* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment Reserved on: September 06, 2012*
Judgment Pronounced on: September 12, 2012

\+ **FAO(OS) 429/2012**

BHARAT HEAVY ELECTRICALS LTD. ..... Appellant
Represented by: Mr.A.S.Chandhiok, Sr.Adv., Mr.Sandeep Sethi, Sr.Adv. instructed by Mr.Kamaljeet Singh, Mr.Bhagat Singh, Mr.Vidit Gupta, Ms.Harleen Singh, Mr.Akshay Palavi, Mr.Prashant Mehta, Advs.

versus

MASS GLOBAL INVESTMENT CO & ORS ..... Respondents
Represented by: Mr.C.A.Sundaram, Sr.Adv., Mr.Neeraj Kishan Kaul, Sr.Adv. instructed by Ms.Divya Kapur, Ms.Manjira Dasgupta, Adv. for respondent No.1.
Mr.S.L.Gupta, Adv. for State Bank of India.

AND

FAO(OS) 430/2012

BHARAT HEAVY ELECTRICALS LTD ..... Appellant
Represented by: Mr.A.S.Chandhiok, Sr.Adv., Mr.Sandeep Sethi, Sr.Adv. instructed by Mr.Kamaljeet Singh, Mr.Bhagat Singh, Mr.Vidit Gupta, Ms.Harleen Singh, Mr.Akshay Palavi, Mr.Prashant Mehta, Advs.

versus

MASS GLOBAL INVESTMENT CO & ORS ..... Respondents
Represented by: Mr.C.A.Sundaram, Sr.Adv., Mr.Neeraj Kishan Kaul, Sr.Adv. instructed by Ms.Divya Kapur, Ms.Manjira Dasgupta, Adv. for

respondent No.1.
Mr.S.L.Gupta, Adv. for State Bank of India.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE MANMOHAN SINGH

PRADEEP NANDRAJOG, J.

1. The requirement of law, while deciding an appeal, is to lay the appellate track parallel to the track on which the learned Trial Judge has undertaken the journey, and if the destination reached is a place other than the one reached by the learned Trial Judge, to highlight the junction from where the direction in the track was made; for only then can a reader of the appellate opinion understand with clarity, with least time spent, on what account the two decisions are at variance.

2. But, we regret our inability to adhere to the aforesaid principle of law on account of the reason, as conceded to by learned counsel for the parties during arguments in the appeal, the learned Single Judge has not noted many facts which were relied upon by the parties and has therefore not dealt with the submissions which were advanced, requiring us to have a virtual original hearing on the subject of : Whether the appellant was entitled to injunct respondent No.2 bank to pay any money to respondent No.1, the beneficiary under the two bank guarantees which were to secure repayment of the advance received by the appellant from respondent No.1 and one bank guarantee to secure due performance of the contract i.e. three bank guarantees issued by respondent No.2 in favour of respondent No.1 at the asking of the appellant.

3. On March 04, 2007, contract No.4/2000 was executed between the appellant and respondent No.1, a company incorporated in Jordan,

requiring the appellant to execute, on a turnkey basis, a Gas Turbine Power Plant: 4XFr9E at Kurdistan, Iraq.

4. Being a turnkey contract, the appellant had to design the power project, supply the equipment, after testing, install the same and thereafter commission the plant and operate it for the period specified in the contract at the agreed price US$ 117 million. It is not in dispute that by a supplementary agreement dated August 04, 2008, scope of work being reduced, the price was reduced to US$ 100 million.

5. As the nomenclature of the turnkey contract: '4XFr9E' suggests, 4 gas turbine units had to be erected.

6. The contract envisaged a performance guarantee of 10% of the value of the contract to be issued to secure due performance of the obligations of the appellant under the contract, as also advance payments to be made by respondent No.1 to the appellant, return whereof had to be secured by means of bank guarantees, as and when advance payments were made.

7. Accordingly, at the asking of the appellant, respondent No.2 issued a bank guarantee to secure due performance of its obligations by the appellant under the contract in favour of respondent No.1 in sum of US$ 11.7 million, the relevant part whereof reads as under:-

> "According to the said contract the principal will furnish a performance bond for US$ 11,700,000.00 (say US dollars eleven million seven hundred thousand only) in favour of Messrs Mass Global Investment Co., Jordan (The Beneficiary) as security in the event that the Principal failed to fulfil his contractual obligations under and in conformity with the terms of the Contract.
>
> At the request of Messrs Bharat Heavy Electricals Limited (BHEL), New Delhi, India we State Bank of

India, CAG Branch, 11th Floor, Jawahar Vyapar Bhavan, 11th Floor, 1 Tolstoy Marg, New Delhi – 110001, India (Guarantor) hereby irrevocably undertake to pay to you on your first written demand any amount upto USD 11,700,000.00 (Say US Dollars Eleven Million Seven Hundred Thousand only) upon receipt of your written request for payment accompanied with your signed statement stating:

(a) That the Principal has failed to fulfil their obligation in accordance with the conditions of the contract, and

(b) The amount which the Principal has failed to fulfil.

(c) The Principal has failed to perform or fulfil any of the material acts or obligations set forth under the contract, despite 30 calendar days notice having elapsed and the Principal still failing to remedy failure/defects and consequently beneficiary demanding payment of an amount of _____ under the bank guarantee no._____ dated _____.

This guarantee shall become effective upon payment of US$ 9,000,000.00 (US dollars nine million) to the Principal to their account with us."

8. In terms of the contract, receiving an advance payment in sum of US$ 11 million, at the asking of the appellant, respondent No.2 issued a bank guarantee dated August 06, 2007 in favour of respondent No.1, the relevant term(s) whereof reads as under:-

"According to the said contract you will make first advance payment of US$ 11,000,000.00 (say US dollars eleven million only) of which two million has been already paid to Messrs Bharat Heavy Electricals Limited (BHEL), New Delhi – 110003, India in security for the

adjustment of the advance payment a guarantee by a bank shall be furnished.

At the request of Messrs Bharat Heavy Electricals Limited (BHEL), New Delhi, India we State Bank of India, CAG Branch, 11th Floor, Jawahar Vyapar Bhavan, 11th Floor, 1 Tolstoy Marg, New Delhi – 110001, India (The Guarantor) hereby irrevocably undertake to pay to you on your first written demand any amount upto USD11,000,000.00 (Say US Dollars Eleven Million only) upon receipt of your written request for payment accompanied with your signed statement stating:

(a) That the Principal has failed to fulfil their obligation for adjustment of the advance payment in accordance with the conditions of the contract, and

(b) The amount which the Principal has failed to fulfil.

This guarantee shall become effective upon payment of US$ 9,000,000.00 (US dollars nine million) to the Principal to their account with us."

9. Having received a further advance payment in sum of US$ 6,727,265.00, at the asking of the appellant, respondent No.2 issued another bank guarantee on December 10, 2007 in favour of respondent No.1, on identical terms as the earlier guarantee, except that the value of the guarantee was the sum received in advance i.e. US$ 6,727,265.00.

10. With respect to the bank guarantees to secure repayment of the advance received by the appellant from respondent No.1, admittedly vide amendment made on December 29, 2009, while extending the two bank guarantees till March 30, 2010, the value of each guarantee was reduced to US$ 2 million.

11. The appellant claims to have not only successfully executed the

installation of the four gas turbine units but even commissioning thereof after completing testing of the four units on May 11, 2009, June 04, 2009, November 19, 2009 and February 26, 2010 and has a grievance that the respondent No.1 has not issued the requisite taking over certificate.

12. Respondent No.1 invoked the two bank guarantees pertaining to repayment advance vide two identically worded letters dated March 21, 2010 which read as under:-

> "Dear Sirs,
>
> Reference is made to your Guarantee No.0999607FG0000699 Dated 6th of Aug.2007 for USD11,000,000.00.
>
> We **Mass Global Investment Co.** P.O. Box 546, Amman 11953 – Jordan (the Beneficiary) hereby certify:
>
> 1. That the Principal **M/s Bharat Heavy Electricals Limited (BHEL)**, New Delhi – 110 003, India has failed to fulfill their obligation for adjustment of the advance payment in accordance with the conditions of the contract and also that the Principal is in breach of his obligation(s) under the underlying contract(s); and
>
> 2. the amount which the principal has failed to fulfil **USD2,000,000.00** say USD TWO MILLION only.
>
> 3. the respect in which the Principal is in breach is in respect of delay in shipping part of required materials and goods and not executing part of the services at site in accordance with the contract."

13. It also issued a letter of even date i.e. March 21, 2010 invoking the performance guarantee which reads as under:-

> "Dear Sirs,

Reference is made to your Guarantee No.0999607FG0000700 Dated 6th of Aug.2007 for USD11,700,000.00.

We **Mass Global Investment Co.** P.O. Box 546, Amman 11953 – Jordan (the Beneficiary) hereby certify:

1. That the Principal **M/s Bharat Heavy Electricals Limited (BHEL)**, New Delhi – 110 003, India has failed to fulfill their obligation in accordance with the conditions of the contract and also that the Principal is in breach of his obligation(s) under the underlying contract(s), and

2. the amount which the principal has failed to fulfil **USD11,700,000.00** say USD eleven million seven hundred thousand only.

3. the Principal **M/s Bharat Heavy Electricals Limited (BHEL)**, New Delhi – 110 003, India has failed to perform or fulfil any of the material acts or obligations set forth under the contract, despite 30 calendar days notice having elapsed and the Principal still failing to remedy failure/defects and consequently beneficiary demanding payment of an amount of USD11,700,000.00 say USD eleven million seven hundred thousand only under the bank guarantee No.0999607FG0000700 dated 6th of Aug.2007.

4. the respect in which the Principal is in breach is in respect of delay in performing and executing the contract/project and also they did not finish the project until now."

14. This led the appellant to file a suit for permanent and mandatory injunction to restrain defendant No.2 from making payment under the bank guarantees to respondent No.1.

15. Eschewing reference to the prolix pleadings in the plaint and the written statement containing the rival versions which led to the delay in executing the works and whether or not the owner of the work was justified in not taking over the works or whether it was the appellant which had to receive money from respondent No.1 for the works executed; pleading fraud in invoking the bank guarantees, in para 13 and 14 of the plaint it was pleaded as under:-

> "13. That the Contract was to be performed in relation to 4 Units. Two Units, i.e. Unit 1 and Unit 2 of the Project have been commissioned and synchronized successfully on 11 May, 2009 and 4 June, 2009 respectively. Unit 3 was commissioned and synchronized on 19 November 2009. Unit 4 was commissioned and synchronized on 26 February 2010. The fact of successful running of all four Units in their full capacity, was intimated by the Plaintiff to the Defendant No.1 on 10 March 2010.
>
> 14.That as would be evident from the above, the Plaintiff herein has complied with its obligations under the Contract. However, as would be evident from the discussion below, the defendant No.1 herein has been in constant violation of its contractual obligations, and has also acted in an illegal, mala fide and fraudulent manner, causing grave prejudice to the Plaintiff herein."

