Housing Development And ... vs Mumbai International Airport Private ... on 29 November, 2012

Author: S. J. Kathawalla

Bench: S. J. Kathawalla

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION (L) NO.1538 of 2012

Housing Development and Infrastructure Limited.] ... Petitione

Versus

Mumbai International Airport Private Limited]
and others.] ... Responden

Mr. T. N. Subramaniam, Senior Advocate, a/w Mr. Gaurav Joshi, Mr. Piyush Raheja, Mr. Satyen Vora, Mr. Atul Kshatriya, Mr. Sanmish Gala & Mr. Chetan Yadav i/b Markand Gandhi & Co. for Petitioner.

Mr. Virag Tulzapurkar, Senior Advocate, a/w Dr. Birendra Saraf, Ms. Shoma Maitra & Mr. Atharva Dandekar i/b Wadia Gandhy & Co. for Respondent No1.

Mr. Snehal Shah a/w Ms. Dipti Panda & Ms. Amita Jasani i/b Purnanand & Co. for Respondent No.2 - Punjab & Maharashtra Co-operative Bank Limited.

Mr. A. Ketkar for Respondent No.4.

CORAM :- S. J. KATHAWALLA, J.

DATE :- NOVEMBER 29, 2012

ORAL JUDGMENT :-

1. Mentioned. Not on board, taken on board.

2. The Petitioner has filed the above Arbitration Petition under Section 9 of the Arbitration and Conciliation Act, 1996, inter alia, for an order and injunction restraining the Respondent No.1 from invoking or encashing or receiving payments under the Bank Guarantee No.3023/4018/152/07-08 URS 1 of 25 2 ARBPL 1538-12-Judgment.doc read with Extension Bank Guarantee No.3023/4018/229/09-10 dated 11th May 2012 or further extended bank guarantees as may be furnished to the Respondent No.1 from time to time. The Petitioner has also sought an order and injunction against the Respondent No.2 bank from making payment or otherwise causing payment to be made under the said Bank Guarantees.

3. An application for urgent orders was made before this Court today at 11.00 a.m. by the learned Senior Advocate appearing for the Petitioner without giving notice to the Respondents. However, the Respondent No.1 appeared through their Advocates and informed the Court that a copy of the petition should be served on them, and necessary orders be passed only after giving them a hearing in the matter. The matter was therefore kept at 3.00 p.m. and it was ordered that in the meantime, the Respondent No.2 Bank shall not act on the letter received from Respondent No.1 dated 27 th November 2012. The matter was taken up at around 5.00 p.m., and it was decided by consent that the arbitration petition be decided finally. In view thereof, the Respondents have not filed any Affidavits-in-Reply and are allowed to proceed in the matter on the basis of denials.

4. The facts, as narrated by the Petitioner, are briefly set out herein :

5. The Petitioner - Housing Development and Infrastructure Limited (HDIL) is a renowned real estate company which is executing several large residential and commercial projects in the city of Mumbai, including various SRA projects. The Respondent No.1 Mumbai International Airport Private Limited (MIAPL) is a Private Limited Company selected by the Airports Authority of India (AAI) to operate, manage, develop, design, upgrade and modernize the Chhatrapati Shivaji International Airport ('the Airport') at URS 2 of 25 3 ARBPL 1538-12-Judgment.doc Mumbai. Respondent No.2 Punjab and Maharashtra Co-operative Bank Limited is a Bank which has provided the performance guarantee ('the said bank guarantee') to the Respondent No.1, at the request of the

Petitioner in the circumstances set out hereinafter. Respondent No.3 is Mumbai Metropolitan Regional Development Authority (MMRDA) and has been appointed by the Respondent No.1 as the project implementation agency for undertaking slum clearance. Respondent No.4 is the State of Maharashtra joined as a party through the Collector, Mumbai Suburban District. According to the Petitioner, it is the duty of the Respondent No.4, inter alia, to determine the eligibility of slum dwellers who are entitled to be rehabilitated in the premises constructed/to be constructed by the Petitioner under its Agreements with the Respondent No.1. The Respondent No.5 is Slum Rehabilitation Authority established under the Maharashtra Slum Areas (Improvements, Clearance and Redevelopment) Act, 1971 and acts as the planning authority for the slum rehabilitation project.

6. According to the Petitioner, as already stated hereinabove, under an Agreement dated 4th April 2006 executed between the AAI and the Respondent No.1, AAI granted to the Respondent No.1 exclusive right to operate, maintain, develop, design, construct, upgrade, modernize finance and manage the Airport. Thereafter AAI also executed a Lease Deed dated 26th April 2006, in favour of Respondent No.1 wherein certain land (the Airport Land) was leased in favour of the Respondent No.1. At the time of the aforesaid Agreement, nearly 276 acres of the Airport Land was encroached upon by the slums. Accordingly Respondent No.1 desired to have the said slums cleared from the Airport Land.

