

M.S Velocis System Pvt Ltd vs Container Corporation Of India Ltd on 15 June, 2024

Author: Amit Sharma

Bench: Amit Sharma

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IN THE HIGH COURT OF DELHI AT NEW DELHI
O.M.P.(I)(COMM.) 97/2024 & I.A. 31739/20
M.S VELOCIS SYSTEM PVT LTD

Through: Mr. R.M.Sinha, Mr.
Ms. Nandini Harsh
Sinha, Advocates.

versus

CONTAINER CORPORATION OF INDIA LTD

Through: Mr. Sanjay Jain, S
with Mr. R.K.Joshi
Mr. Yuvraj Sharma
Jha, Advocates.

CORAM:

HON'BLE MR. JUSTICE AMIT SHARMA

OR

% 15.06.2024 I.A. 31738/2024 (under Section 151 of C.P.C. for grant of stay on order dated 10.06.2024 invoking bank guarantee)

1. The present application under Section 151 C.P.C. on behalf of the applicant/petitioner seeks grant of stay of the operation of the order dated 10.06.2024 passed by the respondent invoking the Bank Guarantee No. 027GT02210340017 dated 03.02.2021 amounting to Rs.35,40,000/- submitted vide letter dated 23.02.2021.

2. Learned counsel appearing on behalf of the applicant submits that vide order dated 01.04.2024, the learned Roster Bench had passed a detailed order and draws attention of this Court to paras 9 and 10 thereof, which records as under:

"9. Accordingly, at this stage this Court is of the opinion that no injunction can be granted restraining the termination. However, issue This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 15/06/2024 at 20:32:02 notice to the Respondent. Notice is accepted by Mr. Joshi, Advocate. Let reply be filed responding to the allegations in the petition within four weeks. Rejoinder thereto be filed within four weeks thereafter.

10. If the Respondent exercises its right of termination and intends to invoke the performance bank guarantee which has not been encashed as yet, at least five working days notice shall be issued to the Petitioner."

3. It is submitted that the communication dated 10.06.2024, which, as per the learned counsel appearing on behalf of the applicant/petitioner, is an order in violation of the aforesaid order dated 01.04.2024. It is submitted that the alleged order dated 10.06.2024 does not give any reasons to invoke the bank guarantee given by the petitioner. Reliance is placed by learned counsel appearing on behalf of the applicant on judgment of Hon ble Supreme Court in Swadeshi Cotton Mills vs. Union of India, (1981) 1 SCC 664 and in particular, para nos. 28, 31, 32, 33 and 37 to demonstrate that the impugned alleged order dated 10.06.2024 has been passed by the respondent without giving any hearing to the applicant/petitioner. It is submitted that in view of the judgment of the Hon ble Supreme Court in Swadeshi Cotton Mills (supra), principles of natural justice have been violated and, therefore, the said impugned order is bad in law.

4. It is further submitted that the power of termination is contained in Clauses 10, 11, 12 of the tender document dated 17.01.2020, as have been detailed in the order dated 01.04.2024 passed by the learned Roster Bench.

5. Attention of this Court was drawn to clause 18 (b) of the purchase order dated 17.12.2020 which provides for liquidated damages and the same reads as under:

"18. Liquidated Damages :

.....b. During the contract period, the maximum time defined for resolution is 4 hrs for each instance for resolution of problem/ bug. In case the problem/ bug is not resolved within 4 hours, a Liquidated This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 15/06/2024 at 20:32:02 Damages (LD) of Rs. 1,000/- per hour beyond 4 hours for each problem/ bug would be imposed, subject to a maximum of 10% of the total contract value. A maximum of two such instances per month or five instances per year will be allowed, beyond which CONCOR may terminate the contract. "

6. Learned counsel appearing on behalf of the applicant/petitioner further submitted that an amount of Rs. 3 crores is due to the applicant/petitioner herein from the respondent. Attention of this Court was further drawn to paras 6, 7, 8, 9, 10 and 12 of the present application, which reads as under:

"6. For the perusal of this Hon ble Court, the petitioner submits the following details showing that there is no reason for encashing the bank guarantee.

The total cost of the work order
The bifurcation of this amount is

below;

(i)

(ii)

The total
one-time
Annual ma

Para 4 of the brief facts of the reply by respondent is relied upon.