16. With respect to the two bank guarantees to secure advance payments received by the appellant from respondent No.1, in the context whether the guarantees were validly invoked in terms of the guarantees, in para 39 of the plaint it is pleaded as under:-

> "39. That the terms of the APG1 and APG2 mandates the Defendant No.1, while demanding money from the Defendant No.2, shall provide statements stating:

"(a) that the Principal has failed to fulfil their obligation for adjustment of the advance payment in accordance with the conditions of the contract, and

(b) the amount which the Principal has failed to fulfill."

A bare perusal of the letters written by the Defendant No.1 herein to the Defendant No.2, seeking to encash the APG1 and APG2, would clearly show that the Defendant No.1 herein has failed to meet the above-mentioned stipulations. Assuming without admitting that the Defendant No.1 is entitled to the amounts demanded by it under APG1 and APG2, the plaintiff humbly submits that the Defendant No.1 has completely failed to indicate let alone prove that any of the aforesaid conditions of APG1 and APG2 have been fulfilled. The statements made by the Defendant No.1 are vague, baseless, incorrect and have been made in a fraudulent manner, merely with malafide attempt to encash the APG1 and APG2 illegally, to defeat the rights and interest of the Plaintiff under the Contract, and to cause grave financial loss to the Plaintiff herein. The Plaintiff humbly submits that the above-mentioned illegal and malafide action on part of the Defendant No.1 herein is not only against the provisions of the Contract, but is also impermissible under the law, as well as equity."

17. And with respect to the guarantee pertaining to performance, in paragraph 40 of the plaint it is pleaded as under:-

"40. That the terms of PBG clearly states that while demanding any amount under the guarantee the Defendant No.1 has to provide statements to the Defendant No.2 in following terms:

"(a) That the Principal has failed to fulfill their

obligation in accordance with the conditions of the contract; and

(b) the amount which the Principal has failed to fulfill.

(c) the principal has failed to perform or fulfill any of the material acts or obligations set forth under the contract, despite 30 calendar days notice having elapsed and the principal still failing to remedy failure/defects and consequently beneficiary demanding payment of an amount of ____ under the bank guarantee No.____ dated _____."

A bare perusal of the letters written by the Defendant No.1 herein to the Defendant No.2, seeking to encash the PBG, would clearly show that the Defendant No.1 herein has failed to meet the above-mentioned stipulations. It is most respectfully submitted that the statements made by the Defendant No.1, vide its letter dated 21 March 2010, addressed to the Defendant No.2, are incorrect and baseless. The Plaintiff states and submits that no such notice pursuant to any alleged failure/defect on Plaintiff's part, was received from Defendant No.1 prior to the instant illegal attempt of the Defendant No.1 to encash the PBG. This clearly shows that the malafide nature of the actions on part of the Defendant No.1 in its dealings with the Plaintiff and its complete disregard to the clear and unambiguous terms of the Contract and its contractual obligations. It is most respectfully submitted that the there was no delay in performing its obligations by the Plaintiff. On the contrary, it is submitted that the Plaintiff herein, as has already been detailed herein above, has at all times complied with its contractual obligations and it is the Defendant No.1 who has sought to wrongfully withhold the amounts payable to the Plaintiff and has now also sought to encash the Bank Guarantees in fraudulent manner, in complete disregard of the clear and unambiguous terms of the Contract and

its contractual obligations and in clear violation of law."

18. With respect to the plea of irretrievable injury if the guarantees were permitted to be encashed, in paragraph 46 of the plaint it is pleaded as under:-

> "46. That it is most respectfully submitted that the Plaintiff is entitled to an ad interim ex-parte injunction restraining the Defendant No.2 from extending the APG1, PBG and APG2 in terms as sought by the Defendant No.1 or making any payment under the APG1, PBG and APG2 in the event of Defendant No.1 seeking to encash the said bank guarantees or any part thereof. The Plaintiff further submits that the Defendant No.1 has not suffered any loss or damage under the Contract, and if the reliefs prayed for in the present Suit are not been granted, it would cause grave and irreparable loss to the Plaintiff herein. If the Defendant No.1 takes away the amount under the Bank Guarantees, the Plaintiff will never be able to recover it as the Defendant No.1 is only based in Jordan and has no assets outside Jordan. The Plaintiff states that there is no established system in Jordan to enable the Plaintiff to recover the amount even if there is an award in favour of the Plaintiff. Hence there would be irretrievable injustice to the Plaintiff if the Defendant No.2 pays the amounts under the Bank Guarantees."

19. The response of respondent No.1 to the averments made in para 13 and 14, 39, 40 and 46 of the plaint, being an intermix of the justification for the stand taken by it while simultaneously traversing the averments made in the plaint, being unnecessarily prolix and lengthy; and if reproduced by us would span nearly 20 pages, require us to summarize the response by noting that while responding to averments in para 13 of the plaint, respondent No.1 did not dispute the dates set out in the plaint when the four units were

commissioned and synchronized, but highlighted that as per contract the corresponding dates were January 31, 2008, February 10, 2008, May 22, 2008 and June 05, 2008. It was pleaded that though commissioned, respondent No.1 had not taken over the plants as several material elements were found missing and significantly were not running on liquid fuel and this was a material non-performance inasmuch as the plants were required to run on dual fuel system being liquid and gas. With reference to the averments made in para 14 of the plaint, apart from highlighting delay in performance of the contract, material failures in operation of the plant i.e. its inability to perform while running on a dual fuel system, failure to deliver the functional power etc. were highlighted and in addition various defects in the power plant and failure to deliver some key components were highlighted i.e. it was asserted that it was not a case where the guarantees were being invoked in the teeth of the appellant having commissioned the works in question. It was thus justified that respondent No.1 was entitled not to take over the plant. Responding to the averments made in paras 39 and 40 of the plaint, it was pleaded that respondent No.1 was justified in invoking all the three guarantees, and with respect to the performance guarantee various facts were pleaded with reference to e-mails exchanged between parties to highlight non-performance of the obligations by the appellant. Response to the averments made in para 46 of the plaint, need to be extracted. It is as under:-

> "Contents of Para 46 are denied and it is submitted that the Answering Defendant is entitled to encash the said guarantees in view of Plaintiff's failure to fulfill materials obligations under the Contract and the delay caused by the Plaintiff in performance of the Contract. Furthermore the Guarantees are irrevocable guarantees which are payable on first written demand of the Answering Defendant specifying conditions, prescribed

in the respective guarantees for invocation of the same. As the Defendant has invoked the guarantees in terms specified for the same, Defendant No.2 is bound to release the said payments and no injunction restraining defendant No.2 from releasing the said amount lies against Defendant No.2. It is settled law that bank guarantees have to be invoked in terms thereof and disputes pending between the parties cannot be considered in releasing the guaranteed amounts.

It is denied that the Plaintiff has not suffered any loss or damage under the Contract. It is submitted that the loss suffered by the Answering Defendant in view of the delays and failures of the Plaintiff in performance of its obligations under the contract, far exceeds the guaranteed amounts. It is also pertinent to reiterate that in total, the Answering Defendant has paid the Plaintiff $96,979,850 of the contract price of approximately @ 118,18,750. However due to failures by the Plaintiff to deliver equipment and services, the Plaintiff is liable to refund $6,500,747 of the Contract price already paid. The Answering Defendant is entitled to invoke the performance guarantee to recover at least a portion of the loss and damage caused to it due to the above stated failures of the Plaintiff and grave prejudice will be caused to the Answering Defendant if he is not able to recover the same. Further grave prejudice to international trade and commerce if bank guarantees are not honoured. On the other hand no prejudice will be caused to the Plaintiff as the Plaintiff has remedy in arbitration in London governed by ICC rules to recover any moneys that it can prove are owed to it whether on account of invocation of the guarantees or otherwise. A foreign arbitral award is enforceable in Jordan as it is a signatory of the New York Convention and there can therefore not be an apprehension that the monies will not be recovered."

20. Realizing that it had overlooked the fact that the performance

guarantee was limited to 10% of the contract value, and when issued the contract value was US$ 117 million, which was reduced to US$ 100 million as also the fact that during execution of the works, respondent No.1 had reduced the scope of supplies, thereby further reducing the price payable to it under the contract, a lesser amount was required to be secured towards due performance of the contract, the appellant moved an application to amend para 41 of the plaint and substitute the same by pleading afore-noted facts; and the obvious object to amend the pleading was to bring home the point that the performance guarantee could not be invoked for the value thereof.

21. Issuing summons in the Suit to the respondents, as recorded in the order dated March 27, 2010, counsel for the respondent No.1 who appeared when the Suit was listed for admission before the learned Single Judge made a statement that said respondent shall maintain status quo vis-à-vis the bank guarantees. Thereafter pleadings were completed and matter lingered on. On May 06, 2010 I.A. No.5975/2010 was listed before the Court in which appellant had made a prayer, as noted above to amend the plaint.

22. Parties thereafter attempted a negotiated settlement. The matter was adjourned from time to time.

23. The parties were able to arrive at a settlement as a result of various meetings held between August 18, 2010 and August 21, 2010. The same was reflected in a minutes drawn up concerning the meetings held from August 18, 2010 to August 21, 2010. Vide Serial No.2 of the minutes it was recorded that in view of several unforeseen challenges faced, procurement actions were taken and supplies effected by respondent No.1 pertaining to some equipment, which as per the contract, had to be supplied by the appellant. Vide Serial No.3 it was recorded that the four units were

commissioned and were running at base load as per grid demand with effect from May 11, 2009, June 04, 2009, November 19, 2009 and February 26, 2010, i.e. the dates alleged by the appellant of having commissioned the four units. The value of the equipment procured and brought at the site by respondent No.1 was thereafter valued. With respect to the payments made by respondent No.1 to the appellant, vide Serial No.7 of the minutes it was recorded that parties have agreed that appellant had to pay US$ 13 million to the respondent No.1. Vide Serial No.10 it was minuted that the four unfinished systems listed at Serial No.10 would be completed by the appellant pertaining to the existing contract.

24. How would appellant pay US$ 13 million to respondent No.1 was recorded as per Serial No.8. And the mode of payment was agreed to be by way of an adjustment with respect to a new contract requiring appellant to execute, on turnkey basis, either 2XFr 6B GTG Open Cycle project at Sulemaniyah Cement Plant or one unit Frame-9E and in respect of which, it was agreed that a new contract pertaining to either one of the two works which would be executed by the appellant, would be executed by September 27, 2010. Vide Serial No.9 of the minutes it was recorded:

> "Till signing of the contract by 27th September 2010, between MGI and BHEL for supply of 2XFr 6B GTG Units for Sulemaniyah Cement Plant or one Frame 9E Unit, the encashment of three numbers of Bank Guarantees by MGI and proceedings in Hon'ble High Court of New Delhi would be kept under hold."

