

Bombay High Court M/S. Abg Kandla Container ... vs Axis Bank Ltd. And
Another on 12 April, 2013 Bench: S. J. Kathawalla KPP 1 NMS No. 2 of 2013

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 2 OF 2013
IN
SUIT NO. 1 OF 2013

M/s. ABG Kandla Container Terminal Ltd.

... Applicant/
(Orig. Plaintiff)

In the matter between:

M/s. ABG Kandla Container Terminal Ltd.

... Plaintiff

Vs.

Axis Bank Ltd. and another

... Defendants

Dr. Veerendra V. Tulzpurkar, Senior Advocate, along with Mr. Simil Purohit and Mr.
Prashant Beri, instructed by M/s. Beri & Co., for the Plaintiff.

Mr. Kevic Setalvad, Senior Advocate, along with Mr. K. Shriram, and Mr.

Bhalwal, instructed by M/s. Vyas & Bhalwal, for Defendant No. 2.

CORAM: S.J. KATHAWALLA, J.
Judgment reserved on : March 13, 2013
Judgment pronounced on : April 12, 2013

JUDGMENT:

1. The above Suit is filed by the Plaintiff for declarations that: (i) the Suit Bank Guarantee has ceased to be operative and that the first Defendant is not bound to make any payment thereunder; (ii) the first Defendant is not entitled to recover the amounts that may be paid by it under the Suit Bank Guarantee to the second Defendant from the Plaintiff and debit the account of the Plaintiff towards the same and (iii) the first Defendant's demand made on the Plaintiff vide their e-mail dated KPP 2 NMS No. 2 of 2013 4th December 2012 is wrongful, non-est and of no effect whatsoever and not binding upon the Plaintiff. The Plaintiff has also sought a permanent injunction restraining the first Defendant from making payment to the second Defendant purportedly due under the Suit Bank Guarantee and for restraining the Defendant No.1 from demanding payment from the Plaintiff and/or debiting the account of the Plaintiff towards payment that may be made under the Suit Bank Guarantee, and/or in any way acting in furtherance of the e-mail dated 4 th December 2012.
2. The Plaintiff has also taken out the above Notice of Motion in the Suit seeking an order restraining the Defendant No.1 (Bank) from claiming or demanding payment from the Plaintiff or debiting the account of the Plaintiff towards payment that may be made under the Suit Bank Guarantee and/or in any manner acting in furtherance of the e-mail dated 4 th December 2012 and also restraining Defendant No.1 from making any payment to Defendant No.2 of any amount under the Suit Bank Guarantee.
3. According to the Plaintiff, the demand made by Defendant No.2 on Defendant No. 1 for payment under the Suit Bank Guarantee is after the Bank Guarantee ceased to be operative. The Plaintiff in fact has completed construction of the Container Terminal, as acknowledged by the Independent Engineer, which acknowledgement is binding on Defendant No.2 as per the terms of the License Agreement and therefore the question of invoking the Bank Guarantee does not arise and the invocation is therefore not in terms or is beyond the terms of the Bank KPP 3 NMS No. 2 of 2013 Guarantee (Cl. 2 (d) of Plaintiff's letter dated 5 th December 2012 to Defendant No.1 Bank). According to the Plaintiff, the Defendant No.1 Bank is therefore not obliged to make any payment and consequently is not entitled to demand payment from the Plaintiff of any

amount that may be paid under the Suit Bank Guarantee by Defendant No.1 to Defendant No.2. Hence the Plaintiff is entitled to the reliefs as prayed for in the Notice of Motion.

4. The facts as narrated by the Plaintiff in the Plaint are briefly set out herein:
5. Pursuant to the mechanization/modernization initiative of the Central Government, on 22nd January 2004, the second Defendant- the Board of Trustees of Kandla Port, floated a global Notice Inviting Tender ("NIT") for the development, operations, management and maintenance of Berths 11 and 12 in Kandla Port as Container Terminal on Build, Operate and Transfer ("BOT") basis for a period of 30 years ("the Project").
6. The Request for Qualification Document ("RFQ") was issued by the second Defendant to M/s. ABG Infralogistics Limited ("bidder"). The bidder submitted its application/request for qualification in terms thereof. Thereafter the second Defendant informed the bidder that its application/request for qualification has been found acceptable and issued a Request For Proposal Document ("RFP") on 16 th April 2004. In terms of the RFP, the Plaintiff was required to furnish to the second Defendant a Performance Bank Guarantee, to secure the due and faithful performance of its obligations under the License Agreement dated 23 rd June 2006 KPP 4 NMS No. 2 of 2013 executed between the second Defendant and the Plaintiff ("License Agreement") till commencement of full-fledged commercial operations at Berth No. 12 in terms of the License Agreement. Accordingly the Bank Guarantee bearing No. 0040100002089 dated 20th June 2006, for a sum of Rs. 9,50,00,000/- (Rupees Nine Crores Fifty lakhs only) was furnished by the first Defendant (formerly known as UTI Bank Limited) in favour of the second Defendant.
7. In view of the bidder submitting a bid quoting the highest revenue share/royalty of 48.99 per cent, the bidder was declared the successful bidder for the Project and a Letter of Intent ("LOI") of Award dated 14 th April, 2006 was issued to the bidder. Pursuant thereto, the Plaintiff was incorporated as a Special Purpose Vehicle and the License Agreement was executed between the second Defendant and the Plaintiff for implementing the Project.
8. According to the Plaintiff, between 19 th February 2009 and March 2009, certain disputes arose between the Plaintiff and the second Defendant before the issuance of completion certificate by the Independent Engineer, because of which the second Defendant threatened to invoke and/or encash the Bank Guarantee dated 20th June 2006. In the circumstances, on or about 19 th February 2009, proceedings were filed by the Plaintiff against the first Defendant and the second Defendant seeking inter alia an injunction against the encashment of the Bank Guarantee dated 20th June, 2006. The said proceedings were withdrawn in view of a settlement arrived at between the Plaintiff and the second Defendant in and around March 2009. KPP 5 NMS No. 2 of 2013
9. Since the Bank Guarantee dated 20 th June 2006 was due to expire on

19 th June 2009, a fresh performance Bank Guarantee on the same terms as the earlier Bank Guarantee dated 20th June 2006 was issued by the first Defendant, bearing No. 0040100003985 dated 18th June 2009, as extended from time to time for an amount of Rs. 9,50,00,000/- in favour of the second Defendant (“the Suit Bank Guarantee”).