7. The whole of the work was to be completed in ten milestones detailed below:

No. Project

1. Award of tender for development of software.

2. Acceptance of PO by Vendor/Agreement signing and Team deployment

3. Submission of SRS

4. Submission of SDD

5. Completion of coding including integration with interfaces & other applications/
software.

6. Software testing by vendor.

7. Software testing by CONCOR team.

8. Software deployment & testing by field users.

9. Data migration by vendor and Go-live.

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10. Software acceptance and start of warranty.

8. Payment terms:

Payment of software with six months warranty (one time cost).

(i) No advance.

(ii) 85% of one-time cost as per the following: -

(a) 15% on submission of SRS.

(b) 15% on submission of SDD.

(c) 15% after design development and testing.

(d) 40% migration, implementation, integration of software and Go-live.

(e) 15% after successful running of software for two months and after acceptance of CONCOR.

9. The respondent admitted the completion of third and fourth milestone i.e. completion of SRS and SDD submissions and has already paid for the same in October 2021 and April 2022. The paragraph 10 (b) of the reply is relied upon.

The respondent in all has paid a sum of Rs. 1,77,54,000/- excluding penalty of Rs. 3,00,000/- i.e., up to third and fourth milestone.

10. According to the petitioner, milestones 5 to 8 have already been completed from petitioner's side detailed below;

(i) The petitioner has already tested the software. (6th Milestone).

Letters dated 24/05/2023, 12/06/2023, 19/06/2023, 28/06/2023, 30/06/2023, 13/07/2023 from petitioner to respondent, filed herewith and marked as document No.3 (colly).

(ii) The petitioner submitted the software for testing by CONCOR (7th Milestone).

Email dated 24/07/2023 from Respondent to Petitioner, email dated 24/07/2023 from Petitioner to Respondent, Letter dated 05/10/2023 from petitioner to respondent, filed herewith and marked as document No.4 (colly).

(iii) The petitioner deployed the software for testing by the field user. Email dated 14/09/2023 from Respondent to Petitioner and email dated 14/09/2023 from Petitioner to Respondent, filed herewith and marked as document No.5 (colly) It is respectfully submitted that the respondent has not deliberately provided the sign off the Milestone No. 5 to 8.

The petitioner is entitled for 15% amount on completion of 5th to 8th Milestones amounting to Rs. 90,27,000/- which amount since is more than the amount of the bank guarantee and therefore, the same cannot be This is a digitally signed order.

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12. The alleged termination of the work order is illegal mainly because;

(i) The delay in the project has been absolutely attributable to the respondent and not to the petitioner. Needless to submit that the extension granted by the respondent put the controversy to the end.

(ii) The respondent intentionally, deliberately, arbitrarily and with malafide intention not provided the sign off for milestones 5 to 9 and with the ulterior motives, the respondent and its employees ensure not to permit the petitioner company to achieve the milestone in time, who has been doing this project with complete honesty as well as on cut throat price.

(iii) In view of the above, the impugned order dated 10.06.2024 deserves to be stayed as there is no fault / delay on the part of the petitioner which can be said to be non-performance on the part of the petitioner qua the work order and to encash the bank guarantee.

(iv) The petitioner has already challenged the termination order on various grounds and facts narrated in the petition and the same may be read as part of this paragraph since the same has not been repeated herein for the sake of brevity.

In the light of the above, the impugned order deserves to be stayed till the final adjudication of the dispute by the Arbitrator."

7. Attention of this Court was also drawn to the communication sent on behalf of the applicant/petitioner to the respondent on various dates, i.e., 30.06.2023, 13.07.2023 and 14.09.2023 to demonstrate that despite various requests made by the applicant/petitioner to the respondent, the latter did not deliberately provide the sign off for the Milestone nos. 5 to 8. It is submitted that the petitioner is therefore entitled to 15% on completion of the 5th to 8th milestones amounting to Rs.90,27,000/- which amount is more than amount of bank guarantee and therefore, the same cannot be encashed. It was again submitted that the entire exercise taken by the respondent for invoking the bank guarantee is arbitrary and without following the Principles of Natural Justice. It is again submitted that no justifiable reason has been assigned for invoking the bank guarantee, keeping in view the fact that the applicant has This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 15/06/2024 at 20:32:04 made out a case of dispute in terms of payments due towards the applicant/petitioner.

8. Per contra, learned Senior Counsel appearing on behalf of the respondent draws attention of this Court to clause 18 of the tender document dated 17.12.2020, which reads as under:

"The project schedule for Software Development, Migration and Implementation of Commercial Systems for EXIM & Domestic Logistics Business of CONCOR Along with other Modules for Integration with other Govt., will be for Total 460 Days and below are the milestones.