25. To give a formal legal colour to what was agreed between the appellant and respondent No.1 and was briefly minuted in the minutes of the meetings held between August 18, 2010 and August 21, 2010, the appellant and the respondent No.1 executed a **SETTLEMENT AGREEMENT** on

August 22, 2010; relevant portions of the recitals whereof read as under:-

> "**WHEREAS,** during execution of the Turnkey Contract, certain disputes had arisen between the parties in respect of the execution of the Power Plant and parts thereof (all such disputes hereinafter referred to as the "**Disputed Matters")**
>
> **WHEREAS,** pursuant to the said Disputed Matters MGI purported to invoke the three Bank Guarantees provided to MGI on behalf of BHEL under the terms of the Turnkey Contract, such Guarantees being (1) Advance Payment Bank Guarantee number 0999607FG0001132, in its current amount of USD 2,000,000.00 (Two Million United States Dollars) (2) Advance Payment Bank Guarantee number 0999607FG0000699 in its current amount of USD 2,000,000.00 (Two Million United States Dollars) and (3) Performance Bank Guarantee number 0999607FG0000700 in an amount of USD 11,700,000.00 (Eleven Million, Seven Hundred Thousands United States Dollars) (hereinafter collectively the "**Bank Guarantees**")
>
> **WHEREAS**, BHEL vide a suit filed in the Delhi High Court (bearing number CS(OS) No.583 of 2010) obtained an interim injunction on the said invocation of the three Bank Guarantees against MGI and State Bank of India, however, the final judgment for the above has not yet been issued as on date;
>
> **WHEREAS**, Now, in pursuance of the meetings dated 19th to 21st June 2010; 31st July 2010 to 4th Aug.2010; 18th to 21st August 2010 at Amman and 18th to 24th July 2010 at Sulymaniyh site between the Parties, the Parties have accordingly agreed to settle all disputes and differences on the terms and conditions more particularly described and stated hereinafter, (Minutes of the Amman meeting from 18th to 21st August 2010 signed by the parties are enclosed herewith as Schedule (1) of this Settlement Agreement, which shall be considered an

integral part and parcel of this Settlement Agreement)"

AND WHEREAS, now, the Parties through their authorized representatives have mutually negotiated a settlement and have accordingly agreed to amicably resolve the Disputed Matters in good faith by entering into this Settlement Agreement, which shall, upon implementation of its terms and conditions as stated herein below, constitute a final and irrevocable settlement of all claims and demands of the Parties in respect thereof in connection with the Turnkey Contract."

26. After recording the recitals, the parties set down in writing the terms of the settlement agreement, relevant clauses, being 1 to 9, whereof read as under:-

"**1. THE SETTLEMENT**

The Parties agree that this Settlement Agreement and the terms set out herein shall be in full, unconditional, irrevocable, comprehensive and final settlement in connection with the Disputed Matters and all claims arising pursuant to the Turnkey Contract, from the date of the commencement of the Parties' commercial relationship until the date of this Settlement Agreement.

Upon execution of this Settlement Agreement in accordance with the terms and conditions stated below, each Party irrevocably and unconditionally relinquishes and waives all claims and demands, and further releases the other Party from all liabilities and amounts whether known or unknown in connection with the Turnkey Contract in perpetuity.

2. TERMS OF SETTLEMENT

In full, unconditional, irrevocable, comprehensive and final settlement of all claims and demands in respect of the Disputed Matters and the Turnkey Contract, the Parties agree as follows:-

(a) Compensation to be paid by BHEL to MGI in an amount of USD 24,046,065.67 (Twenty Four Million and Forty Six Thousand and Sixty Five United States Dollars and 67/100) towards procurement by MGI of certain materials and providing services at site part of BHEL scope of works and pecuniary liabilities linked to scheduled completion;

MINUS

(b) An amount of USD 11,046,065.67 (Eleven Million and Forty Six Thousand and Sixty Five United States Dollars and 67/100) due to BHEL by MGI pursuant to the Turnkey Contract.

The Parties hereby irrevocably agree on the calculation of the amounts and the amount itself herenabove and irrevocably agree to affect a setoff.

Accordingly, BHEL hereby irrevocably acknowledges that it owes MGI, and hereby irrevocably undertakes to settle to MGI, an amount of **USD 13 Million (Thirteen Million United States Dollars)** (hereinafter the **"Settlement Amount"**).

3. MANNER OF SETTLEMENT

The Parties agree that the settlement described herein above shall be fulfilled as follows:

(a) MGI hereby agrees to purchase, and BHEL hereby agrees to supply, the Turbines and Power Generation Equipments comprising of 2x Fr 6B GTG Units for MGI Sulymaniyh Cement Plant and as per the Technical Proposals – Annex (1) of Schedule (1)) or one unit frame 9E. To that end, the Parties will negotiate in good faith and shall exert all reasonable efforts to negotiate and sign a supply agreement no later than 27 September 2010 or such extended period as may be mutually agreed (hereinafter the **"Supply Agreement"**)

(b) It is agreed that the Settlement Amount (USD 13 Million) shall constitute 52% of the contract value of the Supply Agreement. The Settlement Amount referred to herein above shall be considered as advance payment for the Turbines and Power Generation Equipments. The Supply Agreement will expressly stipulate the receipt by BHEL of the Settlement Amount as payment on account (down payment) against the total contract price of the Supply Agreement of USD 25 million (Twenty Five Million United States Dollars).

(c) Upon signature of the Supply Agreement, BHEL will issue an advance payment bank guarantee in an amount equivalent to USD 13 Million (Thirteen Million United States Dollars), effective from the date of operation of letter of credit to be issued by MGI. The advance payment bank guarantee shall be issued through a bank of international repute (Citibank, Commerce Bank or any other similar bank mutually agreed) as per mutually agreed text. All banking charges towards issuance and confirmation of the advance payment bank guarantee will be BHEL's account.

(d) Upon signature of the Supply Agreement and the provision of the advance payment bank guarantee referred to above under paragraph (c), MGI undertakes to discharge the Bank Guarantees in full by issuing the necessary instructions to State Bank of India and simultaneously making a joint application to the Delhi High Court for dissolution of all pending claims.

(e) The remaining 43% of the Contract value (of the Supply Agreement) shall be payable to BHEL progressively against presentation of shipping documents on pro rata dispatches.

(f) The remaining 5% of the Contract value (of the Supply Agreement) shall be payable to BHEL against issuance of Taking over Certificates by MGI. This clause will be further discussed during contract

discussion.

(g) Mode of payment for (e) and (f) above shall be through a confirmed and irrevocable Letter of Credit to be established by MGI in favour of BHEL within a maximum of Thirty Days from the date of signing the Supply Agreement. The above Letter of Credit shall be issued through a bank of International repute (Citibank, Commerce Bank or any other similar bank mutually agreed) as per mutually agreed text. All banking charges towards issuance and confirmation of L/C will be to MGI's account.

(h) It is agreed that BHEL will issue a performance bank guarantee as per mutually agreed text for 10% of the contract price of the Supply Agreement within two weeks from the date of opening of L/C by MGI in favour of BHEL.

4. RELEASE, WAIVER, DISCHARGE

(a) Release by MGI Upon: (i) signing of the Supply Agreement, (ii) issuance of the advance payment bank guarantee referred to under clause 3 (c) above, and (iii) fulfillment by BHEL of its obligations stated herein including clause (5), MGI holds BHEL free of any responsibility and waives its rights against BHEL as regards the Disputed Matters and any obligations, claims, compensations, liabilities or any other, arising out of or in connection with the Turnkey Contract and the Disputed Matters and such release conferred herein shall be considered final and irrevocable.

(b) Release by BHEL. Upon: (i) signing this Agreement, (ii) signing of the Supply Agreement, and (iii) fulfillment by MGI of its obligations set out under clause 3(d) BHEL holds MGI free of any responsibility and waives its rights against MGI as regards the Disputed Matters and any obligations, claims, compensations, liabilities or any other, arising out of or in connection with the Turnkey Contract and the Disputed Matters and such release

conferred herein shall be considered final and irrevocable.

(c) In relation to any claims/counter claims, upon fulfillment of all the terms and conditions of this Settlement Agreement, the Parties agree to fully and finally release, waive and forever discharge each other and any of its affiliated companies, directors, officers, counsels, agents or other representatives from:

- All claims, demands, debts, accounts, expenses, costs, liens, actions and proceedings of any and every kind, nature and description and under any legal theory be it contract, misrepresentations, fraud etc., whether known or unknown, which the Parties has or might have or might assert in relation to the Disputed Matters and Turnkey Contract; and

- Any legal liability arising, directly or indirectly, out of or in any way connected hereto, in relation to the Disputed Matters and Turnkey Contract.

(d) Upon fulfillment of all terms and conditions of this Settlement Agreement, the Parties agree that they will not take any further action or any other measure of any nature, against each other or any of its affiliated companies, directors, officers, counsels, agents or other representatives, in relation to the Disputed Matters and Turnkey Contract.

(e) The Parties hereby agree that the current injunction proceedings being deliberated by the High Court of New Delhi shall temporarily be put on hold until the signing of the Supply Agreement. To that end, the Parties agree to jointly request the High Court of New Delhi to adjourn the proceedings until the Parties move a joint application (if any) in CS(OS) No.583 of 2010 pending before the Delhi High Court to record the terms of this Settlement

Agreement so that a compromise decree can be passed by the Delhi High Court in accordance with this Settlement Agreement. For the avoidance of doubt the joint application referred to above will be made only following signature of the Supply Agreement.

5. COMPLETION OF WORKS

BHEL undertakes to complete the unfinished systems, including: (1) Fire Fighting System by end of October 2010, (2) Commissioning of the GTG's Units for 3&4 on liquid fuel without undue delay, (3) DM Water System, and (4) CCTV.

6. INCONSISTENCIES

In the event of any discrepancies or conflicts between this Settlement Agreement and Schedule (1), the terms of this Settlement Agreement shall prevail.

7. CONFIDENTIALITY AND VALIDITY

In the event this Settlement Agreement is not executed for any reason whatsoever, none of the Parties will have the right to use or refer to this Settlement Agreement and Schedule (1) to arbitration or a court of law, or any other quasi judicial proceeding.

Furthermore, if the Supply Agreement is not signed by 27 September 2010 or such other extended date agreed in writing, this Settlement Agreement and Schedule (1) shall be considered null and void.

8. COSTS

The lawsuit court fees paid by BHEL in connection with the suit filed in the Delhi High Court shall not be claimed by BHEL.

9. SEVERABILITY

If for any reason whatsoever any provision of the Settlement Agreement is or becomes invalid, illegal or unenforceable or is declared by any court of competent jurisdiction or any other instrumentality to be invalid,

> illegal or unenforceable, the validity, legality or enforceability of the remaining provisions shall not be affected in any manner, and the Parties shall negotiate in good faith with a view to agreeing upon one or more provisions which may be substituted for such invalid, illegal or unenforceable provisions, as nearly as is practicable."

27. Relevant would it be to note that annexed as Schedule-1 to the agreement afore-noted was a detailed document delineating the scope of work pertaining to 2XFr-6B Gas Turbine Unit as also the mode of payment pertaining thereto.