10. On 30th July 2009, the Independent Engineer issued interim completion certificate certifying that the commercial operations at Berth No. 12 had commenced from 4th June 2009 with CH-4 equipment (COD-12) as defined under the License Agreement. After the issuance of the said interim completion certificate and since full-fledged commercial operations had commenced at Berth No.12, the Plaintiff called upon the second Defendant to release and return the Suit Bank Guarantee on several occasions as it had served its purpose and had ceased to be in operation. However, the second Defendant has illegally and wrongfully refused to return the Suit Bank Guarantee.
11. According to the Plaintiff, as a consequence of the second Defendant being in incessant breach and default of its obligations under the License Agreement, and in view of the second Defendant’s deliberate, malicious and mala fide inaction in curing its various defaults and defects, despite several requests from the Plaintiff, the Plaintiff was left with no option but to terminate the License Agreement vide its letter dated 9th November 2012. As a counter blast to the said termination letter, the second Defendant also sought to terminate the License Agreement vide its letter KPP 6 NMS No. 2 of 2013 dated 3rd November 2012 which was received by the Plaintiff on 9 th November 2012 only after the termination letter having been served upon the second Defendant.
12. In pursuance of the termination notice dated 3 rd November 2012, the second Defendant vide letter dated 9th November 2012 has called upon the Plaintiff to furnish certain information in terms of the said Agreement. Further, vide its letter dated 17th November 2012, the second Defendant, as a counter blast to the clarifications issued by the Plaintiff vide letter dated 9 th November 2012 issued its clarifications regarding the alleged dates on which inter alia the first Defendant’s termination notice was issued.
13. According to the Plaintiff, in the aforesaid facts and circumstances, justifiably apprehending that, in retaliation to the aforesaid termination letter, and as a counter blast thereto, the second Defendant may illegally, and in contravention of the plain terms of the Suit Bank Guarantee invoke the same, the Plaintiff addressed a letter dated 23rd November 2012 to the first Defendant, inter alia, bringing the various defaults and breaches of the second Defendant to the notice of first Defendant and further informing the first Defendant that since the Container Terminal was fully constructed by the Plaintiff and commercial operations thereon began on 9th June 2009 as is evident from the completion certificate dated 30 th July 2009 issued by the Independent Engineer, all obligations of the Defendant No.1 Bank are duly discharged, and the said Bank Guarantee is

rendered null and void and any invocation of the Suit Bank Guarantee by the second Defendant would be illegal and in contravention of the plain terms of the Suit Bank Guarantee. KPP 7 NMS No. 2 of 2013

14. On 4th December 2012, the Plaintiff received an e-mail dated 4 th December 2012, from an Officer of the first Defendant, forwarding a copy of the second Defendant's letter dated 3rd December 2012, whereby the second Defendant has, inter alia, sought to invoke the Suit Bank Guarantee by stating that the Plaintiff has failed to construct the Container Terminal in accordance with the conditions stated in the License Agreement. In the said e-mail, in view of the purported invocation , the first Defendant also has raised a demand upon the Plaintiff to fund the Plaintiff's account maintained in the first Defendant Bank at the earliest. According to the Plaintiff, the said invocation is illegal and wrongful and the cause of invocation stated therein is also false.
15. According to the Plaintiff, on 5 th December 2012, the Plaintiff received a letter dated 3rd December 2012 addressed by the second Defendant wherein the second Defendant after referring to the License Agreement dated 23 rd June 2006 and the requisition notice dated 9th November 2012 from Defendant No.2 to the Plaintiff, informed the Plaintiff that the Suit Bank Guarantee has been invoked due to the alleged failure of the Plaintiff to develop the back up area.
16. In response to the e-mail dated 4 th December 2012 received from the Defendant No.1 Bank, the Plaintiff vide their letter dated 5 th December 2012 reiterated inter alia that the Suit Bank Guarantee had ceased to be operative and had served its purpose and that the first Defendant is consequently discharged of all its obligations under the Suit Bank Guarantee. The Plaintiff recorded that the Suit KPP 8 NMS No. 2 of 2013 Bank Guarantee is invoked by the Defendant No.2 on the ground that the Plaintiff has failed to construct the Container Terminal in accordance with the terms and conditions of the License Agreement. It is clear from the terms of the said Bank Guarantee that the same is not unconditional and is available for invocation only in case the Plaintiff failed to complete construction of the Container Terminal. Since the Plaintiff has in fact completed construction of the Container Terminal as acknowledged by the Independent Engineer, which is binding on the second Defendant in terms of the License Agreement, the question of the second Defendant being entitled to invoke the Suit Bank Guarantee does not arise. Hence the invocation of the Suit Bank Guarantee by the second Defendant is not in terms or beyond the terms of the Bank Guarantee and is in fact contrary thereto. The Plaintiff therefore put the first Defendant on notice of the fraud allegedly perpetrated by the second Defendant and requested the first Defendant not to make any payment to the second Defendant.
17. According to the Plaintiff, in response to the second Defendant's letters dated 9th November 2012 and 17 th November 2012, the Plaintiff vide its letter dated 5 th December 2012 inter alia denied that the second Defendant is entitled to terminate the License Agreement as alleged in the

letters or at all and further has agreed to abide by the post termination obligations under the License Agreement, including providing the necessary documents and information sought by the second Defendant vide their letter dated 9 th November 2012, subject to the second defendant agreeing to pay terminal compensation as more fully elaborated in the KPP 9 NMS No. 2 of 2013 said letter.

18. The Plaintiff thereafter filed the present Suit on 6 th December 2012 for the aforesaid reliefs and moved this Court for ex-parte urgent ad-interim reliefs in the above Notice of Motion on the same day when this Court passed an ex parte order only for one day i.e. upto 7th December 2012, restraining the Defendants from debiting the Plaintiff's account pursuant to the letter seeking invocation of the Bank Guarantee dated 3rd December 2012 (Exhibit-M to the Plaint at page 150). Since on 7th December 2012, the Advocate appearing for Defendant No.2 sought time to file the affidavit-in-reply of Defendant No.2, the parties were directed to file their affidavit-in-replies and rejoinder, and the Notice of Motion was placed for hearing and final disposal on 4th January 2013. On 4th January 2013, at the request of the learned Advocate for Defendant No.2, the hearing of the Notice of Motion was adjourned to 4th February 2013. Again at the request of the learned Advocate for Defendant No.2, the hearing of the Notice of Motion was adjourned to 4 th March 2013 and at the request of both the parties, the Notice of Motion was thereafter once again adjourned to 13th March 2012. The Notice of Motion is therefore taken up today for hearing and final disposal.
19. Dr. Veerendra Tulzapurkar, the Learned Senior Advocate appearing for the Plaintiff has, after taking me through the above facts, submitted that under the License Agreement dated 23rd June 2006 between the Defendant No.2 and the Plaintiff, the Plaintiff was required to provide a Performance Guarantee in terms of KPP 10 NMS No. 2 of 2013 clause 3.3. Dr. Tulzapurkar submitted that for the purposes of this clause, breaches of the License Agreement and defaults in the due and faithful performance of obligations under the License Agreement, if any, can only be in relation to breaches and defaults till COD-12 and therefore the Bank Guarantee is required to be released within four weeks from COD-12.
20. Referring to recital 1 of the Suit Bank Guarantee viz. "The Licensee shall construct the Container Terminal in accordance with the terms and conditions specified in the License Agreement", Dr. Tulzapurkar submitted that the obligation of Defendant No.1 remains for the due and faithful compliance by the Plaintiff under the License Agreement, till commencement of full fledged commercial operations at Berth No. 12 as per the License Agreement. The operative clause viz. clause No. 1 provides for the obligation to be performed by the Plaintiff. The said clause is a restricted one and does not cover all obligations mentioned in the License Agreement but the only obligation mentioned therein is the construction of the Container Terminal in accordance with the terms and conditions specified in the License Agreement. It is submitted that the entire Suit