Sno.	Project Milestones
1	Award of tender for developm
2	Acceptance of PO by Vendor/A signing and Team deployment
3	Submission of SRS
4	Submission of SDD
5	Completion of coding includi with interfaces & other appl
6	Software testing by vendor
7	Software testing by CONCOR t
8	Software deployment & testin
9	Data migration by vendor and
10	Software acceptance and star

*Assumed 30 Days in a month

The above mentioned project schedule excludes the warranty period (6 months) and recurring AMC Charges of onsite support/ maintenance for 5 years."

9. It is submitted that 460 days, as mentioned hereinabove, expired on This is a digitally signed order.

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10. Learned Senior Counsel further draws attention of this Court to clauses 10.1 and 10.2 of the General Condition of Contract („GCC) as stipulated in the tender document dated 07.01.2020, which reads as under:-

"10. Delay in Suppliers' performance:

10.1 The delivery, installation and commissioning of all equipment shall be made by the Supplier in accordance with the time schedule specified by the Purchaser in its schedule of requirements.

10.2 Any delay by the Supplier in the performance of its delivery obligations shall render the Supplier liable for the following:

Forfeiture of its performance security, imposition of liquidated damages and termination of the Contract for default including purchase of undelivered goods from alternative sources at the risk and cost of the supplier in accordance with clause 12.2."

11. Learned Senior Counsel appearing on behalf of the respondent submitted that as per the settled principles of law, bank guarantee is a contract between the respondent and the bank and further draws attention of this Court to para 2 of the bank guarantee, which reads as under:-

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110001, do hereby agree to be the primary obligator and undertake and promise to pay the amounts due to payable under this guarantee without any demur, merely on a demand from the Container Corporation of India Ltd. stating that the amount claimed is due by way of loss or damage caused to or would be caused or suffered by the Container Corporation of India Ltd. by reason of any failure of the computer system. Any such demand made on the bank shall be conclusive as regards the amount due and payable by the Bank under this guarantee. However, our liability under guarantee shall be restricted to an amount not exceeding Rs. 35,40,000/- (Rs. Thirty Five Lakh Forty Thousand Only)."

12. It is submitted that the language of the bank guarantee is clear to the effect that on a mere demand of the respondent, the bank has an obligation to release the amount.

13. Learned Senior Counsel for the respondent submits that the judgment relied upon by learned counsel for the applicant/petitioner is in a different context. Attention of this Court was drawn to para 10 of the judgement in Swadeshi Cotton Mills (supra) to demonstrate that the issue before the Hon ble Supreme Court in the said judgment was with respect to exercise of power conferred by clause (a) of Sub-section 1 of Section 18-AA of the Industries (Development and Regulation) Act, 1951, whereby National Textile Corporation Limited was asked to take over management of industrial undertakings belonging to private entities. Learned Senior Counsel appearing on behalf of the respondent submitted that as per the doctrine of stare decisis, the observation made by the Hon ble Supreme Court in the paragraphs relied upon by learned counsel appearing on behalf of

the applicant/petitioner should be read in context with the factual background of the aforesaid judgment. It is submitted that the present issue is in a commercial domain and the respondent do not stand on a different footing This is a digitally signed order.

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14. Learned Senior Counsel further submits that vide order dated 01.04.2024, the learned Roster Bench after hearing the arguments of the applicant/petitioner as well as of the respondent has observed and held as under:-

"8. A perusal of clause 11 of the GCC would show that the Respondent is entitled to levy liquidated damages but the same is without prejudice to other remedies available under the agreement. Moreover, clause 12 of the GCC clearly stipulates that if there are any delays, as per the Respondent, the contract can be terminated. In terms of the above three clauses, the contract being a terminable contract, prima facie, the Petitioner would not be entitled to grant of injunction against termination. Moreover, admittedly there have been delays by the Petitioner and the mere fact that extensions have been granted repeatedly does not mean that the Respondent can be restrained from exercising its right to either levy liquidated damages or terminate as per the contract.

9. Accordingly, at this stage this Court is of the opinion that no injunction can be granted restraining the termination. However, issue notice to the Respondent. Notice is accepted by Mr. Joshi, Advocate. Let reply be filed responding to the allegations in the petition within four weeks. Rejoinder thereto be filed within four weeks thereafter.

10. If the Respondent exercises its right of termination and intends to invoke the performance bank guarantee which has not been encashed as yet, at least five working days notice shall be issued to the Petitioner."