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7. Pursuant to an Agreement dated 12th December 2006, the Respondent No.1 appointed MMRDA as the project implementation authority for undertaking slum clearance. Thereafter on 18th April 2007, the Respondent No.1 issued an invitation seeking expression of interest from bidders for undertaking a slum rehabilitation project for clearing the said encroachments on the Airport Land. The Petitioner responded to the said invitation and by a Letter of Intent dated 15th October 2007, the Respondent No.1 awarded the said slum rehabilitation project to the Petitioner. Simultaneously on the same day i.e. on 15th October 2007, the Petitioner and the Respondent No.1 entered into an Agreement (the said Agreement) setting out the terms and conditions for execution of the said slum rehabilitation project by the Petitioner, a copy of which Agreement is annexed at Exhibit 'D' to the petition.

8. Clause 3 of the said Agreement sets out the scope of work which was to be undertaken by the Petitioner for completion of the said slum rehabilitation project, which work included eviction of ineligible slum dwellers and rehabilitation of protected slum dwellers, demolition of hutments, construction of rehabilitation buildings and handing over of vacant land to Respondent No.1. Clause 4 sets out the consideration to be received by the Petitioner for executing the said slum rehabilitation project. The said clause provided that the Petitioner is entitled to receive 65.20 acres of land from the Airport Land, upon the same being released from the encroachments. No monetary

consideration was payable under the said Agreement to the Petitioner.

9. Clause 8 of the said Agreement provided for a performance security and reads as under :

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"8. PERFORMANCE SECURITY
8.1 The Developer has submitted an unconditional irrevocable

and on demand bank guarantee dated October 15, 2007 for Rs.25 (Twenty Five) crores from Punjab and Maharashtra Co-operative Bank Limited in favour of MIAL and an on demand promissory note dated October 15, 2007, for Rs.275 (two hundred and seventy five) crores as performance security, for performance of its obligations hereunder. The said bank guarantee and promissory note shall be retained as security for performance by the Developer of its obligations (including warranties). The Developer shall, no later than 12 (twelve) months from the date of the LOI, replace the bank guarantee and the said promissory note by an interest free cash deposit of Rs.300 (three hundred) crores. Such deposit shall be made by way of a demand draft / pay order or wire transfer and the said bank guarantee and promissory note shall be released simultaneously with the receipt of the demand draft / pay order or, in the case of a wire transfer, simultaneously with the cash deposit being received by MIAL (the said bank guarantee together with the promissory note or the interest free cash deposit in lieu thereof is hereinafter referred to as the "Performance Security"). The Performance Security shall be refunded to the Developer, subject to such set offs and deductions as MIAL may be entitled to make under this Agreement or otherwise, 5 (five) years from the date of deposit or 12 (twelve) months after Project Completion, whichever is later or upon the earlier termination of this Agreement.

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8.2 The Performance Security may be invoked, drawn down, appropriated or adjusted by MIAL at the sole discretion of MIAL for non performance by the Developer, and non performance includes the following events :

> (i) Breach of or failure by the Developer to comply with any of the terms and conditions of this Agreement or any further agreement to be executed between MIAL and the Developer amounting to a material breach of this Agreement or such further agreements; and
>
> (ii) Failure of the Developer to replace the bank guarantee and the promissory note by the cash deposit as mentioned in this Clause hereinabove.

8.3 If at any time the Performance Security is invoked, drawn down, appropriated or adjusted, the Developer shall ensure that the value of the Performance Security is always maintained at the level indicated hereinabove by replenishing or issuing additional security as above Invocation, draw down, appropriation or adjustment of the Performance Security does not absolve the Developer from its obligations to perform the Scope of Work, under the agreement."

10. As agreed under said Clause 8, the Petitioner furnished to the Respondent No.1, a Bank Guarantee dated 15th October 2007 for Rs.25 crores, issued by the Respondent No.2 Bank. A copy of the said Bank Guarantee is annexed and marked as Exhibit 'E' to the petition. The Petitioner has also URS 6 of 25 7 ARBPL 1538-12-Judgment.doc furnished a Demand Promissory Note of Rs.275 crores to the Respondent No.

1. According to the Petitioner, the said Bank Guarantee has been continuously renewed by the Petitioner at the request of Respondent No.1, the last renewal being made in May 2012.

11. Clause 24 of the said Agreement sets out the events of default, and Clause 25 pertains to termination of the Agreement.

12. Clause 35 of the said Agreement provides for resolution of disputes between the parties by arbitration which clause is reproduced hereunder :

> "35. ARBITRATION Any and all claims, disputes, questions or controversies involving the Parties and arising out of or in connection with or relating to this Agreement, or the execution, interpretation, validity, performance, breach or termination hereof (including, without limitation, the provisions of this Clause (collectively, (Disputes") shall, in the first instance be resolved by mediation by the mediators namely the Managing Director of MIAL and, the Chairman of the Developer. In the event that the Dispute is not resolved through mediation then it shall be submitted to arbitration in accordance with the Arbitration and Conciliation Act, 1996 and any rules, regulations made thereunder, or amendments thereto or

re-enactment thereof".

