

## **Mahatma Gandhi Sahakra Sakkare ... vs National Heavy Engg. Coop. Ltd. And Anr on 11 July, 2007**

**Equivalent citations: AIR 2007 SUPREME COURT 2716, 2007 (6) SCC 470, 2007 AIR SCW 4911, 2007 (5) AIR KAR R 461, 2007 CLC 1496 (SC), (2008) 1 BANKCAS 133, 2007 (3) ARBI LR 78, (2007) 2 CLR 531 (SC), (2007) 4 CIVLJ 705, (2007) 4 JCR 17 (SC), 2007 (9) SCALE 177, (2007) 2 WLC(SC)CVL 553, (2007) 5 MAD LJ 1280, (2007) 3 ARBILR 78, (2007) 5 SUPREME 329, (2007) 9 SCALE 177, (2007) 5 KANT LJ 517**

**Author: B. Sudershan Reddy**

**Bench: Tarun Chatterjee, B. Sudershan Reddy**

CASE NO.:

Appeal (civil) 2952 of 2007

PETITIONER:

Mahatma Gandhi Sahakra Sakkare Karkhane

RESPONDENT:

National Heavy Engg. Coop. Ltd. And anr

DATE OF JUDGMENT: 11/07/2007

BENCH:

Tarun Chatterjee & B. Sudershan Reddy

JUDGMENT:

JUDGMENT CIVIL APPEAL NO. 2952 OF 2007 (Arising out of Special Leave Petition (C)No.11821 of 2005) B. Sudershan Reddy, J :

Leave granted.

The appellant herein is a Co-operative Society registered under the provisions of the Karnataka Co-operative Societies Act, 1959. It has established a sugar factory at Hunji, Balki Taluk, Bidar District, Karnataka with a capacity of 2500 TCD per day with a provision to expand the same upto 4000 TCD per day. The appellant had undertaken expansion of its sugar factory from 2500 TCD to 4000 TCD crushing capacity per day and accordingly invited tenders. The offer of the first respondent which is also a Co-operative Society registered under the Multi-State Co- operative Societies Act which is involved in supply, erection and commissioning of Sugar Plants was accepted in the meeting of the State Level Advisory Committee held on 10th

August, 2000. The first respondent undertook to design, procure manufacture, supply transport and deliver at the site and to do the supervision of erection and commissioning of the Sugar Plant and Machinery in conformity with the agreed specifications vide agreement dated 1st November, 2000. The clauses of the agreement dated 1st November, 2000 which are relevant to be noticed are reproduced as under :

"Clause 5 : Supply, Delivery and Supervision of Erection and Commissioning.

Clause 5.1 : The Seller agrees to supply plant and machinery so that the supply and erection of the plant and machinery is completed in all respects and to the satisfaction of the Purchaser and the Sugar Plant and Machinery is Commissioned and made ready for commercial production and use by 11th December, 2001.

#### 8.0 TRIALS AND TAKE OVER :

8.1 As soon as the Plant is ready for commissioning after completion of the supply of plant and machinery and erection of the same to the satisfaction of the purchasers, the sellers on getting information from the erection contractor shall notify in writing to the purchasers specifying the date and time, at least 30 days before the sellers intend to carry out steam and water trials to enable the purchasers to arrange for boiler feed water, fuel, operational staff and workmen and other facilities. Unless otherwise agreed by the purchasers and the sellers, the sellers shall begin the said trial on the date and time so notified.

Provided that the water, steam and vacuum trials shall be conducted by the sellers for a period of one month before the commissioning of the plant and machinery after complete delivery and erection to the entire satisfaction of the purchasers.

8.2 After the said steam, water and vacuum trials have been completed to the entire satisfaction of the purchasers and on their furnishing a certificate to the effect that all the plant and machinery mentioned in Annexure I to III have been inspected and approved by the Inspection Agency, delivered as per detailed parts list of materials referred to above, erected and commissioned under the supervision of the sellers according to the terms and conditions of this agreement, the sellers guarantees given in pursuance of clause 17.2 shall be deemed to have been fulfilled."