Bank Guarantee is to be read as a whole for ascertaining whether the demand made by Defendant No. 2 on Defendant No.1 by invoking the Suit Bank Guarantee is within the terms of and in accordance with the Suit Bank Guarantee. Clauses 2 and 3 of the said Guarantee which provide for payment by Defendant No.1 to Defendant No.2 without demur, upon receipt of a demand from Defendant No.2 that the licensee has failed to fulfill its obligations under the License Agreement as stated in clause (1) above and that KPP 11 NMS No. 2 of 2013 payment shall be made by Defendant No. 1 without any reference to the licensee and irrespective of whether the claim of the Port Trust is disputed by the Licensee or not, cannot be read in isolation but are required to be read in the context of recitals 2 and 3. It is further submitted that even if the said operative clauses 2 and 3 are read in isolation, it is clear that Defendant No.1 is obliged to make payment only if Defendant No.2 makes a demand stating that the Plaintiff has failed to fulfill its obligations under the License Agreement as stated in clause 1 of the Suit Bank Guarantee. Clause 1 makes it clear that the obligation is only regarding the construction of the Container Terminal in accordance with the terms and conditions specified in the License Agreement. It is therefore submitted that it cannot be said that the obligation to make payment on demand is unconditional. It is submitted that Defendant No.2 in the notice dated 3rd December 2012 invoking the Bank Guarantee has given the following reason for invocation. "The Licensee has failed to fulfill its obligations under the License Agreement as stated in clause (1) of the Bank Guarantee, i.e."The Licensee shall construct the Container Terminal in accordance with the terms and conditions specified in the License Agreement". It is submitted that the said letter is required to be read along with the letter of the same date i.e. 3rd December 2012, addressed by Defendant No.2 to the Plaintiff in which it is stated as follows:"From your letter on 09/11/12, you have made it clear that you shall not develop the back up area which you were obliged under the Licensing Agreement and which you had sought extension to KPP 12 NMS No. 2 of 2013 develop till 31/3/2013. Though we were not bound to, keeping in mind in the interest of the entire project, we had given you the extension. Now that you have made it clear that you shall not fulfill the obligations which you had agreed under the Licensing Agreement, please take note, reserving all our rights to claim such sums as damages from you, we shall be encashing the bank guarantee dated 18/6/2009, amendment dated 15/06/2012 issued by AXIS Bank Limited, Mumbai, for Rs. 9,50,00,000/- (Rs. Nine Crores Fifty Lakhs only) without any further reference to you".

21. It is therefore submitted that the invocation is made by Defendant No.2 on the basis that the Plaintiff has refused to fulfill the obligation to develop the back up area. There is no allegation that there is failure to construct the Container Terminal in accordance with the terms and conditions specified in the License Agreement. It is submitted that therefore ex facie the demand for invoking the Suit Bank Guarantee is contrary to the terms of

the Suit Bank Guarantee as the alleged refusal by the Plaintiff to develop the back up area is not covered by the said Guarantee and the Guarantee is conditional upon failure of the Plaintiff to construct Container Terminal and nothing else. It is submitted that therefore the condition for invoking the Suit Bank Guarantee is not fulfilled and the demand made by Defendant No. 2 invoking the Suit Bank Guarantee is beyond the terms of the Suit Bank Guarantee and not in accordance therewith, and is therefore invalid and unenforceable. It is submitted that from the definition of the term "Container Terminal" (Exhibit-B page 38 of the plaint), it is clear that the obligation relating to the Container Terminal is KPP 13 NMS No. 2 of 2013 defined by Appendix IV. The obligation of the Plaintiff was to construct Container Terminal as defined by Appendix IV, the performance of which is guaranteed by Defendant No.1. It is submitted that for appreciating the scope of the work covered in the obligation mentioned in clause 1 of the Guarantee, the provisions of the License Agreement viz. Definition of COD-11, COD-12 along with clauses 4.9 and 4.9.1 of the License Agreement are relevant. It is submitted that there is no failure on the part of the Plaintiff in performing the obligations mentioned in clause 1 of the Guarantee and/or in Appendix IV. The demand does not state that there is failure to comply with the said obligations and the demand is therefore not in accordance with the Suit Bank Guarantee and is beyond the terms of the Suit Bank Guarantee. It is therefore submitted that the invocation is illegal, wrongful and fraudulent.

22. In support of the aforesaid submissions, the Plaintiff has relied on the decisions in Hindustan Construction Co. Ltd. vs. State of Bihar and others 1, Larsen & Toubro Ltd. vs. Maharashtra State Electricity Board and others 2, State of Maharashtra vs. Dr. M.N. Kaul³. The Plaintiff has also relied on the decision of this Court in the case of ABG Port Ltd. vs. PSA International Pte. Ltd. and others 4 wherein it is held that an unconditional and irrevocable Bank Guarantee is an independent contract and whether encashment of the same ought to be permitted or not has to be considered without any reference to the underlying or main contract or to the disputes/claims thereunder. This decision is also upheld by the Hon'ble Appeal Court. It is further 1AIR 1999 SC 3710 2 AIR 1996 SC 334 3 AIR 1967 SC 1634 4 2013 (2) Bom. C.R. 300 KPP 14 NMS No. 2 of 2013 submitted on behalf of the Plaintiff that the demand made by Defendant No.2 on Defendant No.1 is beyond the terms of the Guarantee and the Plaintiff cannot be made liable beyond the terms of its engagement as laid down by the Hon'ble Supreme Court in the case of State of Maharashtra vs. Dr. M.N. Kaul (supra).
23. It is submitted by the Plaintiff that in the alternative the material on record clearly shows that the Plaintiff has performed its obligation which was guaranteed by Defendant No.1 in the Guarantee in clause (1) read with the recital. The Container Terminal has become operative and is certified by the Independent Engineer in its certificate (Exhibit-C page 135 of the Plaint) and the commercial operations thereon have been carried on since

4 th June 2009. The said certificate has been issued under Clause 4.9.1 of the License Agreement. It is therefore submitted that the Plaintiff has fulfilled its obligation guaranteed by Defendant No.1 in clause 1 of the Guarantee and in view thereof Defendant No.2 is not entitled to demand any amount under the Guarantee. It is submitted that it is not disputed by Defendant No.2 that the said performance has been complied with. What is alleged is that there are other obligations under the License Agreement which have not been performed. It is submitted that the Bank Guarantee was not given by Defendant No. 1 guaranteeing such other performances. None of the said obligations are mentioned in Clause 1 of the Guarantee. The demand made by Defendant No.2 is therefore wrongful and Defendant No.2 should be restrained from making payment to Defendant No.2 of any amount. KPP 15 NMS No. 2 of 2013