13. Mr. T. N. Subramaniam, the Learned Senior Advocate appearing for the Petitioner submitted that upon execution of the said Agreement, pursuant to Clause 8.1 thereof, the Petitioner, through Respondent No.2, furnished a Bank Guarantee in the sum of Rs.25 crores and also executed a Demand Promissory URS 7 of 25 8 ARBPL 1538-12-Judgment.doc Note of Rs.275 crores in favour of Respondent No.1. The Petitioner, with all earnestness, also commenced the work of the said rehabilitation project. The Petitioner constructed 7,000 tenements and is completing construction of 20,000 flats. The Petitioner has incurred an expenditure in excess of Rs.3000 crores in respect of the said project, including money expended for acquisition of lands, construction of tenements, provision of facilities to the Respondent No.4 and its officers to carry out eligibility surveys etc. The Petitioner also shifted approximately 650 slum dwellers and provided permanent alternate accommodation to them. However the Respondent No.1, along with Respondent Nos. 3 to 5, has failed and neglected to fulfill their various statutory obligations, as a result whereof the list of eligible slum dwellers is not finalized, due to which more than approximately 7,000 tenements which are fully constructed by the Petitioner are lying vacant. It is submitted that the Petitioner was required to give a cash deposit of Rs.300 crores to the Respondent No.1 in place of the said Bank Guarantee of Rs.25 crores and the Demand Promissory Note of Rs.275 crores, within 12 months from the date of the said Agreement. However, the said condition came to be waived by Respondent No.1 who repeatedly accepted renewal of the said Bank Guarantee without protest, the last renewal was on 11th May 2012. It is submitted that as late as in October 2012, in a meeting held with Respondent No.4, the issue regarding the submission of the list of slum dwellers through Respondent Nos.1 and 3 to the office of the Collector for verification was discussed, inter alia, in order to enable the Collector to determine the eligibility of the slum dwellers particularly in the priority areas determined by Respondent No.1. The Minutes of the said meeting are annexed and marked as Exhibit 'B' to the petition. It is submitted that Respondent No.1 and its representatives who attended the said meeting, never disputed the obligations set out thereunder, but thereafter have not complied with what was agreed.

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14. Mr. Subramaniam on behalf of the Petitioner further submitted that despite the aforestated facts, the Respondent No.1 without any notice as contemplated under the contract between the parties or even otherwise, has sought to surreptitiously invoke the bank guarantee by its letter 27th November 2012 addressed to the Respondent No.2. alleging non performance by the Petitioner herein. Relying on the decision of the Hon'ble Supreme Court in the case of Hindustan Construction Co. Ltd. Versus State of Bihar And Others, reported in (1999) 8 Supreme Court Cases 436, Mr. Subramaniam submitted that the said bank guarantee issued by the Respondent No.2 in favour of the Petitioner, at the instance of the Respondent No.1 is a conditional bank guarantee and the same

has been invoked without complying with the condition contained therein viz. to establish that the Petitioner has failed to perform any of its obligations (including warranties), under the Letter of Intent or the said Agreement. Mr. Subramaniam has submitted that therefore the Respondent No.1 has sought to fraudulently and unjustifiably enrich itself at the expense of the Petitioner. He submitted that the fraudulent conduct of Respondent No.1. is further fortified by Clause 8.3 of the said Agreement which requires the Petitioner, after invocation of the said guarantee, to give further securities/guarantees to the Respondent No.1 which again Respondent No.1 is entitled to invoke. Mr. Subramaniam has submitted that therefore the fraud perpetrated by the Respondent No.1 is of such an egregious nature that it would vitiate the very foundation of the contract as well as the bank guarantee and render the bank guarantee ineffective, null and void. He submitted that in any event, irretrievable injustice would be caused to the Petitioner if the invocation of the bank guarantee is not stayed, inter alia, as the invocation is not attributable to any fault of the Petitioner. Relying on the decision of the Hon'ble Supreme Court in the case of Svenska Handelsbanken Versus M/s. Indian Charge Chrome And URS 9 of 25 10 ARBPL 1538-12-Judgment.doc Others, reported in (1994) 1 Supreme Court Cases 502, he submitted that even the special equities in the present case are in favour of the Petitioner. He therefore submitted that the arbitration petition be allowed and the Respondent No.1 be restrained from invoking or encashing or receiving payments under the said bank guarantee.

15. Mr. Virag Tulzapurkar, the Learned Senior Advocate appearing for Respondent No.1, without prejudice to the contention of the Respondent No.2 submitted that since the Respondent No.2 Bank is not a party to the main contract dated 15th October 2007, and that the contract of guarantee does not contain an Arbitration Agreement, the present petition filed by the Petitioner under Section 9 of the Act is not maintainable, proceeded to make his submissions on behalf of the Respondent No.1 on merits. Mr. Tulzapurkar first submitted that the reliance placed by the Petitioner upon the Judgment of the Hon'ble Supreme Court in Hindustan Construction Co. Ltd. Versus State of Bihar And Others (supra) is misplaced, as the language of the guarantee in that case was materially different from the language of the guarantee in the present case. He therefore submitted that the submission made on behalf of the Petitioner that the suit guarantee is conditional and the conditions stipulated therein have not been met, are untenable and baseless and that the guarantee is in fact unconditional and irrevocable, containing an unequivocal promise to pay a sum of Rs.25 crores to the Respondent No.1 without any demur or protest, and the same ought to be encashed.