Bank guarantees were required to be furnished by the respondent in terms of the agreement. The case of the appellant is that the first respondent failed to commission the plant in terms of the agreement. The appellant sent a notice dated 26th April, 2003 duly putting the respondent on notice of its failure to commission the plant by the scheduled date i.e. 11th February, 2001 and other revised dates, i.e., 26th January, 2002, 25th November, 2002, 28th February, 2003 and 25th April, 2003. Thereafter, a meeting was held between the parties at the intervention of the Government of Karnataka on 1st July, 2003 where both the parties had agreed as hereunder:

i) 1st respondent shall furnish bank guarantee for Rs.92.40 lakhs towards delivery and commissioning of the plant valid upto 28.02.2004.(Clause 1).

ii) Simultaneously, with the receipt of the aforesaid bank guarantee, the petitioner shall release Rs.140.41 lakhs to the 1st respondent (Clause 4)

iii) 1st respondent will start trial run to crush 500-1000 tonnes of sugarcane within 20 days from the date of receipt of Rs.140.41 lakhs as aforesaid (Clause

6).

iv) The plant will be fully commissioned by November/December 2003 (Clause 7).

The first respondent in terms of the agreement reached between the parties furnished a bank guarantee for a sum of Rs. 92.40 lakhs dated 4th July, 2003. The appellant on its part released Rs. 140.41 lakhs on 5th July, 2003.

The case of the appellant is that the trial crushing did not start even as on 28th / 29th July, 2003; no doubt, the trial crushing commenced on 26th November, 2003 but the same had to be stopped on 22nd December, 2003 due to defects in the turbo alternator. The appellant addressed letter dated 27th December, 2003 to the respondent regarding non-supply, defective erection and non-commissioning of the plant by the first respondent. It is not necessary to notice further details in this regard as there is any amount of controversy between the parties as regards non-compliance with the terms and conditions of the agreement. Each is accusing the other of breach of terms of agreement. The appellant, however, relied upon the detailed report dated 16th January, 2004 furnished by National Federation of Co-operative Sugar Factories Ltd., the consultants to the project, in support of the plea that the trial run was unsuccessful and incomplete. The appellant stated on account of the teething problems the appellant could not undertake the crushing of sugarcane leading to heavy losses.

Be it as it may, the Board of Directors of the appellant Society resolved in its meeting dated 13th March, 2004 to invoke the bank guarantee of Rs. 92.40 furnished by the first respondent. The appellant accordingly sent a letter requesting the Commissioner of Cane Development and Director of Sugar to counter sign the invocation letter on the ground that the respondent herein had failed to commission the plant as agreed.

The case of the respondent in nut shell is that the project fell into rough weather purely on account of the inability of the appellant Society to arrange the requisite funds. It is however admitted that after exchange of several acrimonious letters and notices, the parties finally agreed on a final course with a revised time frame to erect and commission the plant in a meeting held on 1st July, 2003. It is pursuant to that agreement the respondent furnished the bank guarantee in question and the appellant released the amount of Rs.140.41 lakhs on 5th July, 2003 and required the respondent to implement the trial run by 25th July, 2003. It is submitted that the contract between the parties envisaged four different kinds of bank guarantees to ensure particular set of obligations by the

respondent. Clauses 16.4 and 17.5 deal with the bank guarantees for timely delivery of civil drawings and clause 17.6 deals with bank guarantee for advance payments; for timely delivery and commissioning of plant is dealt with clauses 8, 16, 16.3, 17.4, 17.9 and for ensuring performance of the plant is dealt with by clauses 9, 16.2, 17.3 and 17.9.

It is the case of the respondent that the trial run of plant and machinery was arranged during 25th July, 2003 and 2nd August, 2003 and the trial run was found satisfactory. The actual commissioning was to take place from 21st July, 2003 but has actually started on 27th November, 2003. According to the respondent after continuous crushing of the sugarcane for about a month all of a sudden there was a problem in the working of the machinery which was attended to on the spot. We do not propose to notice further details in this regard for each one of the parties is blaming the other. There is any amount of controversy between the parties in this regard and it would not be proper to make any comment at this stage since the parties are already before the Arbitrator who is required to decide the dispute on merits in accordance with law. The main contention of the respondent is that the appellant raised false and untenable claims only with a view to avoid or postpone the payment of huge amount of Rs. 327 lakhs due and payable to the respondent. It is under those circumstances the respondent got issued notice to the appellant to refer the dispute for resolution through arbitration. The appellant instead of responding to the notice resolved to invoke the bank guarantee with a malafide intention of depriving the respondent of its legitimate right to receive certain amounts.

The case of the respondent is that the bank guarantee is a conditional one and unless the condition precedent for enforcement of the bank guarantee is satisfied the appellant cannot be permitted to invoke the bank guarantee. It is on that ground the respondent filed Misc. Petition Under Section 9 of the Arbitration and Conciliation Act, 1996 seeking injunction against the appellant restraining it from encashing the bank guarantee No.56/03 dated 4th July, 2005.