24. Mr. Kevic Setalvad, the learned Senior Advocate appearing for Defendant No.2 has submitted that the Suit Bank Guarantee is an unconditional and irrevocable Bank Guarantee for an amount of Rs. 9,50,00,000/-. The said Guarantee is unconditionally payable without demur within 7 days of a written demand from Defendant No.2 stating that the Plaintiff has not fulfilled its obligations under the License Agreement. A mere statement in the invocation letter by the Defendant No.2 stating that the Plaintiff has failed to fulfil its obligations under the License Agreement is sufficient. On such statement being made, the Bank is bound to make payment under the Guarantee without reference to any person and irrespective of whether the claim of the Defendant No.2 is disputed or not. The contention of the Plaintiff that the Bank Guarantee is a conditional guarantee and the reasons given in support thereof are fundamentally fallacious. In support of the contention that the Bank Guarantee is unconditional, Mr. Setalvad has relied on the decisions of this Court (i) dated 29 th November 2012 in Arbitration Petition (L) No. 1538 of 2012 - Housing Development and Infrastructure Limited vs. Mumbai International Airport Pvt. Ltd., (ii) dated 4th May 2012 in Arbitration Petition (L) No. 606 of 2012 - Karam Chand Thapar vs. Hindustan Construction Company Ltd. and the decision in (iii) ABG Ports Limited vs. M/s. PSA International Pte Limited, (supra). Mr. Setalvad has submitted that the decision of Hindustan Construction Company Ltd. vs. State of Bihar (supra) relied upon by the Plaintiff does not support the Plaintiff's case since the terms of the Suit Bank Guarantee in the said case were entirely different from the terms of the Bank Guarantee in the present case. Mr. Setalvad has submitted that the decisions relied upon by the Plaintiff viz. Larsen & Toubro KPP 16 NMS No. 2 of 2013 Ltd. vs. Maharashtra State Electricity Board and others and State of Maharashtra vs. Dr. M.N. Kaul⁵ (supra) also lend no assistance to the Plaintiff.
25. Mr. Setalvad has without prejudice to his contention that the Suit Bank Guarantee is a conditional Guarantee and the Court should decide whether encashment of the same ought to be permitted without reference to the underlying or main contract or to the disputes/claims thereunder, taken

me through the terms of the License Agreement dated 23 rd June 2006, more particularly to the definition of COD-12 which provides “COD-12 means the date on which the Licensee is entitled to commence commercial operation at Berth No. 12 with CH-4 Equipments in accordance with the provisions of the Agreement and MPT Act and shall be the date on which the independent engineer has issued the completion certificate in this regard in accordance with cl.4.9”. Mr. Setalvad has submitted that there is nothing to demonstrate that all the conditions set out in the definition of COD-12 have been complied with. In the absence of all these conditions having been complied with or having been shown to have been complied with, there arises no question of the Plaintiff having achieved COD-12. During the course of arguments, no attempt was made on behalf of the Plaintiff to demonstrate the compliance of all these mandatory requirements. Notably, CH-4 equipments are specified in Clause 1.1.3 of the License Agreement. The Plaintiff has neither pleaded nor demonstrated that Clause 1.1.3 has been complied with. It is submitted that clause 3.3.1 of the License Agreement requires that the Plaintiff provide a Guarantee till COD-12. This amply demonstrates that COD-12 means all the requirements of COD-12 (as defined 5 AIR 1967 SC 1634 KPP 17 NMS No. 2 of 2013 in the License Agreement) and as set out in the License Agreement. Clearly, COD- 12 was never achieved. Under Clause 3.3.2, even if COD-12 had been achieved, there was no question of the Bank Guarantee being released when the Plaintiff was in breach/default. It is submitted that the contemporaneous correspondence (set out hereinafter) clearly establishes that the Plaintiff was in breach/default. Hence there was no question of the Bank Guarantee being released.

26. Mr. Setalvad submits that based upon the certificate dated 30 th July 2009 that commercial operations at Berth No. 12 had commenced from 4 th June 2009, the Plaintiff has contended that in view of the recitals in the Suit Bank Guarantee which provide that security for guaranteeing due and faithful compliance of the Plaintiff’s obligations are only till commencement of full-fledged operations at Berth No. 12, after which the Bank Guarantee stands discharged, is contrary to the contemporaneous correspondence exchanged between the Plaintiff and Defendant No.2 pursuant to which the Suit Bank Guarantee has been repeatedly renewed for more than three years without any demur and on the basis that the Plaintiff was in breach/default. Mr. Setalvad has taken the Court through the correspondence entered into between the Plaintiff and Defendant No.2 after the interim certificate was issued by the Plaintiff to the Defendant No.2, in which correspondence the Plaintiff has repeatedly sought extension of the Bank Guarantee on the ground that the same needs to be extended by Defendant No.2 until the default is cured and the Defendants without any protest have confirmed that they have extended the Bank Guarantee. Mr. Setalvad pointed out that the certificate dated 30 th July 2009 KPP 18 NMS No. 2 of 2013 issued by the Plaintiff to Defendant No.2 provided that certain other obligations linked with completion of

COD-12 have not yet been implemented as per the License Agreement and that the final completion of COD-12 will be certified at a later date when the obligations towards project requirements are implemented by the Plaintiff. Mr. Setalvad has pointed out that the Completion Certificate issued was not as per clause 4.9.1 of the License Agreement nor was the Certificate as per the format provided for the same in Appendix IX of the License Agreement. Therefore, the interim certificate cannot be treated as a completion certificate of COD-12. Mr. Setalvad has pointed out that the second Defendant in paragraph 7 of the affidavit-in-reply has explained as to how the certificate came to be issued. There is no denial or any explanation in the rejoinder which is different from the second Defendant's explanation. Mr. Setalvad without prejudice to his contention that the Suit Bank Guarantee is unconditional, therefore submitted that even if the Bank Guarantee is conditional as is sought to be contended by the Plaintiff, the conditions for discharge of the Suit Bank Guarantee, ex facie have not been complied with by the Plaintiff.

27. I have considered the submissions advanced on behalf of the Plaintiff as well as Defendant No.2. The recitals of the Suit Bank Guarantee dated 20 th June 2006, sets out the background as regards the Project and the purpose of incorporating the Plaintiff as a Special Purpose Vehicle (SPV) i.e. to fulfil and perform the obligations of the Licensee in accordance with the terms of the RFP document and the License Agreement. It is inter alia mentioned in recital (2) of the Suit Bank Guarantee that KPP 19 NMS No. 2 of 2013 the RFP document stipulated that a Performance Guarantee be given by the Licensee to the Licensor for due and faithful compliance of its obligations, till commencement of full fledged commercial operations at berth No. 12 under the License Agreement. In recital (3) it is mentioned that the Defendant No.2 has sought an unconditional and irrevocable Bank Guarantee till commencement of full fledged commercial operations at berth No. 12 under the terms of the License Agreement and the Guarantor has agreed to provide a Guarantee. After making a general mention as set out herein, the terms of contract of the Bank Guarantee between the Plaintiff and the Defendant No.1 Bank are set out in the Suit Bank Guarantee. The same are reproduced hereunder: "1. The Licensee shall construct the Container Terminal in accordance with the terms and conditions specified in the License Agreement.
28. We, the Guarantor, shall, without demur, pay to the Port Trust an amount not exceeding Rs. 95,000,000/- (Rupees Ninety five Millions only) within 7 (seven) days of receipt of a written demand therefore from the Port Trust stating that the Licensee has failed to fulfill its obligations under the License Agreement as stated in Clause (1) above.
29. The above payment shall be made by us without any reference to the Licensee or any other person and irrespective of whether the claim of the Port Trust is disputed by the Licensee or not.
30. This Guarantee shall be valid and shall remain in force for a period of 12 (twelve) months from 20.06.2006 i.e. upto and inclusive of 19.06.2007.