16. Mr. Tulzapurkar has, without prejudice to his contention that an unconditional and irrevocable bank guarantee is an independent contract and whether encashment of the same ought to be permitted or not has to be considered without any reference to the underlying or main contract or to the URS 10 of 25 11 ARBPL 1538-12-Judgment.doc disputes/claims thereunder, has taken me through some of the provisions of the said Agreement. Mr. Tulzapurkar, referring to Clause 3.1 of the said Agreement which pertains to the scope of work of the petitioner, pointed out that the said clause categorically provides that the Petitioner is required to take all the necessary steps for completion of the slum rehabilitation project and make available to the Respondent No.1 the encroached Airport Land, free of any encroachments/hutments, in accordance with the provisions of the said Agreement, including the time lines prescribed therein. Further, the steps required to be taken by the Respondent No.2 would include completion of the plane table survey in a timely

manner. "Plane Table Survey" is defined in the Agreement to mean "the survey to determine the eligibility of slum dwellers for rehabilitation and finally verified under the Applicable Law". Mr. Tulzapurkar submitted that the Petitioner has attempted to give an incorrect interpretation to the Minutes of the Meeting held on 17th October 2012 and that a proper construction and interpretation of the Minutes shows that the Petitioner has failed to give its submissions and conduct survey qua several plots of lands as set out in the said Minutes. Mr. Tulzapurkar has also drawn my attention to Clause 4 of the said Agreement wherein the Petitioner has agreed to remove the encroachments in a phased manner. Phase 1 itself is divided into 3 phases and the Petitioner was obliged to remove at least 28,000 hutments in Phase 1. Mr. Tulzapurkar submitted that the Petitioner has failed to remove a single hutment out of the said 28,000 hutments till date and construction of 7000 tenements is of no consequence in the absence of removal of the hutments from the lands encroached upon. The 650 hutments allegedly removed by the Petitioner are not part of these 28,000 hutments. Mr. Tulzapurkar has submitted that the Petitioner has agreed under the said Agreement that the scope of work shall be complete at the sole cost and expense of the Petitioner and the Petitioner now cannot make a grievance URS 11 of 25 12 ARBPL 1538-12-Judgment.doc about the same and cannot allege that Respondent No.1, not having spent any amount on the redevelopment project, is fraudulently invoking the bank guarantee. Mr. Tulzapurkar submitted that Respondent No.1 is justified in invoking the bank guarantee since the Petitioner has failed to perform its obligations under the said Agreement.

17. Mr. Tulzapurkar has further submitted that under Clause 8 of the said Agreement, the Petitioner agreed to furnish an unconditional irrevocable and on demand bank guarantee to Respondent No.1 for Rs.25 crores and an on demand Promissory Note for Rs.275 crores as performance security for performance of its obligations under the said Agreement. Under the said clause, the Petitioner also agreed that within 12 months from the date of the LOI (which is dated 15th October 2007), the Petitioner shall replace the bank guarantee and the said Promissory Note by an interest free cash deposit of Rs. 300 crores and upon the Petitioner providing the said cash deposit, the said bank guarantee and the said Promissory Note shall be released simultaneously.

Mr. Tulzapurkar has submitted that under Clause 8.2 of the Agreement, the parties have agreed that the performance security may be invoked in the event of breach or failure of the Petitioner to comply with any of the terms and conditions of the said Agreement including failure of the Petitioner to replace the bank guarantee and the Promissory Note by cash deposit of Rs.300 crores. Mr. Tulzapurkar submitted that under Clause 8.3, the Petitioner has agreed that if at any time the performance security is invoked, the Developer shall ensure that the value of the performance security is always maintained at the level indicated (i.e. Rs.300 crores), by replenishing or issuing additional security. Mr. Tulzapurkar submitted that having agreed to maintain the level of the performance security up to Rs.300 crores, the Petitioner cannot make a grievance that after invocation of the present bank guarantee, the Petitioner URS 12 of 25 13 ARBPL 1538-12-Judgment.doc will have to provide further security, which may also be invoked by the Petitioner.