15. It is submitted that if the termination of the contract is not stayed, then as a logical corollary, the performance of bank guarantee cannot be stayed. It is further pointed out that a joint reading of Clauses 10.2 and 12.1(a) of the GCC reflects that no case for an injunction with respect to the encashment of bank guarantee is made out. It is further argued that delay in supply is a ground for breach of contract as stipulated in clause 10.2 of the GCC resulting in "forfeiture in performance security". It is further submitted that reliance placed on behalf of the applicant on clause 18(b) of the This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 15/06/2024 at 20:32:07 purchase order is misplaced and that clause 18(a) of the said purchase order will be applicable in the

facts of the present case, which is in line with clause 12 of the GCC. During the course of the arguments, learned Senior Counsel for the respondent handed up in Court the letter dated 13.06.2024, invoking the bank guarantee and submits that the first two paragraphs are as per the clause of the bank guarantee.

16. Attention of this Court was drawn on para 9 of the reply filed by the respondent, which reads as under:-

"9. Contents of paragraph 9 save and except that the petitioner has written some letters / e mails from time to time, the rest of the allegations are denied. The allegations that it is crystal clear that the delay in completing of the Milestone are attributable only to the respondent and not to the petitioner are wrong and denied. As stated earlier, the petitioner had failed to complete the Milestones 5 to 10 till 31/03/2024 even as per the revised timelines. The petitioner did not complete even one out of 48 cycles stipulated in the contract. It is denied that the respondent had not replied to the petitioner's letters / emails mentioned in the paragraph under reply. The respondent had written number of letters / e-mails to the petitioner from time to time pointing out the delays on the part of the petitioner and requesting it to accelerate the progress of the work. The petitioner inspite of writing numbers of letters / emails from time to time failed to adhere to the timeline mentioned in the contract and the extensions granted to it and even of their own commitments. The respondent had also written the following letters / e-mails in that regard :

*** ** The respondent reserves its right to file the same if the need arises."

17. It is submitted that as pointed out hereinabove as many as 250 mails were written to the respondent so, therefore, it is not a case that the respondent was not pursuing with the applicant/petitioner with respect to completion of the project.

18. Learned Senior Counsel for the respondent further places reliance on the following judgements:-

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Bank Guarantee cannot be stayed excepts in cases of egregious fraud or irretrievable harm or injury

1. Himadri Chemicals Industries Ltd. vs. Coal Tar 10-14 Refining Co. (2007) 8 SCC 110

2. Vinitech Electronics Pvt. Ltd. vs. HCL 24-27 Infosystems Ltd. (2008) 1 SCC 544

3. Gujarat Maritime Board vs. L&T Infrastructure 12 Development Projects Ltd and Anr. (2016) 10 SCC 46

4. Standard Chartered Bank vs. Heavy Engineering 22-23 Corp. Ltd. (2020) 13 SCC 574 Principles of Natural Justice are not applicable in the realm of commercial contracts

5. Asst. Excise Commissioner vs. Issac Peter (1994) 26 4 SCC 104

6. Jagdish Mandal vs. State of Orissa (2007) 14 22 SCC 517

7. Seimens Public Communication Networks Pvt. 40 Ltd. vs. Union of India (2008) 16 SCC 215 Scope of Enquiry under Section 9 of Arbitration and Conciliation Act, 1996

8. Vijay Maheshwari vs. Splendor Buildwell Pvt. 31 Ltd. 2024 SCCOnline Del 3462 This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 15/06/2024 at 20:32:08 Online Del 4189 Section 9 Court cannot exercise the powers of appointment of Arbitrator akin to Section 11 of Arbitration and Conciliation Act, 1996

10. Purushottam s/o Tulsiram Badwaik vs. Anil s/o 8-11 Hariram Malewar WP No. 1210/2021

11. MVV Water Utility Pvt. Ltd. vs. DJB OMP (I) 2-5 Rejoinder on account of applicant/petitioner

19. Learned counsel appearing on behalf of the applicant/petitioner submits that by way of the present application judicial review is not being sought but what is being contended is that by simply giving a notice of 5 days the bank guarantee cannot be encashed without giving a due hearing to the present applicant/petitioner. It is submitted that the process adopted by the respondent herein is arbitrary and therefore, violative of Article 14 of the Constitution of India. It is submitted that it is an admitted case that respondent is a Public Sector Undertaking and therefore, is performing a public duty and the obligation with respect to following due process of law is mandatory. Attention of this Court was drawn to paragraphs 25, 26 and 27 of Hon ble Supreme Court in Swadeshi Cotton Mills (supra) to submit that audi alteram partem is a rule to ensure that a statutory authority like the present respondent arrives at a just decision and not by exercising its powers arbitrarily. It is further submitted that the principles of natural justice is inherent in the decision making process by the respondent with respect to encashment of bank guarantee. Attention of this Court was drawn to a judgment of Hon ble Supreme Court in Kumari Shrilekha Vidyarthi vs. This is a digitally signed order.