31. In order to give effect to this Guarantee the Port Trust shall KPP 20 NMS No. 2 of 2013 be entitled to treat the Guarantor as the principal debtor and the obligations of the Guarantor shall not be affected by any variations in the terms and conditions of the License Agreement or other documents by the Port Trust or by the extension of time of performance granted to the Licensee or any postponement for any time of the power exercisable by the Port Trust against the Licensee or forbear or enforce any of the terms and conditions of the License Agreement and we shall not be relieved from our obligations under this guarantee on account of any such variation, extension, forbearance or omission on the part of the Port Trust or any indulgence by the Port Trust to the Licensee to give such matter or thing whatsoever which under the law relating to sureties would but for this provision have effect of so relieving us.
32. This Guarantee shall be irrevocable and shall remain in full force and effect until all our obligations under this guarantee are duly discharged.
33. The Guarantor has power to issue this guarantee and the undersigned is duly authorized to execute this Guarantee pursuant to the power granted under the power of attorney issued by the Bank." Admittedly, the License Agreement pertains to the project of development, operations, management and maintenance of Berths 11 and 12 in Kandla Port as Container Terminal on Build, Operate and Transfer ("BOT") basis for a period of thirty years. From the aforesaid terms of the contract, it is clear that the Licensee has confirmed to construct the Container Terminal in accordance with the terms and conditions specified in the License Agreement and that Defendant No.1 Bank has agreed that on receipt of a written demand from Defendant No.2 stating that KPP 21 NMS No. 2 of 2013 the Licensee has failed to fulfil its obligations under the License Agreement as stated in clause (1), i.e. qua construction of the Container Terminal, the Bank shall without demur pay to the Defendant No.2 the amount not exceeding Rs. 9,50,00,000/- within seven days of receipt of such written demand. The Bank has further agreed that the said payment shall be made by the Bank to Defendant No.2 without any reference to the Plaintiff or any other person and irrespective of whether the claim of the Defendant No.2 is disputed by the Plaintiff or not. The Defendant No.2 has by its letter dated 3 rd December 2012 (Exhibit-M at page 150 of the Complaint) addressed to the Defendant No.1 Bank inter alia recorded that: "Licensee has failed to fulfill its obligations under the License Agreement as stated in clause (1) of the Bank Guarantee, i.e."The Licensee shall construct the Container Terminal in accordance with the terms and conditions specified in the License Agreement". Therefore, you are requested to arrange the encashment of above said Bank Guarantee and amount may be remitted. . . ." The Defendant No.2 has therefore invoked the Bank Guarantee by complying with the procedure agreed under the contract of the Bank Guarantee, and the Bank is bound to make the agreed payment to Defendant No.2 within seven days from the receipt of the said letter without any demur, without any reference to the Plaintiff or any other person and without taking any

cognizance of any dispute raised/created by the Plaintiff in this regard. Only because the Plaintiff has confirmed in the Bank Guarantee that it shall construct the Container Terminal in accordance with the terms and conditions specified in the License Agreement does not make the KPP 22 NMS No. 2 of 2013 Guarantee conditional. All the submissions advanced on behalf of the Plaintiff to contend that the Suit Bank Guarantee is conditional by relying on the definition of “Container Terminal” in the License Agreement and insistence that the letter of invocation be read with the letter addressed by the Defendant No.2 to the Plaintiff, inter alia informing the Plaintiff about the invocation, are untenable and baseless and made only with the intention of creating confusion in the matter.

34. The Plaintiff has relied on the decision of the Hon'ble Supreme Court in the case of Hindustan Construction Co. Ltd. vs. State of Bihar and others (supra). In that case, the Bank Guarantee furnished by the Hindustan Construction Company provided as under: “The Executive Engineer, Kharkai Dam Division II, Icha, Chaliama, Post Kesargarhia, Dist. Singhbhum, Bihar. Ref.: Construction of Icha Dam -Subernarekha Multipurpose Project - Contract/Tender Notice No. SMP/ICC/CE-8/87 (Adityapur dt. 23.10.1987. In accordance with the provisions of the Conditions of Contract, Clause 9 (Advance Mobilisation Loan) of the abovementioned contract, the Hindustan Construction Co. Ltd., incorporated in Bombay under the Companies Act, 1956, and having their registered office at Construction House, Walchand Hirachand Marg, Ballard Estate, Bombay - 400 038 (hereinafter called ‘the Contractor’) shall deposit with the Executive Engineer, Kharkai Dam Division II, Icha, Chaliama, Post Kesargarhia, Dist. Singhbhum, Bihar, a bank guarantee to guarantee their proper and faithful performance under the said clause of the contract in an amount of Rs. 10,00,000 (Rupees Ten lakhs only). We, the State bank of India, incorporated under State bank of India Act, 1955, and having one of our branches at Nyayamurti C.N. Vaidya Marg, Fort, Bombay - 400 023 (hereinafter referred to as ‘the said Bank’), as instructed by the Contractor, agree unconditionally and irrevocably to guarantee as primary obligator and not as Surety merely, the payment of the Executive Engineer, Kharkai Dam Division II, Icha, Chaliama, Post Kesargarhia, Dist. Singhbhum, Bihar, on his first demand without whatsoever right of objection on our part and without his first claim to the contractor, in the amount not exceeding Rs. 10,00,000 (Rupees Ten lakhs only) in the event that the obligations expressed in the said clause of the abovementioned contract have not been fulfilled by the contractor giving the right of claim to the employer for recovery of the whole or part of the Advance Mobilisation Loan from the contractor under the contract. We further agree that no change or addition to or other modification of the terms of the contract or of works to be performed thereunder or of any of the contract documents which may be made between the Executive Engineer, Kharkai Dam Division II, Icha, Chaliama, Post Kesargarhia, Dist. Singhbhum, Bihar, 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. Our liability under this guarantee is restricted to an amount not exceeding Rs.10,00,000 (Rupees Ten lakhs only) and the said guarantee shall remain in full force upto 11th October, 1990 with a claim period of six months thereafter i.e., upto 11th April, 1991 twelve months after the issuing of maintenance certificate, whichever is earlier. Unless demand or claim under this guarantee is made on us in writing on or before 11th April, 1991 we shall be relieved and discharged from all liabilities thereafter. This guarantee shall remain valid and in full effect from the date of the advance payment under the contract until the Executive Engineer, Kharkai Dam Division II, Icha, Chaliama, Post Kharagarhia, Dist, Singhbhum, Bihar, receives full repayment of the same amount from the contractor, but not later than 11th April, 1991 in any case. Dated at Bombay this 12th October, 1989. For STATE BANK OF INDIA Sd/- MANAGER Commercial Branch, Bombay - 400 023” The Hon’ble Supreme Court, whilst interpreting the said Guarantee held that the Bank Guarantee was conditional by observing in paragraphs 12 and 13 of its order as follows: “12. Where the Bank, in the above Guarantee, no doubt, has used the expression “agree unconditionally and irrevocably” to guarantee payment to the Executive Engineer on his first demand without any right of objection, but these expressions are immediately qualified by following: “... ..in the event that the obligations expressed in the said clause of the abovementioned contract have not been fulfilled by the contractor giving the right of claim to the employer for recovery of the whole or part of the Advance Mobilisation Loan from the contractor under the contract”.