28. As per the appellant, the settlement agreement dated August 22, 2010 read with the minutes of the meeting dated August 18, 2010 – August 21, 2010 is a complete accord between the parties and discharges the liability of the appellant under the original contract dated March 04, 2007 as modified on August 04, 2007. Thus, the appellant filed an application registered as IA No.2852/2011 praying that the suit should be disposed of in terms of the settlement and the bank guarantees be discharged.

29. In the application, with reference to the Supply Agreement which was envisaged to be executed not later than September 27, 2010 (refer clause 3(a) of the Settlement Agreement dated August 22, 2010), it was pleaded in the application in para 7 as under:-

> "7. It is further submitted that even though the formal Supply Agreement was not signed/executed by the parties, however pursuant to the process of finalizing the Supply Agreement, BHEL in accordance with the Settlement Agreement and in utter good faith had commenced performing its obligations as stipulated under the Settlement Agreement. BHEL till date has completed approx 35% - 40% of the works in relation to engineering, procurement, manufacture and assembly of

> the two turbines. The said works performed by BHEL in relation to the Turbines amount to INR 37 crores i.e. USD 8.4 million (at the prevailing currency exchange rates). The works were carried out by BHEL in good faith and with due knowledge of MGI. The same was informed to MGI orally during various discussions BHEL had with the representatives of MGI and was further brought to the notice of MGI vide the letter sent by BHEL on 11 February 2011 along with the photographs of the ongoing works in respect of the 2XFr6B Turbines."

30. In the reply filed by respondent No.1 to the aforesaid application it was pleaded that the execution of the Supply Agreement was a condition precedent for a binding obligation to arise and highlighted that 20 issues pertaining to the supply had yet to be agreed upon: (i) site conditions, (ii) computation of liquidated damages, (iii) performance parameters of the turbines, (iv) liquidated damages for failure to attain guaranteed performance, (v) liquidated damages for delay/late delivery, (vi) delivery terms, (vii) delivery period, (viii) number of lots, (ix) performance bank guarantee, (x) warranty/defect liability, (xi) shipping dates, (xii) indemnity, (xiii) supervision of erection and commissioning, (xiv) inspection, (xv) approval of sub-vendors, (xvi) payment terms, (xvii) default and termination and consequences thereof, (xviii) rectification and cure, (xix) dispute resolution, and (xx) terms pertaining to staff, accommodation, travel, custom clearance etc. It was thus pleaded that no settlement agreement which would discharge appellant's liabilities under the contract in respect whereof the bank guarantees were issued was arrived at between the parties. It was prayed that the application be dismissed.

31. Vide impugned order dated August 31, 2012 the learned Single Judge has dismissed IA No.2852/2011 and has also vacated the injunction

granted in favour of the appellant, i.e. has dismissed I.A.No.4049/2010. As recorded by us in para 1 and 2 of the present decision while commencing our journey, the learned Single Judge has not noted many facts on which parties had placed reliance and thus we may very briefly note that after referring to the pleadings of the parties, in para 19 of the impugned decision, the learned Single Judge has noted that though in the plaint grant of injunction was prayed on the plea of fraud and alternatively on the plea of irretrievable injury to the plaintiff, but the same was not canvassed during course of submission. But, opining that the bank guarantees are unconditional demand guarantees, in paragraphs 24 onward till the learned Single Judge decided IA No.4049/2010, with the discussion concluding in paragraph 40 of the impugned order, the entire discussion pertains to whether a case of fraud or irretrievable injury was made out with reference to the case law on the subject.

32. There is obviously a disconnect in what the learned Single Judge has recorded in paragraph 19 and what follows thereafter. If the appellant had not argued the application with reference to the plea of fraud in invoking the guarantee as also the plea of irretrievable injustice, where was the occasion for the learned Single Judge to labour on the said issues? Further, even the issue: Whether the guarantees were invoked in terms thereof arising out of the pleadings in paragraphs 39 and 40 of the plaint and the response thereto have just not been discussed by the learned Single Judge. Even with respect to the discussion on the subject of fraud and irretrievable injury, we find no discussion in the context of the pleadings in paragraph 13, 14 and 46 of the plaint and the response thereto in the corresponding paragraphs of the written statement.

33. With respect to the view taken that the Settlement Agreement

dated August 22, 2010 is not a complete accord, the learned Single Judge has opined (refer para 55 of the impugned decision) that execution of the Supply Agreement was an integral part of the Settlement Agreement and since the Supply Agreement was not executed, it could not be said that the parties had entered into an agreement which could be treated as a compromise between the parties requiring the suit to be disposed of in terms of the compromise.

34. Learned counsel for the parties, Shri Amarjit Singh Chandhiok, Additional Solicitor General and Shri Sandeep Sethi, Senior Advocate who appeared for the appellant and Shri C.A.Sundaram, Senior Advocate and Shri Neeraj Kishan Kaul, Senior Advocate who appeared for respondent No.1 did not dispute the legal proposition: that of the many modes by which a contract can be discharged, one mode is the same process by which it was created i.e. by a mutual agreement. Learned senior counsel did not dispute that parties to an original contract may enter into a new contract in substitution of the previous contract. Learned senior counsel were not at variance that the legal incidents of the substituted contract stand pithily summarized on the subject of: 'Discharge By Agreement', i.e. accord and satisfaction, in the Treatise: CHITTY ON CONTRACTS (13th Edition-2008) in paras 22-014 and 22-015 in the following terms:-

> "**22-014 Form of accord.** At common law, accord and satisfaction was no answer to a claim on a specialty, but the rule was otherwise in equity and the latter now prevails. The accord need not be in writing even if the contract which it is sought to discharge, or for the breach of which a claim is made, is required by law to be made or evidenced in writing. An oral accord will suffice, unless the accord itself constitutes a contract or transaction which is required to be made or evidenced in writing.

22-015 Executory satisfaction. At one time, a number of cases appeared to establish the rule that satisfaction was of no effect unless it was executed. While the satisfaction remained executory, that is to say, so long as the agreement to give satisfaction remained unperformed, the original claim was not discharged, nor would any action lie for breach of the accord. Even a tender of performance of the satisfaction agreed upon was adjudged insufficient. Only executed satisfaction would suffice. This rule, however, was never completely accepted and it is now established that satisfaction may be executory. The question is one of the construction of the accord: whether it was intended that the promise itself or the performance of the promise should discharge the original claim:

> "*The rational distinction seems to be, that if the promise be received in satisfaction, it is a good satisfaction; but if the performance, not the promise, is intended to operate in satisfaction, there will be no satisfaction without performance.*"
>
> In the modern law, therefore, a claimant may still insist upon the performance of some act by the other party in satisfaction of his claim. In that case, there is no satisfaction until performance, and the other party remains liable on the original claim until the satisfaction is executed. More often, however, the claimant will agree to accept the other party's promise of performance in satisfaction of his claim. The original claim is then discharged from the date of the agreement and cannot be revived. The claimant's sole remedy, in the event that the other party fails to perform, is by action for breach of the substituted agreement, and he has no right of resort to the original claim. If he wishes to preserve his right to proceed with the original claim should the other party fail to perform, an express term should be incorporated in the agreement to that effect."

35. Thus, with reference to the substituted contract, it needs to be discerned whether under the accord it is the promise which is received in satisfaction of the dispute or whether it is the performance and not the promise which is intended to operate in satisfaction of the accord.

36. The legal position and how the issue has to be approached, finds a reflection in the decision of the Privy Council reported as 1914 AC 618 *Payana Reena Saminathan v. Panna Lanapalaniappa*, and the decision of the House of Lords reported as 1918 AC 1 *Morris v. Baron & Co.*, which were cited with approval in the majority opinion of the Supreme Court in the decision reported as AIR 1959 SC 1362 *UOI v. Kishorilal Gupta & Bros*. The legal position being: Where the respective rights under a contract are abandoned in consideration of the acceptance of promises under a new agreement, new rights are born and the new agreement becomes a new departure and the rights of the parties are fully represented by it. The approach to the issue has to be to find either express words in the substituted contract to said effect i.e. parties abandoning their rights in the previous agreement and new rights being born under the new agreement or to find whether the first contract is got rid of by a second contract which is capable of being performed, i.e. the reciprocal obligations being set out with clarity, and consequences of breach provided. In other words, if under the new alleged contract, it is found that it lacks essential features of it being capable of being performed, it would not be a case where parties have abandoned their rights under the original contract. Since, fortunately for us, learned senior counsel for the parties were not at variance on the legal position, our task has become simple i.e. to peruse the Settlement Agreement and determine whether the parties have agreed therein to get rid of the first contract and create new obligations i.e. the promise being received in

satisfaction of the discharge under the original claim or whether it was the performance (and not the promise) which was intended to operate in satisfaction; and this exercise to be performed keeping in view the decisions of the Privy Council and the House of Lords which were approved in the majority decision by the Supreme Court in *Kishorilal Gupta*'s case (supra).

37. With reference to the recitals of the Settlement Agreement dated August 22, 2010, which have been reproduced by us in paragraph 25 of our opinion, the first recital throws light that disputes had risen between the parties with reference to the execution of the turnkey contract and the second and the third recitals records that pursuant to the dispute, respondent No.1 had invoked the two advance payment bank guarantees and the performance bank guarantee, and in respect whereof the appellant had obtained an interim injunction. The fourth recital records that parties have *agreed to settle all disputes and differences on the terms and conditions* herein after recorded i.e. the operative covenants of the contract. The recital expressly makes it clear that the minutes of the meetings from 18th to 21st August 2010 shall be considered as an integral part of the Settlement Agreement. The last recital, has a key to unravel the deadlock. It expressly records that after mutual negotiations a settlement was arrived at and the purport of *this Settlement Agreement* was to not only reduce the terms of the settlement in writing but to discharge the parties from their obligations under the original contract *upon implementation of its terms and conditions* as stated herein below. Prima facie, the recital makes it very clear that it is not the promise but the satisfaction of the promise which would have discharged the parties from their obligations under the original contract.

38. However, there is much more to note and say on the subject for the reason it is settled law that intention of the parties has to be gathered

after reading, as a whole, the contractual documents. We highlight that the same very recital which prima facie leans in favour of the view that it was not the promise but the performance of the promise which was intended to be the satisfaction to discharge the obligations under the original contract, records that the Settlement Agreement *constitutes a final and irrevocable settlement of all claims and demands of the parties in respect of the turnkey contract*, a language which is prima facie suggestive of the contrary i.e. that the parties have agreed to venture a new journey.

39. But what are the operative clauses of the contract? It is probably somewhere hidden within them, that the true intention of the parties has to be found. Indeed it is.

40. We have reproduced the relevant clauses, being 1 to 9 of the agreement in para 26 above of our opinion; and we revisit them one by one. Clause 1 records that the parties are fully, unconditionally, irrevocably and comprehensively bound to the Settlement Agreement in connection with the disputed matters and their claims arising pursuant to the turnkey contract. But, in the same very clause, i.e. the second part, records that it is the execution of the Settlement Agreement in accordance with the terms and conditions thereof that the parties would irrevocably and unconditionally relinquish and waive their claims and demands under the turnkey contract.

