdict contractual compliances by an injunction unless a strong prima facie case was made out on behalf of the petitioner who is seeking such injunction.

28. Section 9 of the Arbitration & Conciliation Act, 1996 has been provided by the

legislature to preserve the subject matter of the arbitration pending final consideration in the arbitration proceedings.

29. The principles which govern grant of an injunction against encashment of a bank guarantee were settled by the Apex Court in U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd., wherein the court held thus:

28. ...In order to restrain the operation either of irrevocable letter of credit or of confirmed letter of credit or of bank guarantee, there should be serious dispute and there should be 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 operation will get jeopardised.

In the concurring opinion of the K. Jagannath Shetty, J, it was observed that whether it is a traditional letter of credit or a performance bond or guarantee, the obligations of the bank appears to be the same. If documentary credits are irretrievable and independent, the bank must pay when the demand is raised. Since the bank pledges its own credit involving its reputation, it has no defense except in the case of fraud. The bank's obligations of course should not be extended to protect the unscrupulous party, that is the party who is responsible for fraud but the bankers must be sure of a ground before declining to pay. The nature of the fraud that the courts talk about is fraud of a "gregarious nature so as to vitiate the entire underlined transaction".

Thus, it would be fraud of the beneficiary and not fraud of somebody else.

30. On these principles, the court declined injunction against the invocation of a bank guarantee in the judgment reported in General Electric Technical Services Company Inc. Vs. M/s. Punj Sons (P) Ltd. and another,

In this case, the respondent was claiming that it had not received the full amount payable by the appellant under the running bills. The Apex Court held thus:

10. The High Court has observed that failure on the part of GETSCO to make a reference to mobilisation advance in the letter seeking encashment of the bank guarantee would be tantamount to suppression of material facts, in the sense that the mobilisation advance was under the contract to be recovered from the running bills. It was further observed that disclosure of such facts would have put the bank to further inquiry as to what was the amount covered by those bills and what was the corresponding amount of the mobilisation advance and to what extent the amount covered by the bank guarantee remained payable. In any event, the High Court said that GETSCO could not demand full amount of the bank guarantee on 17th April 1989. It seems to us that the High Court has misconstrued the terms of the bank guarantee and the nature of the inter se rights of the parties under the contract. The mobilisation advance is required to be recovered by GETS CO from the running bills submitted by the respondent. If the full mobilisation advance has not been recovered, it would be to the

advantage of the respondent. Secondly, the, Bank is not concerned with the outstanding amount payable by GETSCO under the running bills. The right to recover the amount under the running bills has no relevance to the liability of the Bank under the guarantee. The liability of the Bank remained intact irrespective of the recovery of mobilisation advance or the non-payment under the running bills. The failure on the part of GETSCO to specify the remaining mobilisation advance in the letter for encashment of bank guarantee is of little consequence to the liability of the Bank under the guarantee. The demand by GETSCO is under the Bank guarantee and as per the terms thereof. The Bank has to pay and the Bank was willing to pay as per the undertaking. The Bank cannot be interdicted by the Court at the instance of respondent 1 in the absence of fraud or special equities in the form of preventing irretrievable injustice between the parties. The High Court in the absence of prima facie case on such matters has committed an error in restraining the Bank from honouring its commitment under the Bank guarantee.

31. It is Therefore well settled that it is only in the case of established fraud and irretrievable injury that an injunction may be granted in a special case to a party. However the expression fraud as well as irretrievable injury has been considered by the Apex Court in a catena of judgments and as to what would constitute such fraud and irretrievable injury entitling a party to an injunction is also well settled. In this behalf, it would be useful and topical to consider the principles laid down by the Apex Court in Svenska Handelsbanken Vs. M/s. Indian Charge Chrome and others,

In this case as well, the contract between the parties was not vitiated by any fraud much less established fraud. The plaintiff had not repudiated the principal contract which related to sale and purchase of machinery. The plaintiff had filed this suit alleging fraud and has sought an injunction with regard to payment of the bank guarantee.

The observations of the Apex Court and the principles laid down for consideration of such prayer in this judgment are extremely instructive on the issues raised in the present case and reads thus:

40. Coming to the merits of the case itself it appears to us that the High Court totally misdirected itself in assuming that the present application for interim relief against the enforcement of bank guarantee is not to be decided strictly on principles of injunction in relation to bank guarantee but general principles of injunction on lenders would be applicable and on that basis proceeded to decide the matter.

xxxx xxxx xxxx 43. Again it appears the High Court found a strong prima facie case against defendant No. 4 merely on reading the plaint. Pleadings make only allegation or averments of facts. Merely pleadings do not make a strong case of prima facie fraud. The material and evidence has to show it. No material whatsoever is referred to by the High Court.