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State of U.P. and Others, (1991) 1 SCC 212, to submit that if it is shown that action of a state is arbitrary the same would be violative of Article 14 of the Constitution of India and therefore, there would be no impediment in striking down the impugned act irrespective of the question whether an additional right, contractual or statutory, if any, is also available to the aggrieved persons. Reliance was also placed on judgment of Hon ble Supreme Court in Madras Aluminium Company Limited vs. Tamil Nadu Electricity Board and Another, (2023) 8 SCC 240 to submit that Article 14 of Constitution of India would be applicable to contractual matters where State is a party.

20. To demonstrate the arbitrariness of the present respondent, it is submitted that the date of termination is 01.04.2024; however, the notice to invoke the bank guarantee has been given on 10.06.2024. It is submitted that nothing has been mentioned as to what steps had been taken post termination of contract of the present applicant with respect to engagement of any new vendor. It is submitted that as per the purchase order, the project entailed of 10 cycles and in the 9th and 10th cycles nothing substantial was to be done. It is submitted that the dispute is with respect to cycles 5 to 8 and that the 7th Milestone was upto the respondent herein. Attention was again drawn to two communications dated 30.06.2023 and 13.07.2023 by the applicant and the e-mail dated 24.07.2023 from the respondent to again demonstrate that the delay in the project was not on account of applicant/petitioner but because of the acts of the employees of the respondent. In these circumstances, it is therefore submitted that the present applicant/petitioner ought to have been given a hearing so as to explain the delay, if any, on their part.

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21. Heard learned counsel for the parties and perused the record.

22. The present OMP under Section 9 of the Arbitration and Conciliation Act has been filed by the applicant/petitioner seeking the following prayers:-

"In view of the above it is expedient in the interest of justice this Hon ble Court may kindly be pleased to restrain the respondent from terminating, blacklisting and imposing penalty qua the purchase order No. CON/IT/2547, dated 17/12/2020 for Software Development, Migration and Implementation of Single Commercial System (ITMS) for EXIM & Domestic Logistics Business of CONCOR along with other Modules for Integration with other Govt. Systems as well as from encasing the Bank Guarantee bearing No.027GT02210340017 dated 03.02.2021 amounting to Rs.35,40,000/- valid up to 01.03.2029 as the Milestones Nos. 8, 9 and 10 cannot be completed prior to 31.03.2024 as threatened by the Respondent vide letter dated 22.03.2024 since the alleged huge delay attributable to the Respondent however, the petitioner is always ready and willing sincerely to complete 8th, 9th and 10th Milestones but, needs some more time provided the Respondent fulfill all pre-requisite as per tender including the price revision.

Such other or further orders may also be passed in favour of the petitioners and against the respondents as this Hon/ble Court may deem fit and proper under the circumstances of the case and in the interest of justice."

23. As pointed out hereinabove, vide order dated 01.04.2024, learned Roster Bench declined to grant injunction restraining the termination of the contract, however, with respect to invoking the performance bank guarantee a condition of 5 working days notice was imposed.

24. As has been pointed out herein by the parties that in the present contract there are ten milestones that had to be achieved in terms of the purchase order. Learned Roster Bench vide order dated 01.04.2024 has given a prima facie opinion in para 8 thereof that, ".....Moreover, admittedly there have been delays by the Petitioner and the mere fact that extensions have been granted repeatedly does not mean that the Respondent can be This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 15/06/2024 at 20:32:09 restrained from exercising its right to either levy liquidated damages or terminate as per the contract". This finding has not been challenged by the applicant/petitioner.

25. It is not a dispute that the applicant/petitioner had been given extension to complete the project by 31.03.2024 which, admittedly, has still not been completed.