18. Mr. Tulzapurkar has, whilst dealing with the submission advanced on behalf of the Petitioner that the Respondent No.1 has failed to show the alleged non performance by the Petitioner, drawn

my attention to the letter written by Respondent No.1 to the Petitioner dated 26th June 2011, inter alia, recording that the Petitioner has failed to perform various obligations required to be performed by it under the captioned Agreements. The obligations set out in the said letter, which according to the Respondent No.1 were breached by the Petitioner, are set out hereinbelow :

"

Sl. No	Obligation	Agreement Clause R
1.	Replacement of bank guarantee of Rs.25 crores with a cash deposit of Rs.300 crores, by 30th November, 2008.	8.1 of the said Agreement, as amended by Deed of Confirmation dated October 14, 2008.
2.	Reimbursement to MIAL of the amount of Rs. 25 crores paid by MIAL to MMRDA under Agreement dated December 12, 2006 between MIAL and MMRDA by 14th April, 2008	3.1(q)(v) of the said Agreement.
3.	Completion of Phase 1(i) (by April 14, 2009), Phase 1(ii) (by October 14, 2009) and Phase 1(iii) (by October 14, 2010).	7.1(a) of the said Agreement.
4.	Commencement of Phase 2 by October 14, 2010.	7.1(b) of the said Agreement.
5.	Payment of fees to the PMC (M.M. Consultants Pvt. Ltd.). As on date we have been informed that the PMC's invoices for a total amount of Rs. 15 lakhs are outstanding.	3.1(h) of the said Agreement.

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Sl. No	Obligation	Agreement Clause Re
6.	Payment to M. M. Consultants Pvt. Ltd. of the amount of Rs.16,16,152/- for Plane Table Survey, an activity which was to be taken over and completed by HDIL under the Agreement. Failure to make payment has resulted in M. M. Consultants Pvt. Ltd. not refunding equivalent amount which was paid to M. M. Consultants Pvt. Ltd. by MIAL.	3.1(a) read with 3.1(q) of the said Agreement.

> 7. Amount of Rs.25 crores to be paid to MMRDA as 3.1(q)(v) of the said per MMRDA's letter No.Airport/Cost/2001/ 72 Agreement."

dated 21st April 2011 which has till date not been paid by HDIL.

By the said letter, the Respondent No.1 further informed the Petitioner that, "In view of the non compliance of your various obligations under the captioned Agreements, you are called upon within a period of 30 days to comply with the same failing which we will have no option but to take appropriate recourse under the captioned Agreements and as available to us under law."

Mr. Tulzapurkar submitted that the Petitioner failed and neglected to reply to the said letter and has, in the present petition, made incorrect submissions viz.

that the Petitioner had, in response to the said letter, purportedly made representations and offered explanations to Respondent No.1 as alleged.

19. Mr. Tulzapurkar has further submitted that the submission advanced on behalf of the Petitioner that the Respondent No.1 has waived the condition qua the Petitioner substituting the bank guarantee of Rs.25 crores and the Promissory Note of Rs.275 crores by a cash deposit of Rs.300 crores, is false and incorrect to its knowledge. Mr. Tulzapurkar has in support of this submission, relied on Clauses 31 and 33 which pertain to "Modifications" and URS 14 of 25 15 ARBPL 1538-12-Judgment.doc "Waiver" and has submitted that under the said Agreement the parties have expressly agreed that no modifications to the Agreement shall be permitted unless they are in writing and signed by both the parties and that any waiver of any provision of the said Agreement by the Respondent No.1 shall be effective only if it is in writing. Mr. Tulzapurkar has submitted that it is because of these provisions that when the Petitioner was unable to give a cash deposit of Rs.300 crores to the Respondent No.1 within 12 months from the date of the LOI, i.e. on or before 14th October 2008, and had sought extension of time from Respondent No.1, that an extension up to 30th November 2008 was granted to the Petitioner, by a Deed of Confirmation dated 14 th October 2008 executed between the parties. Mr. Tulzapurkar has submitted that thereafter the Respondent No.1 has not granted any extension to the Petitioner for replacing the Bank Guarantee and the Demand Promissory Note by cash deposit of Rs.300 crores.

20. Mr. Tulzapurkar further submitted that despite serving the aforestated notice dated 24th June 2011, the Petitioner has not complied with its obligations set out therein including the replacement of Bank Guarantee of Rs. 25 crores and Promissory Note of Rs.275 crores with a cash deposit of Rs.300 crores till date. He submitted that therefore the Respondent No.1 is fully justified in invoking the said bank guarantee and there is no fraud involved as alleged or otherwise, qua the said invocation. Mr. Tulzapurkar has further submitted that no case of irretrievable injury or special equities is made out by the Petitioner. Mr. Tulzapurkar submitted that it is a well settled principle that except in cases of established fraud violating the very foundation of the bank guarantee or encashment resulting in irretrievable harm or injustice, which would make it impossible for the guarantor to reimburse itself if he ultimately succeeds, the Court shall not grant any injunction restraining the beneficiary URS 15 of 25 16 ARBPL 1538-12-Judgment.doc from invoking/encashing

a bank guarantee. In support of his contention, Mr. Tulzapurkar has relied on the decisions of the Hon'ble Supreme Court in the cases of Dwarikesh Sugar Industries Ltd. Versus Prem Heavy Engineering Works (P) Ltd. And Another1 and Himadri Chemicals Industries Ltd. Versus Coal Tar Refining Co.2 Mr. Tulzapurkar has therefore submitted that the arbitration petition deserves to be dismissed with costs.