The trial court after an elaborate consideration of the matter dismissed the application filed by the respondent herein and refused to grant any injunction restraining the appellant from encashing the bank guarantee as prayed for by the respondent. The trial court came to the conclusion that invocation of the bank guarantee and its encashment by the appellant cannot be held to be fraudulent or untenable and further held that the respondent has failed to prove that there will be irretrievable injustice in case bank guarantee is invoked.

Being aggrieved by the order passed by the trial court rejecting the injunction application, the respondent herein filed MFA No.6188/04 challenging the legality and the correctness of the order passed by the trial court. The High Court upon reappraisal of the evidence and material available on record reversed the order passed by the trial court and accordingly granted injunction restraining the appellant herein from encashing the bank guarantee. The appellate court has taken the view that the bank guarantee appears to be a conditional one and "under the documents the guarantor is entitled to know that the appellant has failed to conduct the trial test and the commissioning of the project as agreed." The appellate court however also took a strange view that the invocation of the bank guarantee without informing to the bank as to the fact of alleged breach of agreement itself amounts to fraud. The Appellate Court also took the view that the letter invoking the bank guarantee

should be counter signed by the Commissioner of Sugar, Bangalore, but the same has been signed by some other authority and not by the Commissioner of Sugar.

Being aggrieved by the orders passed by the High court restraining the appellant from invoking the bank guarantee the present appeal has been preferred.

Shri S.S. Javali, learned senior counsel, submitted that the bank guarantee executed by the respondent herein in favour of the appellant is an unconditional one. The bank giving such a guarantee is bound to own it irrespective of any dispute raised by the respondent. The appellant's right to invoke the bank guarantee cannot be questioned except on the ground of fraud or irreparable injury or on the ground that invoking the bank guarantee would cause irretrievable injury. The respondent failed miserably to make out any case for grant of injunction. The High Court's order suffers from incurable infirmities was the submission.

Shri Jayant Bhushan, learned senior counsel, appearing on behalf of the first respondent supported the judgment of the High Court and submitted that the bank guarantee in question was a conditional bank guarantee to ensure test trials and commissioning within the specified time periods and since these events have already been ensued the bank guarantees cannot be encashed.

We have carefully considered the rival submissions made during the course of the hearing of the appeal. We have perused the entire material available on record including the orders passed by the trial court as well as the High Court.

The main question that arises for our consideration is whether the bank guarantee in question is a conditional one or not. Before we proceed further it would be appropriate to have a look at the relevant clauses of the agreement dated 1st November, 2000 :

"16.3.1 : If the sellers fail to commission the plant according to the schedule of commissioning which is to be worked out mutually to enable the commissioning of the plant within the schedule time, fixed or extension allowed by the purchasers, if any, thereof the sellers shall pay penalty by an amount equal to =% (Half percent) of the contract price for every completed week of delay, but not exceeding 3% of the total contract price.

16.3.2 : To secure the obligations under clause 16.3.1, the sellers shall furnish to the purchasers, bank/insurance guarantees in the form set out by the purchasers as provided in clause 17.4 hereinafter.

17.9 : The bank/insurance guarantee

(s) required to be furnished by the sellers under the provisions hereof to secure the timely delivery, erection, commissioning, as well as for performance of the plant and machinery supplied by the sellers or for any other purpose under the provisions hereof shall be in the form of purchasers after mutual discussions between the

purchasers and sellers which form(s) shall invariably include the provisions that the decision of the purchasers as to whether there has been any loss or damage or default and or negligence on the part of the sellers will be final and binding on the sellers, that the right of the purchasers shall not be affected or suspended by reasons of the fact that any dispute or disputes have been raised by the sellers with regard to their liability or that proceedings are pending before any Tribunal, Arbitrator(s) or court with regard thereto or in connection therewith, that the Guarantee shall pay to the purchasers the sum under the guarantee(s) without demur on first demand and without requiring the purchasers to invoke any legal remedy that may be available to them, that it shall not be open to the guarantee to know the reasons of or to investigate to go into the merits of the demand or to question or to challenge the demand or to know any facts affecting the demand or to require proof of the liability of the sellers before paying the amount demanded by the purchasers under the guarantee (s). In case of invocation of any bank guarantee by the purchasers, the same should be countersigned by the Commissioner for Cane Development and Director of Sugar of the concerned State Government.