35. This condition clearly refers to the original contract between the HCCL and the defendants and postulates that if the obligations, expressed in the contract, are not fulfilled by HCCL giving to the defendants the right to claim recovery of the whole or part of the “Advance Mobilisation Loan”, then the Bank would pay the amount due under the Guarantee to the Executive Engineer. By referring specifically to Clause 9, the Bank has qualified its liability to pay the amount covered by the Guarantee relating to “Advance Mobilisation Loan” to the Executive Engineer only if the obligations under the contract were not fulfilled by HCCL or the HCCL has misappropriated any portion of the “Advance Mobilisation Loan”. It is in these circumstances that the aforesaid clause would operate and the whole of the amount covered by the “Mobilisation Advance” would become payable on demand. The Bank Guarantee thus could be invoked only in the circumstances referred to in Clause 9 whereunder the amount would become payable only if the obligations are not fulfilled or there is misappropriation. That being so, the Bank Guarantee could not be said to be unconditional or unequivocal in terms so that the defendants could be said to have had an unfettered right to invoke that Guarantee and demand immediate payment thereof from the Bank. This aspect of the matter was

wholly ignored by the High Court and it unnecessarily interfered with the order of injunction, granted by the Single Judge, by which the defendants were restrained from invoking the Bank Guarantee. KPP 26 NMS No. 2 of 2013 In fact, in paragraph 8 of its Judgment the Hon'ble Supreme Court has held as under: "8. 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" Thus, the language of the Guarantee in the case of Hindustan Construction Co. Ltd. (supra) was materially different from the language of the Suit Bank Guarantee in the present case and would therefore lend no assistance to the Plaintiff.

36. The terms of the Bank Guarantee in the case of Larsen & Toubro Ltd. vs. Maharashtra State Electricity Board and others (supra) and State of Maharashtra vs. Dr. M.N. Kaul (supra) also are materially different from the language of the Suit Bank Guarantee in the present case and therefore lend no assistance to the Plaintiff. In my view, the Suit Bank Guarantee is a conditional and irrevocable Guarantee. The submission advanced on behalf of the Plaintiff that the Bank Guarantee is a conditional one or that the invocation is not in keeping with the same, and is bad-in-law, therefore cannot be accepted and deserves to be rejected. KPP 27 NMS No. 2 of 2013
37. In any event, since the Plaintiff has put in a lot of effort to contend that the said Bank Guarantee would continue to be only till COD-12 and the Defendant No.2 has also advanced arguments on a presumption that the Bank Guarantee is conditional, however disentitling the Plaintiff from any reliefs, I proceed to deal with the said submissions.
38. On the Plaintiff's own showing, under the License Agreement dated 23rd June, 2006 executed between the Defendant No.2 and the Plaintiff, the Plaintiff was required to provide a Performance Guarantee in terms of Clause 3.3. Clauses 3.3.1, 3.3.2 and 3.3.3 are therefore reproduced hereunder for ready reference: "3.3.1 The Licensee has, for due and faithful performance of its obligations till COD-12, provided to the Licensor a Performance Guarantee from UTI Bank Ltd., Fort, Mumbai before the Date of Award of Licensee. 3.3.2 The Performance Guarantee shall be released by the Licensor to the licensee within 4 (four) weeks from COD-12 provided the Licensee is not in breach of this Agreement. If the Licensee is in default in the due and faithful performance of its obligations under this Agreement, the Performance Guarantee shall be continued till the default is cured. 3.3.3 In the event of the Licensee being in default in the due and

faithful performance of its obligations under this Agreement and failing to remedy such default within the Remedial Period, Licensor shall without prejudice to its other rights and remedies hereunder be entitled to encash and appropriate the Performance Guarantee as Damages for such default. Upon such encashment and appropriation KPP 28 NMS No. 2 of 2013 of the Performance Guarantee, the Licensor shall grant a period of 15 (fifteen) days to the Licensee to provide a fresh Performance Guarantee and the Licensee shall within the time so granted furnish to the Licensor such Performance Guarantee. Failure by the Licensee to furnish a fresh Performance Guarantee in accordance with this clause shall be treated as a Licensee Event of Default and Licensor shall be entitled to terminate this Agreement under Article 13. The provision set forth in Clauses 3.3.1 and 3.3.2 shall apply mutatis-mutandis to each such fresh Performance Guarantee". COD-12 is defined under the Agreement as follows: "COD-12 means the date on which the Licensee is entitled to commence commercial operation at Berth No. 12 with CH-4 Equipments in accordance with the provisions of the Agreement and MPT Act and shall be the date on which the independent engineer has issued the completion certificate in this regard in accordance with clause 4.9". Admittedly certain disputes arose between the Plaintiff and the second Defendant between 19th February 2009 and March 2009 before the issuance of the Completion Certificate by the Independent Engineer and the second Defendant threatened to invoke and/or encash the Bank Guarantee dated 20 th June 2006. On 19th February 2009, proceedings were filed before this Court by the Plaintiff seeking an injunction against the encashment of the Bank Guarantee dated 20 th June 2006, by Defendant No. 2. In view of a settlement arrived at between the Plaintiff and the second Defendant in or around March 2009, the said proceedings KPP 29 NMS No. 2 of 2013 were withdrawn. It is stated by the Defendant No.2 in paragraph 7 of its affidavit- in-reply to the present Notice of Motion that in order to avoid further delay in completion of the Project, on certain assurances given by the Plaintiff as set out therein, the parties came to an understanding that the Independent Engineer could issue an interim completion certificate and the Plaintiff should be allowed to use Berth No. 12 though certain obligations linked with completion of Berth No. 12 has not been completed as per the terms of the License Agreement. The Plaintiff also agreed for extending the performance guarantee under Article 3.3 until all the obligations pending for COD-12 were completed. Based on this understanding, the Independent Engineer issued the interim certificate dated 30 th July 2009. Though the Plaintiff has in its rejoinder generally denied the understanding alleged by the Defendant No.2, it is a matter of fact that the Independent Engineer has issued an interim completion certificate for COD-12 dated 30 th July 2009 and not the completion certificate for COD-12 as envisaged in the said License Agreement. As can be seen from the definition of COD-12, the same can be said to have been achieved only when the Independent Engineer issues a completion certificate. In the instant case, it cannot be said that COD-