21. I have considered the submissions advanced by the learned Senior Advocates appearing for Petitioner as well as for Respondent No.1. The first issue which needs determination by this Court is whether the bank guarantee issued by Respondent No.2, at the instance of the Petitioner to the Respondent No.1, is an unconditional bank guarantee. Clause 1 of the bank guarantee provides as under:

> "..... We Punjab & Maharashtra Co-op Bank Ltd. (Multi- State Scheduled Bank ("Guarantor") unconditionally and irrevocably agree to pay to MIAL immediately on its first demand, whole or part of Rs.25,00,00,000/- (Rupees Twenty Five Crore Only) (the "Guarantee Amount") without any protest or demur, contestation, reservation, recourse or reference to the Developer, upon demand by MIAL for the breach or failure of the Developer to perform all or any of the Developer's obligations (including warranties) under the Letter of intent or the Agreement ..... shall not be questioned and be final and conclusive. Upon written demand by MIAL, the Guarantor shall forthwith make the payment of the sum set out in such demand notice without any conditions, 1 (1997) 6 Supreme Court Cases 450 2 (2007) 8 Supreme Court Cases 110 URS 16 of 25 17 ARBPL 1538-12-Judgment.doc reservations, protest of requirement of any proof whatsoever...."

Clause 4 of the said Bank Guarantee further provides, "We Punjab & Maharashtra Co-op Bank Ltd. (Multi-State Scheduled Bank), the Guarantor, agree and acknowledge that our obligation under this guarantee shall be primary, absolute, irrevocable, continuing and unconditional. We Punjab & Maharashtra Co-op Bank Ltd. (Multi-State Scheduled Bank), the Guarantor, also waive presentment to, demand of payment form and protest by MIAL to the developer before invocation of this guarantee."

From the above terms of the Bank Guarantee, it is clearly established that the Respondent No.1 is entitled to invoke the same in case of failure on part of the Developer to perform all or any of its obligations under the Letter of Intent or the Agreement. The Respondent No.1 is only required to issue a letter to the Respondent No.2 Bank stating that the Petitioner has failed to perform all or any of its obligations (including warranties) under the Letter of Intent or Agreement and the Bank shall not question the decision of the Respondent No.1, which shall be final and conclusive. The Bank has unconditionally and irrevocably agreed to forthwith make payment of the same as set out in the demand notice by the Respondent No.1 without any protest, demur, contestation, reservation, recourse or reference to the Petitioner or requirement of any proof whatsoever. Therefore the stand taken by the Petitioner that the Bank Guarantee is conditional and that the Respondent No. 1 is obliged to establish that the Developer has failed to perform all or any of its obligations under the Letter of Intent and/or the said Agreement is untenable and baseless. The language of the guarantee

in the case of URS 17 of 25 18 ARBPL 1538-12-Judgment.doc Hindustan Construction Co. Ltd. Versus State of Bihar And Others (supra) was materially different from the language of the Bank Guarantee in the present case and would therefore lend no assistance to the Plaintiff. In my view, the said Bank Guarantee is an unconditional and irrevocable guarantee. The submission therefore advanced on behalf of the Petitioner that the Bank Guarantee is a conditional one or that the invocation is not in keeping with the same, and is bad in law, therefore cannot be accepted and is rejected.

22. As regards the contention of the Petitioner that the conduct of Respondent No.1 in encashing the Bank Guarantee is fraudulent, the Petitioner has relied on the provisions of the said Agreement and has tried to allege that though the Petitioner has performed its obligations under the said Agreement, it is Respondent No.1 along with Respondent Nos. 3 and 4 who have not complied with their obligations under the said Agreement. The fact remains that the Petitioner has, despite having agreed under Clause 8.2 of the Agreement to substitute the Bank Guarantee of Rs.25 crores and the Promissory Note dated 15th October 2007 for Rs.275 crores, by cash deposit of Rs.300 crores initially on or before 14th October 2008 and thereafter on or before 30th November 2008, has not substituted the same till date. The Petitioner has agreed under Clause 8.2 of the said Agreement that breach of or failure by the Petitioner to comply with any of the terms and conditions of the Agreement including the failure of the Petitioner to replace the bank guarantee and the Promissory Note by cash deposit as mentioned in Clause 8.1of the Agreement would entitle the Respondent No.1 to invoke the bank guarantee. Failure of the Petitioner to replace the bank guarantee and Promissory Note with interest free cash deposit would also constitute an event of default under Clause 24 of the said Agreement. The Respondent No.1 has, by its letter dated 24th June 2011, set out the breaches committed by the URS 18 of 25 19 ARBPL 1538-12-Judgment.doc Petitioner qua several clauses of the said Agreement including Clause 8.1 of the said Agreement as amended by the Deed of Confirmation dated 14 th October 2008, pertaining to replacement of the bank guarantee and the Promissory Note with cash deposit of Rs.300 crores and, inter alia, calling upon the Petitioner to cure the said breaches within a period of 30 days from the receipt of the said notice. However, the Petitioner has not even replied to this letter despite having received the same from the Respondent No.1. The Petitioner has in the petition alleged that after receipt of the letter, the Petitioner had made certain representations to the Respondent No.1 which allegations are denied by the Respondent No.1. The allegation of the Petitioner that the clause pertaining to substitution of the bank guarantee and a Promissory Note by cash deposit of Rs.300 crores is waived by the Petitioner, also cannot be accepted in view of Clauses 31 and 33 of the Agreement which expressly states that no modification to the said Agreement shall be permitted unless they are in writing and are agreed and signed by both the parties and any waiver of any provision of the Agreement by the Respondent No.1 to be effective has to be in writing.