The Bank/Insurance guarantee or guarantees required to be furnished by the sellers under the provisions hereof to secure timely delivery, erection, commissioning as well as for performance of the plant and machinery supplied by the sellers or for any other purpose under the provisions hereof shall be for such period as may cover the period of complete supply, erection and commissioning and performance respectively, as the case may be, as stipulated under the agreement. If however, the period of agreement is extended due to Force Majeure or sellers not fulfilling their obligations under the agreement or for any other reasons whatsoever, sellers shall have such guarantees extended upto the corresponding extended period and failure of the sellers to do so will amount to a breach of the contract and in no case the extension of the period of the contract shall be construed as waiver of the right of the purchasers to enforce the guarantee.

The relevant portion of the bank guarantee is extracted herein below :

" Clause 1 : In consideration of the above premises, the Guarantor hereby undertakes to pay to the purchasers within 30 days of demand, without demur such a sum not exceeding Rs. 92,40,000/- (Rupees Ninety two lakhs forty thousand only), representing 3% of the contract price as the purchasers may demand upon the failure of the supplier to conduct the trial test of the sugar plant by 24th July, 2003 and also upon the failure of the sellers to commission the Project (Plant and Machinery) before December 2003.

2. The Guarantor shall pay to the purchasers on demand the sum without demur and without requiring the purchasers to invoke any legal remedy that may be available to them, it being understood and agreed FIRSTLY that the purchasers shall be the sole judge of and as to whether the amount of bank guarantee has become recoverable from the sellers or whether the sellers have committed any breach(es) of the terms and conditions of the said agreement and the extent of losses, damages, costs,

charges and expenses caused to or suffered by or that may be caused to or suffered by purchaser's from time to time shall be final and binding to the Guarantor and SECONDLY that the right of the purchasers to recover from the guarantor any amount due to the purchasers under this guarantee shall not be affected or suspended by reasons of the fact that any dispute or disputes have been raised by the sellers with regard to their liability or that proceedings are pending before any tribunal Arbitrator(s) or court with regard thereto or in connection therewith and THIRDLY that the guarantor shall immediately pay the aforesaid guaranteed amount to the purchasers on demand and it shall not be open to the Guarantor to know the reasons of or to investigate or to go into the merits of the demands or to question or challenge the demand or to know any facts affecting the demand, and LASTLY that it shall not be open to the guarantor to require the proof of the liability of the sellers to pay the amount, before paying the sum demanded under clause 1 above.

8. The invocation of this guarantee shall be by a letter as herein, signed by the purchasers and countersigned by the Commissioner of Sugar, Bangalore, Karnataka State."

A plain reading of Clauses (1) and (2) of the bank guarantee makes it abundantly clear that the guarantor had undertaken to pay to the appellant within 30 days of demand, without demur such an amount not exceeding Rs.92.40 lakhs. The sole discretion is conferred on the purchasers as to whether the amount of bank guarantee has become recoverable from the sellers or whether the sellers have committed any breach of the terms and conditions of the said agreement. The right of the purchaser to recover from the guarantor the guaranteed amount shall not be affected or suspended by the reasons of the fact that any dispute or disputes have been raised by the sellers with regard to their liability or that the proceedings are pending before any tribunal or court with regard thereto or in connection therewith.

However, Shri Jayant Bhushan, learned senior counsel submitted that the purchasers were entitled to invoke the bank guarantee and demand the payment of money only upon the failure of the supplier to conduct the trial test of the sugar plant by 24th July, 2003 and also upon the failure of the sellers to commission the project before December, 2003. This condition forms an integral part of the bank guarantee was the submission. We find it difficult to accept the submission. The guarantee executed by the guarantor (PNB) in favour of the purchaser (appellant) cannot be dissected in the manner suggested by the learned senior counsel for the respondent. Clauses 1 and 2 of the guarantee executed by the banker in favour of the purchaser are required to be read together. The respondent cannot be allowed to contend that there is a dispute as to whether it had failed to conduct the trial test of the sugar plant by 24th July, 2003 and therefore bank guarantee cannot be invoked. The acceptance of the argument would make Clause 2 of the bank guarantee totally meaningless and inoperative. The guarantor essentially agreed that the purchasers alone shall be the sole judge in the matter as to whether the amount of bank guarantee has become recoverable from the sellers or whether the seller had committed any breach of the terms and conditions of the agreement. The dispute, if any, between the parties with regard to the liability in any proceedings either before the arbitral tribunal or court in no manner affects the right of the purchaser to invoke

the bank guarantee and realise the guaranteed sum from the guarantor.