44. In *A. L. N. Narayanan Chettiyar v. Official Assignee*, High Court, Rangoon AIR 1941 PC 93, the Privy Council held that "fraud like any other charge of a criminal proceedings, must be established beyond reasonable doubt. A finding as to fraud cannot be based on suspicion and conjecture".

xxxx xxxx xxxx 81. Mr. Venugopal, learned Counsel for the borrower referred us to the decision in *Itek Corporation v. The First National Bank of Boston etc.* by the United States District Court, Massachusetts reported in 566 Federal Supplement 1210, particularly observations at page 1217, which read thus:

Because I find that Itek has demonstrated that it has no adequate remedy at law, and because I find that the allegations of irreparable harm are not speculative, but genuine and immediate, I am satisfied that Itek will suffer irreparable harm if the requested relief is not granted.

82. The facts in that case were that the exporter in U.S.A. entered into an agreement with Imperial Government of Iran had brought action seeking order terminating its liability on standby letters of credit issued by American Bank in favor of Iranian Bank as part of the contract. The learned District Court held that the contractor was entitled to issuance of preliminary injunction.

83. It will be noticed that this judgment is on peculiar facts of its own and the situation created after the Iranian Revolution and the American Government cancelled the export license in relation to Iran as it related to high technology. As the American Government had cancelled the export license in view of revolution in Iran and the Iranian Government had forcibly taken 52 American citizens as hostages and the President Carter by Executive order blocked all Iranian assets subject to the jurisdiction of the United States and also cancelled the export contracts, the plaintiff informed the importer in Iran invoking force majeure but the Iranian importer in spite of it resorted to encashment of the bank guarantee. The court was of the view that even if claim for damages is decreed by the American courts situation in Iran was such that the decree will not be executable in Iran. It was on these facts that the court felt that it was a case where the plaintiff had demonstrated that it has no adequate remedy at law and the allegations of irreparable harm are not speculative but genuine and immediate and the plaintiff would suffer irreparable harm if the requested relief is not granted. The court also found as a fact at page 1217 itself that "the uncontested facts in the record, if proved at trial, appear to make out a prima facie case of fraud within the meaning of Section 5-114(2)(b) and held that under these circumstances, any demand on the guarantees or letters of credit by Iran importer in March, 1980 would necessarily have been fraudulent".

84. It is thus clear that this judgment is based on peculiar facts, particularly of situation in the Government of Iran which came into power after the revolution in Iran and its relation with the United States of America and in any case on the prima facie finding of fraud being given by the learned court read with the finding of irreparable harm which could not be avoided by adequate remedy at law due

to peculiar situation in Iran.

32. On this discussion, the court held that the contract between the lender and the borrower was not vitiated by any fraud much less established fraud and hence there was no question of irretrievable injury. It was further held that irretrievable injury would require to be of the type of injury as considered in the case of Itch Corporation, 566 Federal Supplement 1210, wherein it was considered that such injury would be in the nature of difficulty in execution of a judgment against the defendant in its country. The conclusion of established fraud justifying grant of an injunction cannot be based on mere suspicion which may be raised on account of allegations in the plaint. The same has to be clearly spelt out from the material on record. In this behalf, the court held thus:

98. The High Court was also in error in considering the question of balance of convenience. In law relating to bank guarantees, a party seeking injunction from encashing of bank guarantee by the suppliers has to show prima facie case of established fraud and an irretrievable injury. Irretrievable injury is of the nature as noticed in the case of Itch Corporation (566 Federal Supplement 1210) (supra). Here there is no such problem. Once the plaintiff is able to establish fraud against the suppliers or suppliers-cum-lenders and obtains any decree for damages or diminution in price, there is no problem for affecting recoveries in a friendly country where the bankers and the suppliers are located. Nothing has been pointed out to show that the decree passed by the Indian courts could not be executable in Sweden.