23. It is set out in the letter dated 24th June 2011 addressed by the Respondent No.1 to the Petitioner and also submitted by Mr. Tulzapurkar that the Petitioner has miserably failed to comply with the other provisions of the said Agreement, more particularly the completion of Phase 1(i) by November 14, 2009, Phase 1(ii) by October 14, 2009 and Phase 1 (iii) by October 14, 2010 and commencement of Phase 2 by October 14, 2010, as agreed under Clauses 7.1 (a) and 7.1 (b) of the said Agreement. The Petitioner has not responded to the said letter dated 24th June 2011 and has

refuted its contents for the first time only in the present petition i.e. after more than a year, on the ground that after receipt of the said letter dated 24th June 2011, the URS 19 of 25 20 ARBPL 1538-12-Judgment.doc Petitioner had made representation and explained the correct position to the Respondent No.1, which again is denied by Respondent No.1. The said issues qua the compliance of the obligations under the said Agreement shall be finally decided in the arbitration proceedings. Mr. Subramaniam has submitted that the Petitioner has spent substantial amounts after executing the said Agreement and the Respondent No.1 has not spent any amounts. He has also submitted that after invocation of the present bank guarantee, the Petitioner is required to give further securities to the Respondent No.1 which again the Respondent No.1 is entitled to invoke. What is forgotten is that the Petitioner has under the Agreement, agreed to substitute the bank guarantee of Rs.25 crores and the Demand Promissory Note of Rs.275 crores by a cash deposit of Rs.300 crores and the Petitioner has further agreed to maintain the value of the performance security at the level agreed i.e. Rs.300 crores by replenishing or issuing additional security. Needless to point out that it is well settled law that Courts cannot rewrite contracts.

24. The Hon'ble Supreme Court has in its decision in the case of Himadri Chemicals Industries Ltd. Versus Coal Tar Refining Co. (supra) observed that the law relating to grant or refusal to grant injunction in the matter of invocation of a bank guarantee or a letter of credit is now well settled by a plethora of decisions and in the case of U. P. State Sugar Corpn. v. Sumac International Ltd., the Hon'ble Supreme Court made two exceptions for granting an order of injunction to restrain the enforcement of a bank guarantee or a letter of credit i.e. (i) fraud committed in the notice of the bank which would vitiate the very foundation of the guarantee; and (ii) injustice of the kind which would make it impossible for the guarantor to reimburse himself. So far as the first exception of fraud is concerned, the Hon'ble Supreme Court in paragraph nos. 11 and 12 of the its decision held as follows :

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"11. Except under these circumstances, the courts should not readily issue injunction to restrain the realisation of a bank guarantee or a letter of credit. So far as the first exception is concerned i.e. of fraud, one has to satisfy the court that the fraud in connection with the bank guarantee or letter of credit would vitiate the very foundation of such a bank guarantee or letter of credit. So far as the second exception is concerned, this Court has held in that decision that it relates to cases where allowing encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. While dealing with the case of fraud, this Court in U. P. Coop. Federation Ltd. v. Singh Consultants and Engineers (P) Ltd. held as follows : (SCC p. 197, para 53) The fraud must be of an egregious nature such as to vitiate the entire underlying transaction. (emphasis supplied) While coming to a conclusion as to what constitutes fraud, this Court in the above case quoted (at SCC p. 197, para 54) with approval the observations of Sir John Donaldson, M.

R. in Bollivinter Oil SA v. Chase Manhattan Bank, All ER at p. 352g-h which is as follows :

> "The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear, both as to the fact of fraud and as to the bank's knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated URS 21 of 25 22 ARBPL 1538-12-Judgment.doc statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it discharged."

12. In Svenska Handelsbanken v. Indian Charge Chrome it has also been held that a confirmed bank guarantee/irrevocable letter of credit cannot be interfered with unless there is established fraud or irretrievable injustice involved in the case. In fact, on the question of fraud, this decision approved the observations made by this Court in U. P. Coop. Federation Ltd. v. Singh Consultants and Engineers (P) Ltd."

In paragraph no.14 of the said decision, the Hon'ble Supreme Court has set out certain principles which are required to be noted by the Court in the matter of granting injunction restraining the encashment of a bank guarantee.