41. In clause 1, the parties have not expressed themselves with clarity and on the one hand have recorded that the Settlement Agreement binds them unconditionally, comprehensively and irrevocably and in the same breath have proceeded to record that the claims and demands under the turnkey contract shall be discharged upon execution of the Settlement Agreement. The problem is with the use of the word *'execution'* in the second part of the clause. Did the parties understand *'execution'* to mean the

signing of the Settlement Agreement, for to execute an agreement would mean parties appending their signatures thereto, or the parties used the word *'execution'* as a synonym for the word *'performance'*; to be understood to mean that upon performance of the terms and conditions of the Settlement Agreement the parties would relinquish and waive their claims and demands under the turnkey contract?

42. Clause 1 also has scope for a debate and till now, if it was boxing round, and we were match referees, we would say it is 'One : One'.

43. Does clause 2 tilt the balance? It records that the appellant has to compensate respondent No.1 in sum of US$ 24,046,065.67 towards procurement by respondent No.1 of materials and services provided at site for scope of work which had to be executed by the appellant. It records that for the work done a balance amount of US$ 11,046,065.67 is payable by respondent No.1 to the appellant; and thereafter the clause records that by affecting set-off, the appellant acknowledges a liability to pay US$ 13 million to the respondent.

44. The clause helps us no bit to understand on the subject we are discussing. It simply records an accord that with respect to the turnkey contract, after squaring off the respective claims i.e. affecting set-off, appellant acknowledges a liability to pay US$ 13 million to the respondent No.1. But whether the promise is the satisfaction to discharge the parties from their obligations under the turnkey contract or it is the performance thereof, the subject with which we are grappling, the clause throws no light. Thus, till clause 2 it can be said that the parties are: 'One : One'. Let us see whether clause 3 helps us. Its caption: '**MANNER OF SETTLEMENT**', is expected to resolve the issue. Sub-para (a) of clause 3 records that the promise under the accord to pay US$ 13 million to respondent No.1 would

be satisfied by the appellant by supplying either Turbines and Power Generation Equipments comprising 2XFr6B GTG Units as per technical proposals annexed as Annexure-1 to the Settlement Agreement or one unit frame 9E, and for which contract the parties shall further negotiate and sign, not later than September 27, 2010, a Supply Agreement. Sub-para (b) of clause 3 records that US$ 13 million payable under the turnkey contract by the appellant to respondent No.1 shall be adjusted as payment under the Supply Agreement, whether it would relate to the 2XFr6B GTG Units or 9E Unit frame, and this would constitute 52% of the contract value, meaning thereby that the contract value for the proposed new contract would be US$ 25 million. Prima facie, the game now leans in favour of respondent No.1 inasmuch as law requires that to break from the past contract, with reference to an accord, the new contract has to be an executable contract and this would mean the terms of the further journey and the new destination have to be clearly defined. In other words, the execution of a Supply Agreement was essential, to put it in yet different words, it was the execution of the Supply Agreement which would have severed the parties from their respective obligations to each other under the turnkey contract. But Sub-para (c) of clause 3 of the Settlement Agreement records that when the Supply Agreement was signed only then the settled amount i.e. US$ 13 million would be treated as an advance payment under the Supply Agreement and simultaneously would oblige the appellant to issue an *advance payment bank guarantee in the amount equivalent to US$ 13 million*. Simultaneously, to secure payment of further sum of US$ 12 million by respondent No.1 to the appellant, it would open a Letter of Credit. The balance now shift in favour of respondent No.1 Sub-para (d) of clause 3 further shifts the balance in favour of respondent No.1 and against the

appellant, inasmuch as the clause clearly envisages that when the Supply Agreement is signed i.e. executed and the condition of advance payment bank guarantee referred to in para (c) of the clause is complied with, respondent No.1, shall discharge the bank guarantees pertaining to the turnkey contract and simultaneously, the parties shall make a joint application to the Delhi High Court for resolution of the pending claims. Sub-paras (e) and (f) of the clause record the stages at which the remainder 48% of the contract value under the Supply Agreement would be paid. Sub-para (h) requires appellant to issue a performance guarantee for 10% of the contract price under the Supply Agreement.

45. Clause 4, under the caption **'RELEASE, WAIVER, DISCHARGE'**, records that upon signing of the Supply Agreement and issuance of the bank guarantee referred to in sub-para (c) of clause 3, alone would respondent No.1 waive its rights against the appellant as regards the disputed matters under the turnkey contract.

46. Clause 4 needs to be spoken of a little more. Since a contract is the result of mutually agreed terms being accepted by the parties, its novation by way of an accord has obviously to be the result of mutually agreed terms. Whether it is the promise under a new agreement which is intended to discharge the parties i.e. satisfy the claims under a previous agreement or it is the satisfaction of the promise which was intended to discharge the parties i.e. satisfy the claims under the previous agreements, is the position which needs to be determined with reference to the language of the accord. But what we find in the instant case is that the parties have clearly intended to charter the journey through a different route. Clause 4 of the accord clearly evidences that the mutually agreed terms of the accord are that it is the signing of the Supply Agreement and issuance of the advance

payment bank guarantees referred to in sub-para (c) of clause 3 which was intended by the parties to be the satisfaction of the accord to discharge the appellant and respondent No.1 from their respective obligations under the turnkey contract. The parties have clearly contemplated that unless, not only the Supply Agreement is executed but is put into the journey of 'performance', the relationship, the rights and liabilities under the turnkey contract would not stand discharged.

47. It had to be so. The accord is that with respect to the turnkey contract, after effecting set-off, the appellant owed US$ 13 million to respondent No.1, which amount became the advance payment in the hands of the appellant pertaining to the new contract i.e. the Supply Agreement to supply either equipment pertaining to the 2XFr6B GTG Units or the Unit Frame 9E. Respondent No.1 had to be secured repayment of the said advance under a bank guarantee. Further, it had to be secured, by way of a performance guarantee, for the due performance of the obligations under the new contract. The situation was akin to a baton being passed at a relay race. Unless the previous runner, on the track, within the limited distance recognized by the rules of the race, passes on the baton to the next runner, alone she can fade away from the race, with the next runner completing the next lap. Without the baton in hand, the next runner cannot run the lap. With this analogy, one can understand that the intention of the parties was that unless the accord i.e. the settlement amount i.e. US$ 13 million was not secured by another bank guarantee and due performance of the new contract was not secured by a performance guarantee, the parties would remain tied with the umbilical cord to the turnkey contract. This is the reason why, as per sub-paras (d) and (e) of clause 4, the parties clearly recorded that till the Supply Agreement was executed and it took off with respect to respondent

No.1 being secured through a security advance guarantee and a performance guarantee, neither party would be discharged from the obligations under the turnkey contract. And what more clear language could the parties use, other than in sub-para (e) of clause 4 when they recorded that the current injunction proceedings shall temporarily be put on hold till the parties signed the Supply Agreement.

48. Clause 5 of the Settlement Agreement is interesting. It shows that even if the Supply Agreement was executed and the guarantees envisaged under sub-para (c) of clause 3 were issued, not everything pertaining to the turnkey contract would have stood discharged. Four items of work which were unfinished pertaining to the turnkey contract were required to be completed by the appellant. Thus it can be said that clause 5 of the Settlement Agreement is a residue clause, saving the performance of some obligations under the turnkey contract. However, we hasten to add that the clause in question is of no help to resolve the issue at hand which we are discussing; but would simultaneously highlight that clause 3 and clause 4 have sufficient indicators, signposts and signage to point the direction in which the parties intended to move. The victory is not on points but on a clean knock out.

49. Clause 6, 7 and 8 of the Settlement Agreement have no bearing on the issue at hand; and thus we reach clause 9, which requires that in the event of any provision of the Settlement Agreement becoming invalid, illegal or unenforceable or is declared so by any Court of competent jurisdiction, the legality or enforceability of the remaining provisions shall not be affected in any manner and the parties shall negotiate in good faith with a view to agree upon one or more provisions which may be substituted for the provision declared invalid, illegal or unenforceable, as nearly as is

practicable.

50. Prima facie clause 9 reflects the intention of the parties to save such part of the Settlement Agreement which can be save upon a part thereof being declared illegal, invalid or unenforceable.

51. We propose to discuss further clause 9 after we note the rival submissions of the learned Senior Advocates who appeared for the parties because the issue of severability would be inter linked to not only their submissions but even to the overall structure of the agreement.

52. Mr. Amarjeet Singh Chandhiok, learned Additional Solicitor General, had rightly urged that the Settlement Agreement, though factually one entity, has two distinct severable parts, i.e. it is an agreement which is factually one but conceptually two. The first part of the Settlement Agreement, which is distinct from the second part thereof, is that the parties have recorded a complete accord pertaining to the Disputed Matters relating to the turnkey contract. They have listed the terms of the settlement in the two sub-paras of clause 2 of the Settlement Agreement. Briefly recorded, parties have settled that pertaining to the turnkey contract, the appellant would pay to respondent No.1, by way of compensation, a sum of US$ 24, 046,065.67 and that for the work done by the appellant and accepted by respondent No.1 US$ 11,046,065.67 are payable. Setting off the two sums, the parties have recorded that appellant would pay to respondent No.1 sum of US$ 13 million. Pertaining to the turnkey contract, the parties have further agreed, as recorded in clause 5 of the Settlement Agreement, that pertaining to the turnkey contract, the appellant would complete the unfinished systems listed in clause 5 of the Settlement Agreement. In other words, the parties have agreed that the turnkey contract shall be closed upon the appellant completing the unfinished systems mentioned in clause 5 of the

Settlement Agreement and paying US$ 13 million to respondent No.1. The Settlement Agreement, after crystallizing as aforesaid, and being a complete accord, requiring satisfaction of the promise by the appellant to pay US$ 13 million to respondent No.1, proceeds to record the manner in which the satisfaction of the promise would be made. And here enters the distinct subsequent agreement, a new agreement, embodying the terms of the satisfaction of the promise under the accord and clearly envisages that under a Supply Agreement (to be executed by the parties not later than September 27, 2010), on the terms contained therein, the appellant would supply either Turbines and Power Generation Equipment comprising of 2XFr 6B GTG units or one unit frame 9E. Pertaining to the 2XFr 6B GTG units, as per Annexure-1 to the Settlement Agreement, the description and the specifications of the supplies to be made have been clearly spelled out as also the terms of payment. The price has been agreed to, i.e. US$ 25 million. It has been recorded that the amount crystallized under the accord pertaining to the turnkey contract, i.e. US$ 13 million, payable by appellant to respondent No.1, would be treated as an advance payment under the Supply Agreement and the balance sum of US$ 12 million would be paid: 43% progressively against presentation of shipping documents on pro-rate dispatches and 5% against issuance of taking over certificate. The Settlement Agreement further records that the mode of payment by respondent No.1 to the appellant would be through confirmed and irrevocable Letter of Credit. However, the Settlement Agreement i.e. the Annexure-1 thereto, clearly requires the parties to negotiate further and agree the date wherefrom supplies would be effected as also other commercial terms and conditions. If the alternative pertained to 2XFr 6B GTG Units, the parties were obliged to discuss further the proposal for installation and

commissioning of the Units, and these are to be found in clauses 3(iii)(c), (g) and clause 5 of an appendix to the schedule. Clause 6 of the said appendix requires appellant to submit an offer to the respondent No.1 regarding 2XFr 6B GTG Units with an option to buy Frame 9 instead of Frame 6.