26. Judgement relied upon by learned counsel for the applicant/petitioner in Swadeshi Cotton Mills (supra) and Kumari Shrulekha Vidyarthi (supra) are in context of exercise of statutory powers by the government and does not relate to commercial disputes. In Madras Aluminium Company Limited (supra) Hon ble Supreme Court was dealing with the issue with regard to refund of an amount paid by the appellant therein to the respondent (Tamil Nadu Electricity Board) which was paid under protest. At this stage, it would be apposite to refer to the judgment of Hon ble Supreme Court in Asst. Excise Commissioner (supra), wherein in para 26 it has been held as under:-

"26. Learned counsel for respondents then submitted that doctrine of fairness and reasonableness must be read into contracts to which State is a party. It is submitted that the State cannot act unreasonably or unfairly even while acting under a contract involving State power. Now, let us see, what is the purpose for which this argument is addressed and what is the implication? The purpose, as we can see, is that though the contract says that supply of additional quota is discretionary, it must be read as obligatory -- at least to the extent of previous year's supplies -- by applying the said doctrine. It is submitted that if this is not done, the licensees would suffer monetarily. The other purpose is to say that if the State is not able to so supply, it would be unreasonable on its part to demand the full amount due to it under the contract. In short, the duty to act fairly is sought to be imported into the contract to modify and alter its terms and to create an obligation upon the State which is not there in the contract. We must confess, we are not aware of any such doctrine of This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 15/06/2024 at 20:32:09 fairness or reasonableness. Nor could the learned counsel bring to our notice any decision laying down such a proposition. Doctrine of fairness or the duty to act fairly and reasonably is a doctrine developed in the administrative law field to ensure the rule of law and to prevent failure of justice where the action is administrative in nature. Just as principles of natural justice ensure fair decision where the function is quasi-judicial, the doctrine of fairness is evolved to ensure fair action where the function is administrative. But it can certainly not be invoked to amend, alter or vary the express terms of the contract between the parties. This is so, even if the contract is governed by statutory provisions, i.e., where it is a statutory contract -- or rather more so. It is one thing to say that a contract -- every contract -- must be construed reasonably having regard to its language. But this is not what the licensees say. They seek to create an obligation on the other party to the contract, just because it happens to be the State. They are not prepared to apply the very same rule in converse case, i.e., where the State has abundant supplies and wants the licensees to lift all the stocks. The licensees will undertake no obligation to lift all those stocks even if the State suffers loss. This one- sided obligation, in modification of express terms of the contract, in the name of duty to act fairly, is what we are unable to appreciate. The decisions cited by the learned counsel for the licensees do not support their proposition. In *Dwarkadas Marfatia v. Board of Trustees of the Port of Bombay* [(1989) 3 SCC 293] it was held that where a public authority is exempted from the operation of a statute like Rent Control Act, it must be presumed that such exemption from the statute is coupled with the duty to act fairly and reasonably. The decision does not say that the terms and conditions of contract can be varied, added or altered by importing the said doctrine. It may be noted that though the said principle was affirmed, no relief was given to the appellant in that case. *Shrilekha Vidyarthi v. State of U.P.* [(1991) 1 SCC 212 : 1991 SCC (L&S) 742] was a case of mass termination of District Government Counsel in the State of U.P. It was a case of termination from a post involving public element. It was a case of non-government servant holding a public office, on account of which it was held to be a matter within the public law field. This decision too does not affirm the principle now canvassed by the learned counsel. We are, therefore, of the opinion that in case of contracts freely entered into with the State, like the present ones, there is no room for invoking the doctrine of fairness and reasonableness against one party to the contract (State), for the purpose of altering or adding to the terms and conditions of the contract, merely because it happens to be the This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 15/06/2024 at 20:32:09 State. In such cases, the mutual rights and liabilities of the parties are governed by the terms of the contracts (which may be statutory in some cases) and the laws relating to contracts. It must be remembered that these contracts are entered into pursuant to public auction, floating of tenders or

by negotiation. There is no compulsion on anyone to enter into these contracts. It is voluntary on both sides. There can be no question of the State power being involved in such contracts. It bears repetition to say that the State does not guarantee profit to the licensees in such contracts. There is no warranty against incurring losses. It is a business for the licensees. Whether they make profit or incur loss is no concern of the State. In law, it is entitled to its money under the contract. It is not as if the licensees are going to pay more to the State in case they make substantial profits. We reiterate that what we have said hereinabove is in the context of contracts entered into between the State and its citizens pursuant to public auction, floating of tenders or by negotiation. It is not necessary to say more than this for the purpose of these cases. What would be the position in the case of contracts entered into otherwise than by public auction, floating of tenders or negotiation, we need not express any opinion herein."