In U.P.Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd. [ (1998) 1 SCC 174 ] the respondent therein entered into an agreement with the appellant for constructing a Vanaspati manufacturing plant for the latter. The contract required the respondent to furnish two bank guarantees for proper construction and successful completion of the plant. The Bank of India executed two bank guarantees in favour of the appellant. Under the terms of guarantee the bank undertook to make unconditional payments on demand without reference to the respondent. The guarantees also provided that the appellant would be the sole judge for deciding whether the respondent had fulfilled the terms of the contract or not. Disputes arose between the parties as to the erection and performance of the plant. The seller approached the civil court seeking injunction restraining the purchaser from invoking the bank guarantee. The High Court, proceeding on the basis that the injunction was sought not against the bank but against the appellant, restrained the appellant from invoking the bank guarantee. This court after elaborate consideration of the matter held :

" ..commitments of banks must be honoured free from interference by the courts. Otherwise, trust in commerce internal and international would be irreparably damaged. It is only in exception case that is to say in case of fraud or in case or irretrievable injustice be done, the could should interfere."

This court relied upon its own earlier decision in United Commercial Bank vs. Bank of India and others [ 1981 (2) SCC 766 ] in which it is observed " that a bank issuing or confirming a letter of credit is not concerned with the underlying contract between the buyer and seller. Duties of a bank under a letter of credit are created by the documents itself." In General Electric Technical Services Company Inc. vs. Punj sons (P) Ltd. And anr. [ 1991 (4) SCC 230 ] this court observed " if the documentary credits are irrevocable and independent, the Bank must pay when demand is made. Since the bank pledges its own credit in involving its reputation, it has no defence except in the case of fraud. The Bank's obligation of course should not be extended to protect the unscrupulous party, that is, the party who is responsible for the fraud. But the banker must be sure of his ground before declining to pay. The nature of the fraud that courts talk about is fraud of a "erregious nature as to vitiate the entire underlying transaction." It is the fraud of the beneficiary not the fraud of somebody else. The bank cannot be interdicted by the court at the instance of purchaser in the absence of fraud or special equities in the form of preventing irretrievable injustice between the parties.

In our considered opinion if the bank guarantee furnished is an unconditional and irrevocable one, it is not open to the bank to raise any objection whatsoever to pay the amounts under the guarantee. The person in whose favour the guarantee is furnished by the bank cannot be prevented by way of an injunction in enforcing the guarantee on the pretext that the condition for enforcing the bank guarantee in terms of the agreement entered between the parties has not been fulfilled. Such a course is impermissible. The seller cannot raise the dispute of whatsoever nature and prevent the purchaser from enforcing the bank guarantee by way of injunction except on the ground of fraud and irretrievable injury.



In U.P. State Sugar Corporation vs. Sumac International Ltd. [ 1997 (1) SCC 568 ] this court had laid down the principle as to the enforcement of the bank guarantees as under :

"The law relating to invocation of such Bank Guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee in terms is given or accepted, the beneficiary is entitled to realise such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned ".

We do not propose to burden this judgment of ours with various other authoritative pronouncements on this very subject.

In the present case the respondent in its application filed under Section 9 of the Arbitration and Conciliation Act, 1996 in the district court, Bidar mostly highlighted as to how the very vital conditions of the agreement have been breached by the appellant herein by not arranging the funds at the proper time. It is alleged that the appellant did not even complete their obligation in respect of providing storage facilities for valuable goods etc. It is specifically alleged that required funds were not available with the appellant. On account of non availability of funds there were two halts of nine months and five months during the execution of the project from 03.12.2001 to 14.08.2002 and from 14.08.2002 to 10.01.2003. It is further alleged that the appellant failed to arrange for all the pre-requisites. It is not necessary for the purpose of disposal of this appeal to notice all the allegations and averments filed by the respondents except to note that the main thrust of the allegation relate to alleged breach of the conditions of the agreement by the appellant. It was further contended that the bank guarantees were conditional bank guarantees and not unconditional. We have referred to the substance of the allegations only to highlight that no factual foundation as such has been laid in the pleadings as regards the allegation of fraud. In fact there is no serious allegation of any fraud except using the word "fraud". It is also not stated as to how irreparable loss would be caused in case the appellant is allowed to encash the bank guarantee. The only two exceptions, namely fraud and irretrievable injury based on which injunction could be granted restraining encashment of bank guarantee are singularly absent in the pleadings. Once it is held that the bank guarantee furnished by the banker is an unconditional one, the appellant in our considered opinion cannot be restrained from encashing the bank guarantee on the ground that a serious dispute had arisen between the parties and on the allegations of breach of terms and conditions of the agreement entered between the parties.