53. As regards the alternative contemplated by the Settlement Agreement, with respect to either supplying 2XFr 6B GTG Units or one unit frame 9E, it is not in dispute that the parties agreed that the Supply Contract would be with respect to the former, i.e. 2XFr 6B GTG Unit.

54. What happened due to which the parties could not execute the Supply Agreement by September 27, 2010, is not clear from the pleadings of the parties, but apparently the dialogue continued to settle such terms which were required to be settled for the contract to be formally drawn up; and needless to state the said unsettled terms were the ones which the parties had in mind when they recorded in the Settlement Agreement that they would negotiate further and agree to the dates wherefrom supplies would be effected as also other commercial terms and conditions. These negotiations took the parties till early January 2011, evidenced by a letter written by respondent No.1 to the appellant on January 03, 2011, requiring the appellant to reach Amman so that the matter pertaining to the 2XFr 6B GTG Units could be finalized and the Supply Agreement drawn and executed. In the said letter, respondent No.1 informed the appellant to ensure that somebody should reach Amman latest by January 15, 2011, so that negotiations could be held over the next two days and contract finalized by January 17, 2011. On January 14, 2011, the appellant requested the meeting to be postponed, and on January 20, 2011, the respondent No.1 terminated the Settlement Discussions informing that there was an unjust delay, attributable to the appellant, in executing the Supply Contract, date of execution of which was

fixed as September 27, 2010 under the Settlement Agreement. It was also informed that the appellant was in breach of clause 5 of the Settlement Agreement which obliged the appellant to complete the listed incomplete works pertaining to the turnkey project.

55. It was rightly urged, and with which submissions we agree, by Sh.Amarjeet Singh Chandhiok, learned Additional Solicitor General, that the Settlement Agreement has two distinct parts and that the severability clause No.9 does not render the Settlement Agreement to be void or non-est, if a part of it was illegal, invalid or unenforceable. We also agree with the submissions made by the learned Additional Solicitor General that this would include a breach of a part of the Settlement Agreement, requiring the remainder to be enforced. But this takes the appellant nowhere.

56. Every Settlement Agreement, which is by way of an accord pertaining to a dispute under an existing contract, is bound to have two limbs. The first limb is to record the term of the settlement, which would mean the promise by one party to the other. The second limb would be the manner in which the promise would be satisfied. Thus, the submissions urged by the learned Additional Solicitor General would take us nowhere to resolve and untie the knot, with which we are grappling, i.e. whether the parties agreed under the accord that the promise be received in satisfaction of the accord or it was the performance of the promise which would operate in satisfaction of the accord. And on the facts of the instant case, as we have already opined in paragraph 52 above, there is a problem with the identification of the promise itself. Whether the promise under the accord is accepted in satisfaction of the accord or whether the performance of the promise is the satisfaction of the accord, is thus not even arising for consideration, inasmuch as the promise which was intended to be the sine

qua non of the accord has not been fully crystallized. What we find on facts is that as per the accord, the settlement amount i.e. US$ 13 million, has been recorded as payable by the appellant to respondent No.1 and completion of the listed incomplete works as per clause 5 of the Settlement Agreement, and this was the promise under the accord. But the parties did not leave the matter at that. Contemplating what would be the promise, the parties were conscious of the fact that apart from the Settlement agreed amount, the mode of payment thereof would also be within the ambit of the promise: akin to a situation where 'A' promises to pay 'B' a sum of ₹500/- at 12 Noon on January 01, 2012. The promise would be not only to pay ₹500/- but the time as well. Further, if the promise was to pay ₹500/- at 12 Noon at Volga Restaurant in Connaught Place Volga Restaurant, i.e. the place would also be the part of the promise. The promise would embrace the amount, the time and the place.

57. We highlight once again that as per the law noted by us in paragraph 36 above, where the parties under a contract abandon their rights in consideration of the acceptance of a promise under a new agreement whereunder new rights are born and the new agreement becomes a new departure, unless the promise is clearly defined there cannot be in law: A new defined contract.

58. To overcome the problem, learned Additional Solicitor General urged that law recognizes the distinction between a condition precedent and a condition antecedent. The former would be a sine qua non for a contract to come into existence and the latter would be a part of the contract. Learned Additional Solicitor General urged that the Settlement Agreement had included as Schedule-1, the minutes of the meetings drawn up pertaining to the meeting held between August 18, 2010 and August 21, 2010 as also an

Annexure-1, in which, i.e. both documents the contractual terms and conditions pertaining to the supply of the equipment relating to 2XFr 6B GTG Units were listed, and thus urged the learned Additional Solicitor General, that the Settlement Agreement distinctly embodies the Supply Agreement, execution whereof was a mere formality, i.e. the execution of the Supply Agreement was a condition antecedent of the agreement between the parties and not a condition precedent for a contract to come into existence. In other words the submission was that the promise under the accord relating to the terms of the discharge of the promise was a complete promise, and not as urged by learned Senior Advocates appearing for respondent No.1.

59. The minutes of the meetings held between August 18, 2010 and August 21, 2010, which are an integral part of the Settlement Agreement, vide clause 3(iii)(g) and clause 4 stipulate as under:

> "3(iii)(g) All other commercial terms and conditions shall be mutually agreed between MGI and BHEL as per following schedule:
>
> - Draft contract to be submitted by BHEL to MGI by 1st September 2010.
> - MGI to furnish their comments on the draft contract by 9th September 2010.
> - Mutually agreed contract to be finalized and signed between MGI and BHEL during a meeting on 27th September 2010
>
> For the purposes of the above, both parties shall agree to adhere to the dates mentioned herein. However, in case of minor changes/deviations, the parties shall mutually agree upon the revised dates.
>
> 4. The time schedule mentioned in the offer dated 11th August, 2010 was not acceptable to MGI and both parties will mutually agree upon a revised time schedule during the

Purchase Contract discussions."

60. It is apparent that the parties had to agree some commercial terms and conditions as also the time schedule to execute the contract pertaining to 2XFr 6B GTG Units. It is true that the technical details pertaining to the supply items have been put down in detail, but pertaining to a supply and installation contract to be a concluded and a binding contract coming into being, not only the price of the goods and the description thereof, but even the time and mode of the delivery; installation and execution thereof and other commercial terms, for example, excise, sales tax, custom duties, transportation charges etc. etc. would require to be finalized before an identifiable promise comes into existence. Sans all these, the discussions pertaining to the promise would be inchoate. In the instant case, the parties clearly understood that they had broadly agreed to some of the essential features of the promise pertaining to the Supply Agreement, and had additionally clearly understood that a few of them remained to be firmed up and this is the reason why the Settlement Agreement clearly records that unless the Supply Agreement is drawn up, the parties would not be released of their obligations under the turnkey contract.

61. On facts, we may summarize that the Settlement Agreement is an accord requiring appellant to pay US$ 13 million to the respondent No.1 and additionally complete the unfinished works detailed in clause 5 of the Settlement Agreement. The promise under the accord i.e. to pay US$ 13 million is by way of executing another contract valued at US$ 25 million, requiring the amount under the accord i.e. US$ 13 million to be treated as advance payments under the said contract. The accord does not treat the promise as satisfaction of the claims under the original contract nor does the

accord contemplate the performance of the promise to be the satisfaction of the claim under the original contract, but contemplates a third kind of a situation i.e. unless all the parameters of the promise were finalized and new rights and liabilities were created, the past rights and liabilities were not to be extinguished. With respect to the bank guarantees issued under the turnkey contract, the Settlement Agreement i.e. the accord clearly contemplates the validity thereof to be existing and the right and liability thereunder to be existing till the Supply Agreement was executed and the two guarantees i.e. Advance Payment Guarantee and Performance Guarantee pertaining to the Supply Agreement executed. To put it in other words, as regards the bank guarantees which were issued pertaining to the turnkey contract, parties clearly agreed that these guarantees would enure till discharged, and the discharge to be simultaneous with the execution of fresh Advance Payment Guarantee and Performance Guarantee pertaining to the Supply Agreement.

62. Realizing that the appellant had to overcome the aforesaid intention of the parties, Shri Amarjit Singh Chandhiok, learned Additional Solicitor General had urged that it is one thing to say that I have settled and it is altogether another thing to say that I will tell somebody else that I have settled. To make good the argument, learned Additional Solicitor General referred to sub-para (d) of para 3 of the Settlement Agreement, which reads: *Upon signature of the Supply Agreement and the provision of the advance payment bank guarantee referred to above under paragraph (c), MGI undertakes to discharge the Bank Guarantees in full by issuing the necessary instructions to State Bank of India and simultaneously making a joint application to the Delhi High Court for dissolution of all pending claims.*

63. The argument was that the execution of the Supply Agreement

being a condition antecedent to the accord, and in law a Supply Agreement having come into existence, the bank guarantees stood discharged as far as the respondent No.1 was concerned and this has been covenanted by the parties in sub-para (d) of clause 3 of the Settlement Agreement. Dovetailing clause 9 of the agreement under the caption: **SEVERABILITY,** learned Additional Solicitor General urged that if for any reason the Supply Agreement fell, or there was a dispute in relation thereto, the remainder under the Settlement Agreement had to be severed and the same would survive. In other words, what was urged was that whatever be the position pertaining to the Supply Agreement, the accord in relation to the bank guarantees being discharged had to be given effect to.

64. We have already opined against the stand taken by the appellant with respect to the execution of the Supply Agreement being a formality or a condition antecedent. We have already held that not all what would have constituted the promise under the Supply Agreement was negotiated by the parties when the Settlement Agreement was executed. Many aspects of the promise pertaining to the Supply Agreement were settled and finalized, but parties clearly understood that many aspects of the promise pertaining to the Supply Agreement had yet to be finalized and thus they fixed the date September 27, 2010 to do the needful, and thereafter, in writing, reduce the terms of the Supply Agreement for future reference. We have already held that the parties clearly agreed that till the bank guarantees contemplated under the Supply Agreement were executed, the bank guarantees under the turnkey contract would not be discharged. This intention is to be specifically found in sub-para (d) of clause 3 of the Settlement Agreement where the parties have recorded that respondent No.1 undertakes to discharge (and we emphasize the use of the word *'undertakes'*) the bank guarantees under the

turnkey contract when appellant will get issued through a bank of international repute the bank guarantee referred to in paragraph (c) of the clause; and suffice would it be to state that as per said paragraph the bank guarantee to be got issued through a bank of international repute was the advance payment bank guarantee in sum of US$ 13 million.