(emphasis supplied)

27. With respect to encashment of bank guarantee, the Hon ble Supreme Court in Standard Chartered Bank vs. Heavy Engineering Corporation Ltd & Anr., (2019) SCC Online SC 1638, has observed and held;

"... 23. The settled position in law that emerges from the precedents of this Court is that the bank guarantee is an independent contract between bank and the beneficiary and the bank is always obliged to honour its guarantee as long as it is an unconditional and irrevocable one. The dispute between the beneficiary and the party at whose instance the bank has given the guarantee is immaterial and is of no consequence. There are however, exceptions to this Rule when there is a clear case of fraud , irretrievable injustice or special equities. The Court ordinarily should not interfere with the invocation or encashment of the bank guarantee so long as the invocation is in terms of the bank guarantee.

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26. In our considered view, once the demand was made in due compliance of bank guarantees, it was not open for the Appellant bank to determine as to whether the invocation of the bank guarantee was This is a digitally signed order.

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was in terms of the bank guarantee and this what has been observed by the Division Bench of the High Court in the impugned judgment and that reflected the correct legal position."

28. Hon ble Supreme Court in Himadri Chemicals Industries Ltd. (supra) has held;

"14. From the discussions made hereinabove relating to the principles for grant or refusal to grant of injunction to restrain enforcement of a bank guarantee or a letter of credit, we find that the following principles should be noted in the matter of injunction to restrain the encashment of a bank guarantee or a letter of credit:

(i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional bank guarantee or letter of credit is given or accepted, the beneficiary is entitled to realise such a bank guarantee or a letter of credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.

(ii) The bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.

(iii) The courts should be slow in granting an order of injunction to restrain the realisation of a bank guarantee or a letter of credit.

(iv) Since a bank guarantee or a letter of credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of bank guarantees or letters of credit.

(v) Fraud of an egregious nature which would vitiate the very foundation of such a bank guarantee or letter of credit and the beneficiary seeks to take advantage of the situation.

(vi) Allowing encashment of an unconditional bank guarantee or a letter of credit would result in irretrievable harm or injustice to one of the parties concerned."

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29. In Ansal Engineering Projects Ltd. vs. Tehri Hydro Development Corporation Ltd. And Another, (1996) 5 SCC 450, the Hon ble Supreme Court held;

"4. It is settled law that bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction and the validity of the primary contract between the person at whose instance the bank guarantee was given and the beneficiary. Unless fraud or special equity exists, is pleaded and prima facie established by strong evidence as a triable issue, the beneficiary cannot be restrained from encashing the bank guarantee even if dispute between the beneficiary and the person at whose instance the bank guarantee was given by the bank, had arisen in performance of the contract or execution of the works undertaken in furtherance thereof. The bank unconditionally and irrevocably promised to pay, on demand, the amount of liability undertaken in the guarantee without any demur or dispute in terms of the bank guarantee. The object behind is to inculcate respect for free flow of commerce and trade and faith in the commercial banking transactions unhedged by pending disputes between the beneficiary and the contractor.

5. It is equally settled law that in terms of the bank guarantee the beneficiary is entitled to invoke the bank guarantee and seek encashment of the amount specified in the bank guarantee. It does not depend upon the result of the decision in the dispute between the parties, in case of the breach. The underlying object is that an irrevocable commitment either in the form of bank guarantee or letters of credit solemnly given by the bank must be honoured. The court exercising its power cannot interfere with enforcement of bank guarantee/letters of credit except only in cases where fraud or special equity is prima facie made out in the case as triable issue by strong evidence so as to prevent irretrievable injustice to the parties. The trading operation would not be jettisoned and faith of the people in the efficacy of banking transactions would not be eroded or brought to disbelief. The question, therefore, is whether the petitioner had made out any case of irreparable injury by proof of special equity or fraud so as to invoke the jurisdiction of the Court by way of injunction to restrain the first respondent from encashing the bank guarantee. The High Court held that the petitioner has not made out either. We have carefully scanned the reasons given by the High Court as well as the contentions raised by the parties. On the facts, we do not find that any case of fraud has been made out. The contention is that after promise to extend time for constructing the buildings and allotment of extra houses This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 15/06/2024 at 20:32:10 and the term of bank guarantees was extended, the contract was terminated. It is not a case of fraud but one of acting in terms of contract. It is next contended by Shri G. Nageshwara Rao, the learned counsel for the petitioner, that unless the amount due and payable is determined by a competent court or tribunal by mere invocation of bank guarantee or letter of credit pleading that the amount is due and payable by the petitioner, which was disputed, cannot be held to be due and payable in a case. The Court has yet to go into the question and