12 has been achieved by the Plaintiff since the Independent Engineer has categorically stated in the certificate that he is issuing an “interim completion certificate for commissioning of Berth No. 12...” and has specifically listed in the said certificate that certain other obligations linked with completion of COD-12 including resolution of dispute pertaining to the back up area behind Berth No. 12 have not yet been implemented as per the License Agreement, and has further stated in the interim certificate that the KPP 30 NMS No. 2 of 2013 final completion of COD-12 will be certified at a later date when the obligation towards project requirements are implemented by the Plaintiff. Therefore, the Plaintiff has wrongly alleged that the Suit Bank Guarantee had ceased to be operative when invoked. In the absence of a completion certificate as envisaged under the License Agreement and only on the basis of an interim Completion Certificate, it cannot be said that full-fledged commercial operations at Berth No. 12 had commenced and the Bank Guarantee has ceased to be operative. Therefore the invocation is not bad even upon reading of the entire Suit Bank Guarantee along with the recitals. Clause 3.3.2 of the License Agreement also provides that the Performance Guarantee shall be released by the Defendant No.2 within four weeks from COD-12 provided the Licensee is not in breach of the License Agreement. If the Licensee is in default in the due and faithful performance of its obligations under the License Agreement, the Performance Guarantee shall be continued till the default is cured. The Plaintiff has not produced any evidence to show that the Plaintiff has at any time objected to the said interim completion certificate. Instead, the Plaintiff who now contends that the question of its obligations to continue renewing the Suit Bank Guarantee under the License Agreement after commencement of full-fledged commercial operation at Berth No. 12 does not arise, has continued to accept that the Plaintiff has yet to cure defects and has repeatedly renewed the Bank Guarantee even after three years have elapsed from the date of the interim completion certificate issued by the Independent Engineer, without any murmur or protest. KPP 31 NMS No. 2 of 2013

39. As pointed out by Defendant No.2, the Defendant No.2 has after issuing the interim certificate on 30th July, 2009, written a letter dated 28 th May 2010 to the Plaintiff stating that the Suit Bank Guarantee would be expiring on 19 th June 2010 and the Plaintiff should extend the Bank Guarantee for a further period of one year or till the issuance of the completion certificate for COD-12 as per clause No. 3.2 of the License Agreement. The Plaintiff responded to the second Defendant vide their letter dated 16th June 2010 wherein after referring to the said letters, the Plaintiff has recorded that the Bank Guarantee would be extended further and in fact by their letter dated 18th June 2010 addressed to the Defendant No.2 forwarded the original copy of the extension advise of Performance Bank Guarantee for the records of Defendant No.2. Interestingly, the Plaintiff has not raised any protest against the Defendant No.2 calling upon it to extend the Bank Guarantee for a period of one year or till the issuance

- of the completion certificate for COD-12 as per clause No. 3.3.1 of the License Agreement thereby accepting that the Plaintiff is yet to receive a completion certificate for COD-12 from the Defendant No.2 i.e. after complying with the conditions set out in the interim certificate which included resolution of the issue pertaining to the back up area behind Berth No.12.
40. Again, by a letter dated 16th April, 2011 addressed by the Defendant No.2 to the Plaintiff, the Plaintiff was called upon to extend the validity of the Suit Bank Guarantee for a further period of one year/till the default is cured. Again, the Plaintiff did not record any protest by alleging that there is no default on its part which remains to be cured but extended the Suit Bank Guarantee by its letter dated KPP 32 NMS No. 2 of 2013 16th June 2011 for a period of one year or till the issuance of the completion certificate for COD-12 as per clause No. 3.3.1 of the License Agreement. By so doing, the Plaintiff accepted that it is yet to receive a completion certificate for COD-12 from the Defendant No. 2, which would be issued after the Plaintiff complied with the conditions set out in the interim certificate, which included resolution of the issue pertaining to the back up area behind Berth No.12.
 41. Again the Plaintiff by its letter dated 21 st April 2012 called upon Defendant No. 2 to extend the Suit Bank Guarantee for one year/till default is cured as required under Clause 3.3.2 of the License Agreement. It was further clarified by the Defendant No.2 in its letter addressed to the Defendant No.1 Bank with a copy forwarded to the Plaintiff that the Defendant No.2 has been requested to extend the Bank Guarantee for a further period of one year/till default is cured as the Plaintiff has failed to perform certain obligations under the License Agreement. The Plaintiff by its letter dated 18th June 2012 addressed to the Defendant No.2 forwarded the original Bank Guarantee extended upto 19 th June 2013 i.e. for a period of one year or till the issuance of the completion certificate for COD-12 as per clause No. 3.3.1 of the License Agreement, thereby accepting that the Plaintiff is yet to receive a completion certificate for COD-12 from the Defendant No.2 after complying with the conditions set out in the interim certificate which included resolution of the issue pertaining to the back up area behind Berth No.12.
 42. Despite the Plaintiff having accepted in the aforestated manner that the KPP 33 NMS No. 2 of 2013 interim certificate issued by the Independent Engineer is interim and conditional and that the Plaintiff is yet to receive a completion certificate for COD-12 from the Defendant No.2 after complying with the conditions set out in the interim certificate which included resolution of the issue pertaining to the back up area behind Berth No. 12, the Plaintiff has incorrectly recorded in its letter dated 23 rd November 2012 (Exhibit-L to the Plaintiff) that the Container Terminal was fully constructed by the Plaintiff as is evident from the completion certificate for COD-12 (interim) issued to the Plaintiff by the Independent Engineer on 30 th July 2009 and in view thereof any invocation of the Suit Bank Guarantee by the Defendant No.2 will clearly be fraudulent. The Plaintiff has

again wrongly alleged in its letter dated 5 th December 2012 addressed to the first Defendant that the obligation sought to be secured under the said Bank Guarantee viz. construction of Container Terminal in accordance with the terms and conditions specified in the License Agreement has been duly performed by the Plaintiff and the same is evident by the completion certificate of COD-12 issued to the Plaintiff by the Independent Engineer and further that it is clear from the terms of the said Bank Guarantee that the same is not unconditional and is available for invocation only in case the Plaintiff fails to complete construction of the Container Terminal. It is wrongly alleged that since the Plaintiff has in fact completed construction of the Container Terminal as acknowledged by the Independent Engineer which is binding on Defendant No.2 in terms of the License Agreement, the question of the Defendant No.2 being entitled to invoke the said Bank Guarantee does not arise and hence invocation of the said Bank Guarantee by Defendant No.2 is not in keeping with the terms but is contrary KPP 34 NMS No. 2 of 2013 to the terms of the Suit Bank Guarantee.