65. It made commercial sense for respondent No.1 to so insist. Under the Settlement Agreement i.e. the accord, which was a severable accord, requiring: if the latter part failed the former to survive; the appellant agreed liability to pay US$ 13 million to respondent No.1 and needless to state this liability would have the composite element of non-performance of the obligations by the appellant thereby entitling respondent No.1 to invoke the performance guarantee as also excess payments made by respondent No.1 to the appellant after effecting set-off and thus rendering the advance payment guarantees liable to be invoked. The parties clearly understood, may be at the insistence of respondent No.1, that it would not permit any chink in its armour by releasing the bank guarantees under the turnkey contract without obtaining back to back guarantees under the Supply Agreement and these guarantees under the Supply Agreement were to be in sum of US$ 13 million to secure advance payment under the second contract i.e. the guarantee in sum of US$ 13 million and another bank guarantee in sum of US$ 2.5 million to secure due performance of the Supply Agreement, for the reason the performance guarantee had to be 10% of the value of the supply contract which was agreed to be US$ 25 million.

66. We thus agree with the conclusion arrived at by the learned Single Judge, but not on the reasoning of the learned Single Judge, and on the strength of the reasoning herein above noted that no compromise was effected between the parties of the kind which satisfied the dispute which

was the subject matter of the instant suit, requiring the suit to be disposed of in terms of the compromise. The dispute settled by the parties was to close the turnkey contract by setting off the amounts found due and payable to the appellant with respect to the amounts paid by the respondent No.1 to it and such amounts to which respondent No.1 would be entitled to on adjustment for works not carried out by the appellant, and the net position being the appellant was liable to pay US$ 13 million to respondent No.1. The matter would have rested if the accord simply stopped there, requiring appellant to pay, in cash, US$ 13 million the respondent No.1, and in said circumstance the parties would have certainly decided that the suit could be disposed of as compromised by appellant either simultaneously paying US$ 13 million to respondent No.1 or that under the bank guarantees which were invoked by respondent No.1, only said sum could be released. But, this did not happen and thus it cannot be said that with reference to the dispute pertaining to the bank guarantees a compromise took place which embraced the subject matter of the suit. We highlight once again that as per sub-para (e) of clause 4 of the Settlement Agreement pertaining to **RELEASE, WAIVER AND DISCHARGE** the parties have clearly recorded that the current injunction proceedings being deliberated by the High Court of Delhi shall not be withdrawn till signing of the Supply Agreement and only by way of a joint application to record the terms of the settlement so that a compromise decree could be passed.

67. This takes us to the next part of the discussion pertaining to the invocation of the three bank guarantees in question, which question would have a sub-issue to be answered with reference to the Settlement Agreement having two distinct parts and a Severability clause therein. Whether or not, in the instant proceedings, it would arise for determination by the Court as to

who was responsible for the Supply Agreement not being executed inasmuch as, the learned Additional Solicitor General urged that if respondent No.1 was responsible for non-execution of the Supply Agreement, and the take off clause thereof not taking off, breach would be attributable to respondent No.1 and since there was a complete accord pertaining to the turnkey contract, the appellant would stand relieved of the obligations to have furnished the bank guarantees, meaning thereby the bank guarantees would have to be treated as discharged.

68. We are of the opinion that the said issue would not arise for consideration in the instant suit and irrespective of the fact whether respondent No.1 acted as a horrible party and was wholly responsible for the Supply Agreement not being executed, the same would have no bearing on the continued rights under the bank guarantees which were invoked, for the reason this dispute would be a distinct dispute, required to be severed under the severability clause of the Settlement Agreement and to be adjudicated upon independently. We are thus not dealing with the issue that there is some evidence to support the stand of the appellant that pertaining to the supply contract it had started fabricating the equipment which was to the knowledge of respondent No.1 and thus said respondent would be estopped from acting in a manner which would breach the supply contract. Even if this be so, the appellant would have an independent cause of action to sue for breach thereof.

69. From the pleadings in the plaint we find that invocation of the three bank guarantees has been challenged on the plea of fraud in the factual setting pleaded in paragraphs 13 and 14 of the plaint which we have reproduced in paragraph 15 of our opinion; on the plea that the bank guarantees have not been invoked validly as per the pleadings in paragraph

No.39 and 40 of the plaint which we have reproduced in paragraph 16 and 17 of our opinion and lastly on the plea of irretrievable injury as per pleading in paragraph 46 of the plaint, noted in para 19 above.

70. On the subject of there being a fraud in invoking the bank guarantees, learned Additional Solicitor General who appeared for the appellant, stated that the fraud was that notwithstanding the appellant having completed the turnkey contract, the performance guarantee as also the two guarantees pertaining to advance payments were invoked. It was highlighted that in the pleadings, the respondent No.1 had admitted said fact while responding to the averments made in para 13 of the plaint. Learned Additional Solicitor General urged that there was an apparent malice in not issuing the 'Taking Over' certificate; and hence the fraud.

71. We have noted in para 15 of our opinion the pleadings in para 13 and 14 of the plaint and have highlighted, in para 19 of our opinion, that since the response was prolix and lengthy, and if reproduced would span nearly 20 pages, we would be summarizing the response; and while summarizing the response have noted that as against the four contractual dates: January 31, 2008, February 10, 2008, May 22, 2008 and June 05, 2008, the works were completed on the dates mentioned in para 13 of the written statement i.e. May 11, 2009, June 04, 2009, November 19, 2009 and February 26, 2010 i.e. with an extreme delay. The respondent No.1 has also highlighted that though commissioned, several elements were found missing and the biggest problem was a material non-performance, inasmuch as the plants were required to run on dual fuel system i.e. liquid and gas. The systems were capable of running only on liquid fuel. The written statement also highlights various works not executed by the appellant which were then executed by respondent No.1 to complete the works (and in respect of which

we find considerable evidence even in the Settlement Agreement of August 22, 2010). Besides, the written statement highlights the incomplete works, which were listed in paragraph 5 of the Settlement Agreement.

72. The contract clearly envisaged the respondent No.1 to issue a Taking Over certificate after the works were satisfactorily completed. In the instant case, not only the pleadings in the written statement but even the documents filed by both parties would reveal that prima-facie the works were not completed as per contract. Four units were set up, but not as per a turnkey contract. The units were not running on a dual fuel system. They could not be operated on liquid fuel. If this be so, respondent No.1 could have rejected the entire works and proceeded to invoke the bank guarantees and additionally sue for a refund of all amounts paid to the appellant as also damages. We need not reiterate our discussion with respect to the Settlement Agreement which records unsatisfactory executed works; monies payable to the respondent No.1 from the appellant and vice-versa; net amount being payable to respondent No.1.

73. The plea of fraud, prima-facie, fails on the facts and thus we need not note the case law cited on either side on the issue: Whether the plea of fraud in invoking the bank guarantee would be with reference to a fraud in the issuance of a bank guarantee or a fraud in enforcing the guarantee. But we cannot refrain from observing that under what circumstances certain decisions hold that a plea of fraud must relate to the issuance of the bank guarantee, is not clear to us for the reason one of the first reported decisions on a plea of fraud made prima-facie good, acting as an exception to the rule of absolute independence of a bank guarantee, is the opinion of Shientag J. reported as 31 NYS 2d 631 *Sztejn v. J.Henry Schroder Banking Corp.* The year was 1941. Injunctions under letters of credit were not issued by

Courts. Mr.Sztejn had placed an order for quality bristles from India and payment was secured by means of a letter of credit. Somehow Mr.Sztejn discovered that the shipment made was crates of worthless rubbish. He went to the bank with a request not to pay under the letter of credit and received a response from the bank that being an independent undertaking of the bank it had to pay when documents were presented with bill of exchange to negotiate the letter of credit. Mr.Sztejn went to Court alleging fraud in invoking the letter of credit and made prima-facie good his allegation, that as against the contracted goods i.e. quality bristles, worthless material was shipped. Noting a fraud, the Court issued an injunction. The exception carved out by Shientag J. was accepted by the Courts in England in the decisions reported as 1958 (2) QBD 127 *Hamzen Milas & Sons v. British Imex Industries Ltd.*, 1977 (2) All.E.R. 862 *R.D.Harbottle Mercantile Ltd. & Anr. v. National West Minister Bank Ltd.*, 1978 (1) All.E.R. 976 *Edward Oven Engineering Ltd. v Barklay's Bank International Ltd.*, and 1982 (2) All.E.R. 720 *UCM (Investment) v. Royal Bank of India*, in which decision the opinion of Shientag, J. was hailed as a landmark case by Lord Diplock, J.

74. In our opinion, the first judgment with respect to a plea of fraud acting as an exception in a letter of credit, and which would apply even to bank guarantees, and which opinion set the trend even in Common Law Jurisdiction, pertained to a plea of fraud in invoking the guarantee and not at the time when the guarantee was issued; and thus we hardly see any scope for a debate on the subject that the plea of fraud recognized by Courts as an exception would be limited to when the guarantee was issued.

75. However, on the facts of the instant case we find no fraud made prima-facie good, when the bank guarantee was invoked.

76. On the subject of irretrievable injustice/injury, the said defence

against the bank guarantee being invoked, has been predicated by the appellant with respect to the averments made in paragraph 46 of the plaint; contents whereof have been noted by us in paragraph 18 of our opinion. The plea is rested on the pleading that if respondent No.1 receives the amount under the bank guarantees the appellant will never be able to recover it since respondent No.1 is based in Jordan and has no assets outside Jordan and there is no established system in Jordan to enable the appellant to recover the amount if it has an award in its favour. The response to said paragraph has been noted by us in paragraph 19 of our opinion and suffice would it be to highlight that the admitted position is, as pleaded in the written statement, that Jordan is a signatory to the New York Convention. The contract between the parties has a remedy by way of arbitration in London; governed by ICC Rules. Thus, on facts, it cannot be said that the appellant has made out a prima facie case of irretrievable injury. In fact, what the appellant really intended to plead was a case of special equity, for the reason an irretrievable injury is always contemplated of a kind which was noted in the celebrated decision reported as 566 Fed. Supp. 1210 *Itek Corpn. v. First National Bank of Boston* which was noted with approval by the Supreme Court in the decision reported as 1988 (1) SCC 174 *U.P. Co-operative Federation Ltd. v. Singh Consultants & Engineers*. Special equities is also an exception recognized against the rule of absolute invocation of bank guarantees in terms of the bank guarantees. Courts have used the two expressions 'Special Equity' and 'Irretrievable Injustice', as interchangeable expressions. One instance of a Special Equity is to be found in the opinion of Lord Dening M.R. reported as 1966 (2) Lloyd's List Law Reports 495 *Elian & Rabbath (Trading as Elian & J Rabbath) v. Massas & Ors*. In that case the first defendants' Greek motor vessel 'Flora M' was chartered by

Lebanese charterers for carriage of plaintiffs' cargo (consigned to Hungary) from Bairut to Rijeka. Discharge was delayed at Rijeka and Ship owners exercised lien on cargo in respect of demurrage. Third defendant bank put up guarantee in London in favour of second defendant (first defendants' London agents) to secure release of cargo. There was a claim by Yugoslavians to distrain on goods, involving ship in further delay and master of Flora M, on lifting original lien, immediately exercised another lien in respect of extra delay (which was raised when Hungarian buyers put up 2000). Two years later, shipowners claimed arbitration with charterers to assess demurrage for which first lien was exercised and claimed to enforce guarantee. Plaintiff claimed declaration that guarantee was not valid and injunction to restrain shipowners or their agents from enforcing guarantee. First and second defendants appealed against granting of injunction by Blain, J. It was held by the Court of Appeal that it was a special case in which the Court should grant an injunction to prevent what might by irretrievable injustice. Lord Denning, M.R., observed that although the shippers were not parties to the bank guarantee, nevertheless they had a most important interest in it. If the Midland Bank Ltd., paid under this guarantee, they would claim against the Lebanese bank who in turn would claim against the shippers. The shippers would certainly be debited with the account. On being so debited, they would have to sue the shipowners for breach of their promise express or implied, to release the goods. Lord Denning, M.R., further posed the question were the shippers to be forced to take that course? Or can they shortcircuit the dispute by suing the shipowners at once for an injunction? He further observed at page 497 of the Report that this was a special case in which injunction should be granted. Lord Denning, M.R. went on to observe that there was a prima facie ground for saying that on telex messages which

passed (and indeed, on the first three lines of the guarantee) the ship owners promised that, if the bank guarantee was given, they would release the goods. He further observed that the only lien they had in mind at that time was the lien for demurrage. But would anyone suppose that the goods would be held for another lien? It can well be argued that the guarantee was given on the understanding that the lien was raised and no further lien imposed and that when the shipowners, in breach of that understanding imposed a further lien, they were disabled from acting on the guarantee.