The High Court in its judgment went to the extent of recording a finding that it cannot be said that there was no delivery, erection and commissioning of plant. The High Court also took the view that the appellant has agreed to invoke the bank guarantee only in case of default on the part of the respondent in delivery, erection, commissioning of the plant. This view of the High Court is totally contrary to the terms and conditions of the bank guarantee executed by the bank in favour of the appellant. It has been specifically agreed by the banker to pay the guaranteed amount to the appellant on demand and " it shall not be open to the guarantor to know the reasons of or to investigate or to go into the merits of the demands or the question or challenge the demand or to know any facts affecting the demand." The bank guarantee further makes it clear that it shall not be open to the guarantor to require the proof of the liability of the seller to pay the amount, before paying the sum demanded. In the process the High Court made the following observations which in our considered opinion are totally untenable and unsustainable being contrary to the terms and conditions incorporated in the bank guarantee. The High Court observed :

"From the facts and circumstances narrated by the petitioner, it is clear that the first respondent could not have invoked the bank guarantee when the setting up of the machinery and commissioning in accordance with the agreement and all these facts therefore show that the invocation of the bank guarantee was fraudulent."

It is further held that since the appellant failed to give any information to the bank as to the fact of any alleged breach of agreement in order to invoke the bank guarantee itself amounts to fraud. We must however hasten to add that the learned senior counsel appearing for the respondent did not support this part of the judgment of the High Court.

However, Shri Jayant Bhushan, learned senior counsel appearing for the respondents contended that invocation of the bank guarantee relating to "delivery and commissioning of the plant" was wholly illegal and the High Court was right in granting the injunction order relating to that guarantee. It was submitted that the said bank guarantee could be invoked only on the failure of the respondent to commission the plant according to the schedule of commissioning in terms of the relevant clauses of the principal agreement entered into between the parties and since the conditions contemplated under those clauses did not exist, the invocation of the guarantee by the appellant itself is bad.

The learned counsel in support of his submission relied upon the decision of this Court in Hindustan Construction Co. Ltd. Vs. State of Bihar & Ors. [ (1999) 8 SCC 436]. This Court in Hindustan Construction Co. (supra) having referred to the terms of clause (9) of principal contract between the parties therein came to the conclusion that the bank guarantee specifically refers to the original contract and postulates that the obligations expressed in the contract, are not fulfilled by HCCL, the right to claim recovery of the whole or part of the "advance mobilisation"

then alone the bank was liable to pay the amount due under the guarantee to the Executive Engineer. The court found that the bank guarantee specifically refers to clause (9) of the principal agreement and it is under those circumstances came to the conclusion that the amount covered by the bank guarantee becomes payable and the

same could be invoked only in the circumstances referred to in clause (9) of the principal agreement. The bank guarantee executed by the bank in the instant case in favour of the appellant herein does not contain any such clause. Mere fact that the bank guarantee refers to the principal agreement without referring to any specific clause in the preamble of the deed of guarantee does not make the guarantee furnished by the bank to be a conditional one. In the very said judgment this Court observed that "what is important, therefore, is that the bank guarantee should be in unequivocal terms, unconditional and recite that the amount would be paid without demur or objection and irrespective of any dispute that might have cropped up or might have been pending between the beneficiary under the bank guarantee or the person on whose behalf the guarantee was furnished. The terms of the bank guarantee are, therefore, extremely material. Since the bank guarantee represents an independent contract between the bank and the beneficiary, both the parties would be bound by the terms thereof. The invocation, therefore, will have to be in accordance with the terms of the bank guarantee, or else, the invocation itself would be bad." What is relevant, therefore, is the terms incorporated in the guarantee executed by the bank. On careful analysis of the terms and conditions of the guarantee, we find the guarantee to be an unconditional one. The respondent, therefore, cannot be allowed to raise any dispute and prevent the appellant from encashing the bank guarantee.

For all the aforesaid reasons, we hold that the respondent herein did not make out any case for grant of injunction restraining the appellant herein from encashing the bank guarantee.

For the reasons stated above, the impugned judgment of the Appellate Court is set aside and the appeal is allowed.

Before parting with the judgment, it is made clear that the observations, if any made, in this order shall have no bearing whatsoever upon the dispute pending before the Arbitrator which is required to be disposed of on its own merits uninfluenced by the observations, if any, made in this order.

No costs.