33. Again, so far as irretrievable injury is concerned, the Apex Court has observed that the same has to be in the nature of injury considered in the Itch Corporation case. In this behalf, in AIR 1997 1644 (SC) the court held thus:

12. The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is or accepted, the beneficiary is entitled to realise 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 realisation of such a bank guarantee. The Courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of

such an injunction on commercial dealings in the country. The two grounds are not necessarily connected, though both may co-exist in some cases. In the case of *U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd.*, which was the case of a works contract where the performance guarantee given under the contract was sought to be invoked, this Court, after referring extensively to English and Indian cases on the subject, said that the guarantee must be honoured in accordance with its terms. The bank which gives the guarantee is not concerned in the least with the relations between the supplier and the customer ; nor with the question whether the supplier has performed his contractual obligation or not, nor with the question whether the supplier is in default or not. The bank must pay according to the tenor of its guarantee on demand without proof or condition. There are only two exceptions to this rule. The first exception is a case when there is a clear fraud of which the bank has notice. The fraud must be of an egregious nature such as to vitiate the entire underlying transaction. Explaining the kind of fraud that may absolve a bank from honouring its guarantee, this Court in the above case quoted with approval the observations of Sir John Donaldson. M.R. in *Bolivinter Oil SA v. Chase Manhattan Bank NA* (1984) 1 All ER 351. " The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear both as to the fact of fraud and as to the bank's knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it charged". This Court set aside an injunction granted by the High Court to restrain the 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. The First National Bank of Boston etc.* 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 granting of injunctions when unconditional bank guarantees are sought to be realised the Court said in the above case that the irretrievable injury must be of the kind which was the subject-matter of the decision in the *Itek Corporation* case 566 Fed Supp 1210 (supra). In that case an exporter in the U.S.A. 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 U. S. 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 the Itek case (supra) 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.

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. There must be a fraud in connection with the bank guarantee. In the present case we fail to see any such fraud. The High Court seems to have come to the conclusion that the termination of the contract by the appellant and his claim that the time was of the essence of the contract, are not based on the terms of the contract and, Therefore, there is a fraud in the invocation of the bank guarantee. This is all erroneous view. The disputes between the parties relating to the termination of the contract cannot make invocation of the bank guarantees fraudulent. The High Court has also referred to the conduct of the appellant in invoking the bank guarantees on an earlier occasion on 12th of April, 1992 and subsequently withdrawing such invocation. The Court has used this circumstance in aid of its view that the time was not of the essence of the contract. We fail to see how an earlier invocation of the bank guarantee and subsequent withdrawal of this invocation make the bank Guarantees or their invocation tainted with fraud in any manner. Under the terms of the contract it is stipulated that the respondent is required to give unconditional bank guarantees against-advance payment as also a similar bank guarantee for due delivery of the contracted plant within the stipulated period. In the absence of any fraud the appellant is entitled to realise the bank guarantees.

34. Therefore, the rule is well settled that the bank which has issued the bank guarantee is not concerned with the underlying contract between the parties. The bank's duty under a performance guarantee is created by virtue of the documents issued by it. When there is no dispute with regard to the documents issued by the bank, it is bound to honour the same and make payments ordinarily unless there is an allegation and a fraud is established in the dispute between the parties to the contract and there may be fraud in issuance,

invocation and enforcement of the bank guarantee.

35. My attention has been drawn to the admitted position of the petitioner's financial standing. The petitioner had submitted a tender and has also filed along with its annual returns. The petitioner in the year 2001-2002 had indicated its annual financial turnover of Rs. 1551 lakhs. Its profitability is indicated by the profit and loss statements and balance sheets which were submitted by the petitioner for the period between 2000 to 2002 which show profits of over Rs. 1 crore as late as on 27th March, 2003.

The same also indicate the financial health and standing of the petitioner. It has not agitated for a considerable period since March, 2004 when it executed the Memorandum of Understanding dated 20th May, 2005. No steps were taken in this behalf after the Memorandum of Understanding till the filing of the Arbitration Application in April, 2006.

36. In view of the well settled principles laid down by the Apex Court as noticed above and the facts of the case as have been established before this Court, the petitioner has not been able to make out any fraud in the provisions of the bank guarantee by the respondent No. 2, let alone established fraud. There is no allegation even in this behalf.

So far as irretrievable injustice is concerned, certainly the petitioner has been unable to make out a case for irretrievable injustice. It is only if the guarantor i.e. the petitioner authoritatively and decisively establishes that it will be impossible for him to reimburse himself or recover the amount if it ultimately succeeds would he be entitled to an injunction. This is certainly not so in the instant case. There is not a whisper of an allegation or submission in this behalf. The only plea is that the petitioner is suffering financial loss. It is well settled that financial loss would not constitute irretrievable injustice to entitle the petitioner to grant an injunction.

For all these reasons, I find no merit in this case.

This petition is accordingly dismissed.

The interim orders passed by this Court on 1st June, 2006 shall stand acated.

This petition is dismissed in the above terms.