77. We may only highlight that the expression *'That it was a special case'* in which the Courts should grant an injunction to prevent what might be irretrievable injustice had caught the eye of the Supreme Court in *U.P.Co-operative Federation* case (supra) (refer para 16), and needless to state with approval.

78. But, as we have already noted herein above, the pleadings in the plaint, on the subject of either irretrievable injury or a special circumstance/special equity are found to be prima-facie wanting in making out a prima-facie case for grant of an injunction.

79. And this takes us to the last plea: Whether the guarantees were invoked in terms thereof, and for which the rival pleadings would be as per para 39 and 40 of the plaint, reproduced by us in para 16 and 17 of our opinion, and the summarized response thereto in the corresponding paragraphs of the written statement as per what we have noted in paragraph 19 of our opinion.

80. From the pleadings of the appellant, pertaining to the performance guarantee, it is apparent that the fulcrum rests on the words: *in the event that the Principal failed to fulfill his contractual obligations under and in conformity with the terms of the contract;* and the argument is that the

terms of the contract not being fulfilled, as per the contract, is an integral part of the bank guarantee. Thus, notwithstanding that a bank guarantee is an independent contract, in the instant case, pertaining to the performance guarantee, the parties have made the contract a part of the bank guarantee. Extending the argument, reliance is placed upon sub para 'a' of the bank guarantee in question, where the words used are: *That the Principal has failed to fulfill their obligation in accordance with the conditions of the contract.* Sh.Amarjeet Singh Chandhiok, learned Additional Solicitor General urged that the letter invoking the bank guarantee in question, contents whereof have been noted by us in paragraph 13 above, is not in conformity with the performance guarantee inasmuch as it merely reiterates parrot like words of the bank guarantee. The words in the letter invoking the bank guarantee to the effect that the principal has failed to fulfill their obligation in accordance with the contract are unintelligible and are meaningless words unless and until a reference was made to some particular obligation which the principal had failed to perform in the judgment of the respondent was the submission made. Pertaining to the two bank guarantees to secure advance payments, learned Additional Solicitor General highlighted sup-para 'a' of the two guarantees where the words used were: *That the Principal has failed to fulfill their obligation for adjustment of the advance payment in accordance with the conditions of the contract.* Subsequently reduced to US$ 2 million, the guarantee being the same, learned Additional Solicitor General urged that for the submissions made pertaining to the performance guarantee, the invocation of the two bank guarantees with respect to advance payment being secured were not in accordance with the terms of the guarantee. Reliance was placed upon the decision of the Supreme Court reported as 1999 (8) SCC 436 *Hindustan*

Construction Co.Ltd. v. State of Bihar & Ors., where the words in the bank guarantee pertaining to secure the advance mobilization loan: *'In the event that the obligations expressed in the said clause of the above-mentioned 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 mobilization loan from the contractor under the contract'* were interpreted by the Supreme Court as clearly referring to the original contract and the guarantee becaming liable to be invoked only in circumstances referred to in clause 9 of the contract and in that context opined, in para 14 of the opinion.

81. The decision afore-noted has been explained by the Supreme Court in a later decision reported as AIR 2007 SC 2361 *State Bank of India & Anr. v. Mula Sahakari Sakhar Karkhana Ltd.*, in paragraphs 30 to 32, by highlighting that the rectial in the bank guarantee which was being considered by the Supreme Court in *Hindustan Construction Co. Ltd.'*s case (supra) had indicated clearly, by referring to clause 9 of the contract, that the parties were embodying the contract in the bank guarantee, and thereafter the use of the words: *'in the event that the obligations expressed in the said clause of the above-mentioned contract*' made it clear that by referring specifically to clause 9 in the recital and thereafter reflecting the same in the operative part of the bank guarantee, the bank had qualified its liability to pay the amount. In other words, the defaults had to be specifically listed or in other words the guarantee was conditional.

82. The three bank guarantees at hand simply make a reference to they being issued pursuant to the contract between the parties and we may note that virtually all bank guarantees which we have come across refer, in the rectial, to the guarantee being executed pursuant to a condition under the main contract obliging the contractor to furnish a bank guarantee(s). A

recital in a bank guarantee to the effect, of it being issued pursuant to a term in the contract, requiring the bank guarantee to be furnished would not mean that the terms of the contract get embodied in the terms of the bank guarantee, unless a condition of a contract is made an integral part of the operative part of a bank guarantee as was to be found in the decision in *Hindustan Construction Co.*'s case (supra). Otherwise, the issue has to be approached: On the premise that a bank guarantee is an independent contract unrelated to the main contract.

83. The operative parts of the guarantees in question do not embody any term of the contract as a condition for the invocation thereof. The guarantees clearly use the expressions: *'hereby irrevocably undertake to pay to you on your first written demand.'*

84. With respect to the submissions urged that parrot like reproduction of the language of the bank guarantees is insufficient, suffice would it be for us to state that the advance payment guarantees simply require the beneficiary, while raising the demand in writing, to incorporate in the demand three statements: (i) the principal has failed to fulfill their obligation in accordance with the conditions of the contract, (ii) the amount which the principal has failed to fulfill; and (iiii) the principal has failed to perform or fulfill any material act or obligation under the contract despite 30 days' calendar notice. The performance guarantee simply requires it to be stated that the principal has failed to fulfill its obligation for adjustment of the advance payment in accordance with the conditions of the contract and secondly the amount which the principal has failed to fulfill.

85. A bank guarantee has to be strictly construed. If the parties chose to incorporate as above, they have to be bound to what they chose. To accept the argument advanced by the learned Additional Solicitor General

would mean that letters invoking bank guarantees have to be a virtual plaint.

86. Having negated the three grounds on which the invocation of the bank guarantees was challenged, as per the pleadings, we proceed to note some additional submissions made by learned Senior Counsel for the appellant, which strictly speaking do not arise out of the pleadings in the suit.

87. The first additional submission urged was that when issued, the performance guarantee envisaged a contract value of US$ 117 million which admittedly got reduced to US$ 100 million. Thus, it was urged that the performance guarantee could not be invoked beyond a value 10% of the original contract price.

88. It may be true that when the bank guarantee was issued at 10% of the value of the contract i.e. to secure due performance and default valued at US$ 11.7 million and later on the contract price was reduced, but it was for the appellant to have got the bank guarantee modified suitably. As regards the bank and the beneficiary, the guarantee amount remained the same.

89. It was urged that since there are traces of acquiescence on the part of respondent No.1 in the appellant proceeding to fabricate the equipment covered by the Supply Agreement (which as we have noted above was never executed), prima-facie it would be an invocation of the bank guarantees which lacked good faith or it being enforced with an oblique purpose.

90. In the decision reported as (2002) 1 SLR 1 *Samwoh Asphalt Premix Ptc. Ltd. v. Sum Cheong Piling Pte Ltd.* the Court of Appeal in Singapore held that where a bank guarantee was invoked as a *'bargaining chip'* or as a *'deterrent'* or in an *'abusive manner'* it would amount to calling

a guarantee for an oblique purpose, justifying the issuance of an injunction. This decision was relied before the Supreme Court on the argument of *'lack of good faith'* and/or *'enforcing with an oblique purpose'* in the decision reported as 2006 (2) SCC 728 *BSES Ltd. v. Fenner India Ltd*. Refusing to go for the bite, the Supreme Court held:-

> "We are afraid that in the face of the law succinctly laid down in *U.P.Coop. Federation* and reiterated in numerous judgments of this Court referred to earlier, we are unable to accept the wide proposition of law laid down in the foreign judgments cited by Mr.Sorabjee. Whatever may be the law, as to the encashment of bank guarantees in other jurisdictions, when the law in India is clear, settled and without any deviation whatsoever, there is no occasion to rely upon foreign case-law."

91. This closes the legal debate, which reaches its destination against the appellant.

92. But we have a word to be spoken of. What if, all the aforesaid facts were told to a layman with a request to take a decision as a reasonable man, using the tools of reason and logic. The fact would be that under the turnkey contract the appellant managed to set up gas turbine units which could operate only on one fuel system and not dual fuel system. Even the executed works were not fully complete when the plant was put into operation. The appellant delayed the setting up of the four turbine units. It did not supply all the equipment which was to be supplied thereby compelling respondent No.1 to procure and install at its own level the equipment in question. The parties negotiated and mutually agreed that a net sum of US$ 13 million is due from the appellant to respondent No.1. They settled to close the contract requiring appellant to pay respondent No.1 a sum of US$ 13 million and additionally (refer clause 5 of the Settlement

Agreement) that the appellant would complete the unfinished works. The common man would obviously say that the appellant has become liable to pay respondent No.1 US$ 13 million and such amount as would be payable for the unfinished works listed in clause 5 of the Settlement Agreement. On being further informed that the bank guarantees under the turnkey contract are still alive and were clearly envisaged to be substituted by bank guarantees in sum of US$ 13 million (to secure repayment of US$ 13 million treated as advance payment in the hands of the appellant for the Supply Agreement) and also issue a performance guarantee in sum of US$ 2.5 million for the Supply Agreement contract, and that the said guarantees were not issued for the reason the Supply Agreement was never executed, and required to factor in the same in the decision making process and then reach the conclusion, the common man is bound to say, or at least in all reasonable probability would say: that prima-facie the appellant must pay respondent US$ 13 million and such sum as would be required to complete the balance works.

93. We accordingly dismiss the two appeals but without there being any order as to costs.

(PRADEEP NANDRAJOG)
JUDGE

(MANMOHAN SINGH)
JUDGE

SEPTEMBER 12, 2012
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