until a finding after trial, or decision is given by a court or tribunal that amount is due and payable by the petitioner, it cannot be held to be due and payable. Therefore, the High Court committed manifest error of law in refusing to grant injunction as the petitioner has made out a prima facie strong case. We find no force in the contention. All the clauses of the contract of the bank guarantee are to be read together. Bank guarantee/letters of credit is an independent contract between the bank and the beneficiary. It does not depend on the result of the dispute between the person on whose behalf the bank guarantee was given by the bank and the beneficiary. Though the question was not elaborately discussed, it was in sum answered by this Court in *Hindustan Steel Workers Construction Ltd. v. G.S. Atwal & Co. (Engineers) (P) Ltd.* [(1995) 6 SCC 76] (SCC at p. 79). This Court had held in para 6 that the entire dispute was pending before the arbitrator. Whether, and if so, what is the amount due to the appellant was to be adjudicated in the arbitration proceedings. The order of the learned Single Judge proceeds on the basis that the amounts claimed were not and cannot be said to be due and the bank has violated the understanding between the respondent and the bank in giving unconditional guarantee to the appellant. The learned Judge held that the bank had issued a guarantee in a standard form, covering a wider spectrum than agreed to between the respondent and the bank and it cannot be a reason to hold that the appellant is in any way fettered in invoking the conditional bank guarantee. Similarly, the reasoning of the learned Single Judge that before invoking the performance guarantee the appellant should assess the quantum of loss and damages and mention the ascertained figure, cannot be put forward to restrain the appellant from invoking the unconditional guarantee. This reasoning would clearly indicate that the final adjudication is not a precondition to invoke the bank guarantee and that is not a ground to issue injunction restraining the beneficiary to enforce the bank guarantee. In *Hindustan Steelworks Construction Ltd. v. Tarapore & Co.* [(1996) 5 SCC 34 : JT (1996) 6 SC 295], it was contended that a contractor had a counter-claim against the appellant; that disputes had been referred to the arbitrator and no amount This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 15/06/2024 at 20:32:11 was said to be due and payable by the contractor to the appellant till the arbitrator declared the award. It was contended therein that those were exceptional circumstances justifying interference by restraining the appellant from enforcing the bank guarantee. The High Court had issued interim injunction from enforcing the bank guarantee. Interfering with and reversing the order of the High Court, this Court has held in para 23 that a bank must honour its commitment free from interference by the courts. The special circumstances or special equity pleaded in the case that there was a serious dispute on the question as to who has committed the breach of the contract and that whether the amount is due and payable by the contractor to the appellant till the arbitrator declares the award, was not sufficient to make the case an exceptional one justifying interference by restraining the appellant from enforcing the bank guarantee. The order of injunction,

therefore, was reserved with certain directions with which we are not concerned in this case."

30. This Court finds force in the contention of learned Senior Counsel for the respondent that once the learned Roster Bench of this Court had refused to stay the termination of the contract, then the logical corollary after such termination would be invocation of the bank guarantee in terms of Clause 10.2 of the GCC. It is not the case of the applicant/petitioner that any clause existed either in the tender document or purchase order specifying any requirement to give a hearing to the applicant/petitioner before invocation of the bank guarantee. It is also pertinent to note that the prerequisite of invocation of the bank guarantee would be termination of contract and the same was done post the order dated 01.04.2024, which was passed after hearing the present applicant/petitioner at length. It is also pertinent to note that thereafter another application was filed by the present applicant/petitioner which was again disposed of by the learned Roster Bench vide order dated 09.04.2024 recording that the termination of contract was not in violation of order dated 01.04.2024.

31. A perusal of the present application filed by the applicant/petitioner, This is a digitally signed order.

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32. In view of the above, the present application is dismissed and disposed of accordingly.

33. Needless to state, nothing mentioned hereinabove is an opinion on the merits of the case and any observations made are only for the purpose of the present application.

34. Order be uploaded on the website of this Court, forthwith. O.M.P.(I)(COMM.) 97/2024 & I.A. 31739/2024 (interim relief)

35. List on date already fixed, i.e., 08.07.2024.

AMIT SHARMA, J (VACATION JUDGE) JUNE 15, 2024/sn This is a digitally signed order.

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