In the said paragraph, the Hon'ble Supreme Court has held that in case an injunction restraining the encashment of a bank guarantee or letter of credit is granted on the ground of fraud, the same has to be of an egregious nature, which would vitiate the very foundation of the bank guarantee or letter of credit and in cases where the beneficiary seeks to take advantage of the situation.

25. It is therefore trite law that the Court can restrain encashment of bank guarantee in cases of established fraud in issuance of the bank guarantee. The fraud has to be absolutely egregious vitiating the foundation of the bank guarantee. In the present case, the Petitioner has failed to make out any case of fraud. The allegations of fraud made by the Petitioner are merely bald URS 22 of 25 23 ARBPL 1538-12-Judgment.doc assertions and do not establish a case of fraud much less fraud of an egregious nature. As set out herein, the bank guarantee is an unconditional and irrevocable guarantee. As held by the Hon'ble Supreme Court, encashment of an unconditional and irrevocable bank guarantee ought not to be injuncted by Courts unless the case falls within recognized exceptions laid down by the Hon'ble Supreme Court. Again, an unconditional and irrevocable Bank Guarantee is an independent contract and whether encashment of the same ought to be permitted or not has to be considered without any reference to the underlying or main contract or to the disputes/claims thereunder. The allegations therefore made by the Petitioner that the invocation of the Bank Guarantee is vitiated by fraud, cannot be accepted and the said contention is rejected.

26. The Petitioner has also submitted that irretrievable injustice shall be caused to it in case the Bank Guarantee is encashed. In the case of U. P. State Sugar Corpn. v. Sumac International Ltd. (supra), irretrievable injustice is the second exception made by the Hon'ble Supreme Court for grant of an injunction restraining encashment of a Bank Guarantee which is referred to in clause 13 of the

decision in Himadri Chemicals Industries Ltd. Versus Coal Tar Refining Co. (supra) and reads thus:

> "13. So far as the second exception is concerned, this Court in U. P. State Sugar Corpn. v. Sumac International Ltd. as considered herein earlier, as SCC para 14 on pp.575-76 observed as follows :
>
> "14. On the question of irretrievable injury which is the second exception to the rule against granting of injunctions when unconditional bank guarantees are sought to be realised the Court said in the above case that the irretrievable injury must be of the kind which was the subject-

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> matter of the decision in Itek Corpn. case. In that case an exporter in USA entered into an agreement with the Imperial Government of Iran and sought an order terminating its liability on stand by letter of credit issued by an American bank in favour of an Iranian bank as part of the contract. The relief was sought on account of the situation created after the Iranian revolution when the American Government cancelled the export licenses in relation to Iran and the Iranian Government had forcibly taken 52 American citizens as hostages. The US Government had blocked all Iranian assets under the jurisdiction of United States and had cancelled the export contract. The Court upheld the contention of the exporter that any claim for damages against the purchase if decreed by the American courts would not be executable in Iran under thee circumstances and realisation of the bank guarantee/letters of credit would cause irreparable harm to the plaintiff. This contention was upheld. To avail of this exception, therefore, exceptional circumstances which make it impossible for the guarantor to reimburse himself if he ultimately succeeds, will have to be decisively established. Clearly, a mere apprehension that the other party w ill not be able to pay, is not enough. In Itek case there was a certainty on this issue. Secondly, there was good reason, in that case for the Court to be prima facie satisfied that the guarantors i.e. the bank and its customer would be found entitled to receive the amount paid under the guarantee."

In the present case, if the Petitioner succeeds in the arbitration proceedings and/or in any other proceedings, it can always seek refund/reimbursement of URS 24 of 25 25 ARBPL 1538-12-Judgment.doc the said amount of Rs.25 crores from the Respondent No.1 and it is not the case of the Petitioner that it will not be possible for the Petitioner to recover the said amount of Rs.25 crores from the Respondent No.1. As correctly submitted on behalf of the Respondent No.1, the Petitioner has done nothing more than to merely plead fraud of irretrievable injustice and

special equities without establishing cogent grounds in respect of the same. In view thereof, no case is made out by the Petitioner as to how irretrievable injustice will be caused to the Petitioner in case the Bank Guarantee is encashed. Also no special equities have been made out by the Petitioner for grant of injunction against encashment of the Bank Guarantee. In the case of Dwarikesh Sugar Industries Ltd. Versus Prem Heavy Engineering Works (P) Ltd. And Another (supra), the Hon'ble Supreme Court held in paragraph 22 as under :

> "22. The second exception to the rule of granting injunction, i.e., the resulting of irretrievable injury, has to be such a circumstance which would make it impossible for the guarantor to reimburse himself, if he ultimately succeeds. This will have to be decisively established and it must be proved to the satisfaction of the court that there would be no possibility whatsoever of the recovery of the amount from the beneficiary, by way of restitution."

No such circumstance exists in the present case.

27. In the light of the above circumstances, in my opinion, the Petitioner has not made out any case to restrain the Respondent No.1 from invoking the said Bank Guarantee. The Arbitration Petition is therefore dismissed with costs.

(S. J. KATHAWALLA, J.)

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