43. Therefore according to the Plaintiff the Defendant No. 2 is entitled to invoke the Bank Guarantee in the event of the Container Terminal not being constructed in terms of the License Agreement. However, according to the Plaintiff, the construction of the Container Terminal has been completed since the Independent Engineer has issued the certificate dated 30 th July 2009. As stated hereinabove, the certificate issued is an interim certificate and the Plaintiff itself has repeatedly renewed the Bank Guarantee on the ground that the default is required to be cured by the Plaintiff as listed in the interim certificate. This included the resolution of the dispute pertaining to the back up area. Therefore, even if the Plaintiff is correct in contending that the Defendant No.2 can invoke the Bank Guarantee only if Defendant No.2 is able to show that there is a default committed by the Plaintiff, from the aforesaid facts and correspondence, it is established that certain defaults including resolution of the dispute pertaining to the back up area have not been complied with by the Plaintiff thereby enabling Defendant No.2 to invoke the Suit Bank Guarantee. In view of these facts, the Defendant No.2 is also not incorrect in writing a letter dated 3rd December 2012 to the Plaintiff stating that they have not handed over the back up area and the Defendant No.2 is therefore entitled to invoke the Bank Guarantee. The Plaintiff is therefore incorrect in contending that the Suit Bank Guarantee has ceased to be operative or that the invocation of the Suit Bank Guarantee is beyond the terms of the Guarantee and the said contentions cannot be accepted. KPP 35 NMS No. 2 of 2013
44. Though the Plaintiff has in the plaint made allegations of fraud and irretrievable injustice and special equities, no such submissions/allegations were pressed across the Bar. However, the Hon'ble Supreme Court has in its decision in the case of Himadri Chemicals Industries Ltd. Versus Coal Tar Refining Co. (supra) observed that the law relating to grant or refusal to grant injunction in the matter of invocation of a bank guarantee or a

letter of credit is now well settled by a plethora of decisions and in the case of *U. P. State Sugar Corpn. v. Sumac International Ltd.*, the Hon'ble Supreme Court made two exceptions for granting an order of injunction to restrain the enforcement of a bank guarantee or a letter of credit i.e. (i) fraud committed in the notice of the bank which would vitiate the very foundation of the guarantee; and (ii) injustice of a kind which would make it impossible for the guarantor to reimburse himself. So far as the first exception of fraud is concerned, the Hon'ble Supreme Court in paragraph nos.11 and 12 of the decision held as follows : "11. Except under these circumstances, the courts should not readily issue injunction to restrain the realisation of a bank guarantee or a letter of credit. So far as the first exception is concerned i.e. of fraud, one has to satisfy the court that the fraud in connection with the bank guarantee or letter of credit would vitiate the very foundation of such a bank guarantee or letter of credit. So far as the second exception is concerned, this Court has held in that decision that it relates to cases where allowing encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. While dealing with the case of fraud, this Court in *U. P. Coop. Federation Ltd. v. KPP 36 NMS No. 2 of 2013 Singh Consultants and Engineers (P) Ltd.* held as follows : (SCC p. 197, para 53) The fraud must be of an egregious nature such as to vitiate the entire underlying transaction. (emphasis supplied) While coming to a conclusion as to what constitutes fraud, this Court in the above case quoted (at SCC p. 197, para 54) with approval the observations of Sir John Donaldson, M. R. in *Bollivinter Oil SA v. Chase Manhattan Bank*, All ER at p. 352g-h which is as follows : "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."

45. In *Svenska Handelsbanken v. Indian Charge Chrome* it has also been held 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. In fact, on the question of fraud, this decision approved the observations made by this Court in *U. P. Coop. Federation Ltd. v. Singh Consultants and Engineers (P) Ltd.*" In paragraph No.14 of the said decision, the Hon'ble Supreme Court has set out certain principles which are required to be noted by the Court in the matter of granting injunction restraining the encashment of a bank guarantee. In the said paragraph, the Hon'ble Supreme Court has held that in case an injunction KPP 37 NMS No. 2 of 2013 restraining the encashment of a bank guarantee or letter of credit is granted on the ground of fraud, the same

has to be of an egregious nature, which would vitiate the very foundation of the bank guarantee or letter of credit and in cases where the beneficiary seeks to take advantage of the situation.

46. It is therefore trite law that the Court can restrain encashment of bank guarantee in cases of established fraud in issuance of the bank guarantee. The fraud has to be absolutely egregious vitiating the foundation of the bank guarantee. In the present case, the Petitioner has failed to make out any case of fraud. The allegations of fraud made by the Petitioner are merely bald assertions and do not establish a case of fraud much less fraud of an egregious nature. As set out herein, the bank guarantee is an unconditional and irrevocable guarantee. As held by the Hon'ble Supreme Court, encashment of an unconditional and irrevocable bank guarantee ought not to be enjoined by Courts unless the case falls within recognized exceptions laid down by the Hon'ble Supreme Court. Again, an unconditional and irrevocable Bank Guarantee is an independent contract and whether encashment of the same ought to be permitted or not has to be considered without any reference to the underlying or main contract or to the disputes/claims thereunder. The allegations therefore made by the Petitioner that the invocation of the Bank Guarantee is vitiated by fraud, cannot be accepted and the said contention is rejected.
47. The Plaintiff has also submitted that irretrievable injustice shall be caused to KPP 38 NMS No. 2 of 2013 it in case the Suit Bank Guarantee is encashed. In the case of U. P. State Sugar Corpn. v. Sumac International Ltd. (supra), irretrievable injustice is the second exception made by the Hon'ble Supreme Court for grant of an injunction restraining encashment of a Bank Guarantee which is referred to in clause 13 of the decision in Himadri Chemicals Industries Ltd. Versus Coal Tar Refining Co. (supra) and reads thus: "13. So far as the second exception is concerned, this Court in U. P. State Sugar Corpn. v. Sumac International Ltd. as considered herein earlier, as SCC para 14 on pp.575-76 observed as follows : "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 Itek Corpn. case. 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 letter of credit issued by an American bank in favour of an Iranian bank as part of the contract. The relief was sought on account of the situation created after the Iranian revolution when the American Government cancelled the export licenses in relation to Iran and the Iranian Government had forcibly taken 52 American citizens as hostages. The US Government had blocked all Iranian assets under the jurisdiction of United States and had cancelled the export contract. The Court upheld the contention of the exporter that any claim for damages against the purchase if decreed by the American courts would not be executable in Iran under the circumstances and realisation of the bank

guarantee/letters of credit would cause irreparable harm to the plaintiff. This contention was upheld. To KPP 39 NMS No. 2 of 2013 avail of this exception, therefore, exceptional circumstances which make it impossible for the guarantor to reimburse himself if he ultimately succeeds, will have to be decisively established. Clearly, a mere apprehension that the other party will not be able to pay, is not enough. In Itek case there was a certainty on this issue. Secondly, there was good reason, in that case for the Court to be prima facie satisfied that the guarantors i.e. the bank and its customer would be found entitled to receive the amount paid under the guarantee." In the present case, if the Plaintiff succeeds finally in the suit and/or in any other proceedings, it can always seek refund/reimbursement of the said amount of Rs. 9.5 crores from the Defendant No.2 and it is not the case of the Plaintiff that it will not be possible for it to recover the said amount of Rs. 9.5 crores from the Defendant No.2 As correctly submitted on behalf of the Defendant No.2, the Plaintiff has done nothing more than to merely plead fraud, irretrievable injustice and special equities without establishing cogent grounds in respect of the same. In view thereof, no case is made out by the Plaintiff as to how irretrievable injustice will be caused to the Plaintiff in case the Suit Bank Guarantee is encashed. Also no special equities have been made out by the Plaintiff for grant of injunction against encashment of the Bank Guarantee. In the case of Dwarikesh Sugar Industries Ltd. Versus Prem Heavy Engineering Works (P) Ltd. And Another (supra), the Hon'ble Supreme Court held in paragraph 22 as under : "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 KPP 40 NMS No. 2 of 2013 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." No such circumstance exists in the present case. Under the aforesaid circumstances, the Notice of Motion is dismissed. (S.J. KATHAWALLA, J.)