M/S.Hydroair Tectonics (Pcd) Ltd vs M/S.Sirupooluvapatti Common Effluent on 11 March, 2011

Author: M.M.Sundresh

Bench: R.Banumathi, M.M.Sundresh

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 11.03.2011

CORAM

THE HONOURABLE MRS. JUSTICE R.BANUMATHI
AND
THE HONOURABLE MR. JUSTICE M.M.SUNDRESH

O.S.A. NO.49 AND 50 OF 2011
AND CONNECTED MISCELLANEOUS PETITIONS

M/s.Hydroair Tectonics (PCD) Ltd
No.116, Rahaja Arcade
Section 11, Plot No.61
Belapur, Navi Mumbai 400 061.
Rep.by its Managing Director
Mr.H.B.Singh .. Appellant
(in both O.S.

Versus

1.M/s.Sirupooluvapatti Common Effluent
Treatment Plant Private Ltd.,
S.F.No.632, Athuvazhi Thottam
Sirupooluvapatti Post
Thirupur 641 603.
Rep.by its Managing Director
Mr.N.V.Murthy

2.M/s.Vijaya Bank
Chembur Mumbai Branch
Kumkum, 17th Cross
Chembur, Mumbai 400 071.
Rep.by its Chief Manager .. Respondents

(in both O.

This Original Side Appeals have been filed under Order 36 Rule 1 of Original Sid

For Appellant : Mr.Umasudhan
for M/s.Ponsoundara Pandiyan
For Respondent-1 : Mr.Guberan
for Mr.S.Umapathy
for M/s.T.Rajamohan
For Respondent-2 : Mr.R.Sureshkumar

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C O M M O N J U D G M E N T

M.M.SUNDRESH, J These two appeals have been filed by the appellant against the dismissal of a common order of the applications filed in O.A.Nos.1107 and 1108 of 2010, seeking the invocation of powers under Section 9(d) of the Arbitration and Conciliation Act, 1996.

Facts in brief:-

2.The appellant has been involved in the business of providing water treatment solutions. The first respondent is a Company promoted by 24 Dying Units located in and around Tirupur, for the purpose of establishing a Common Effluent Treatment Plant in order to treat and purify the Effluent water.

3.A Memorandum of Understanding was entered into between the appellant and the first respondent on 25.07.2005 for the supply, erection and commissioning of Reverse Osmosis System. Thereafter, the Memorandum of Understanding dated 25.07.2005, was modified by a subsequent Memorandum of Understanding dated 11.01.2006. The subsequent Memorandum of Understanding dated 11.01.2006 also provides for an arbitration in the event of any possible dispute between them and as per the provisions of the Arbitration and Conciliation Act, 1996.

4.The bankers of the first respondent insisted for the performance guarantee of the Plant, while considering the application for loan, by the letter dated 09.02.2007. Accordingly, a performance guarantee was executed on 21.08.2008 by the second respondent in favour of the first respondent. The performance bank guarantee is an irrevocable guarantee in nature. It also states that it should be released on a receipt of a written demand from the first respondent stating that the system was delivered in good order, the appellant has failed to meet the requirements of the system, it has performed its contractual obligations and a demand has to be made for the sum stated therein. The amount mentioned in the performance guarantee was for a sum of Rs.1,91,30,000/-. It also provides that notwithstanding anything contained therein, it has been issued for the purpose of assuring the performance of M.B.R. and Reverse Osmosis System. It further stipulates that in the event of failure on the part of the contractor namely, the appellant herein to achieve the guaranteed performance of the

M.B.R. and Reverse Osmosis System, the said amount is liable to be claimed by the first respondent. The Bank Guarantee furnished by the second respondent was extended on 14.10.2009.

5.By the meeting dated 09.07.2008, the total value payable by the first respondent to the appellant was refixed at Rs.22.19 Crores. In pursuant to the said meeting held on 09.07.2008, a sum of Rs.10 Crores has been paid by the first respondent to the appellant on 24.12.2008. A letter was sent by the first respondent to the appellant on 03.03.2009 stating that the appellant has not completed the work after receipt of the payment including the erection and completion of M.B.R. and R.O.A. It has been stated that consequently the trial run of the plant has not been done showing the proof that the appellant has achieved 500mg of Total Dissolved Solids (TDS). An advocate notice was sent by the appellant to the respondents on 11.03.2009 stating that another sum of Rs.6 Crores has to be paid as agreed between the parties failing which action would follow. After receipt of the same, a reply was given by the first respondent to the appellant on 20.03.2009 stating that the remaining amount of Rs.6 Crores will be paid after the completion of the erection and therefore, the said sum cannot be paid prior to that of erection and commissioning of M.B.R. and Reverse Osmosis System to the effect of 50% of the amount, 30% of the balance amount will be paid at the time of trial run and the remaining 20% of balance amount will be paid when the system achieves less than 500mg/1 and colourless. A meeting was held in pursuant to the exchange of notices on 08.05.2009 by which it was agreed regarding the commissioning of the Plant and the mode of payment by the parties. Accordingly, a letter was sent by the appellant to the first respondent on 12.05.2009 requesting for a payment of Rs.50 Lakhs. A reply was sent by the first respondent to the appellant on 03.09.2009 stating that the progress of the work is not satisfactory and the appellant has not completed the work within the 60 days as agreed earlier considering the fact that already 4 months got over. It was further stated therein that the respondents have taken all possible steps at their end. A further reply was sent on 10.11.2009 by the appellant stating that a 5 MLD CETP would be ready by 16.11.2009 with a request to the first respondent to make ready the following things for the completion of the work. A request was made by the appellant on 23.04.2010 stating that the stabilization of the Units is under progress and all the other work have been completed and therefore the balance amount need to be paid.

6.By the letter dated 09.08.2010, the first respondent has stated that in the meeting conducted on 08.05.2009, it has been agreed between the parties that the Plant would be commissioned within 60 days. However, work has not been completed by the appellant even though the first respondent has committed to the promise regarding the payment. The first respondent has also pointed out the pending works apart from the poor maintenance as found out during the trial run. It was also informed that action has to be taken urgently so as to approach the Tamil Nadu Pollution Control Board towards the revocation of the closure of the Units ordered on 21.05.2010. The said letter was followed by another letter dated 30.08.2010 stating

that the first respondent was not able to run the Units due to the action taken by the Tamil Nadu Pollution Control Board which was caused due to the failure to complete the project and achieve the result. It was also informed to the appellant that the early letters did not yield any result and if the appellant has failed to complete the work, then it will be taken over by the first respondent by appointing some other Company to save it from the closure order.

7.A reply was given by the appellant on 06.09.2010 stating that it agrees that there are certain pending issues relating to maintenance. It has been further stated that there is a tremendous liquidity crunch and the appellant has been unable to mobilize any finances. Therefore, a request has been made to make the required payment to its obligations and deduct from the final payment. The appellant also assured that all the technical support required and the balance work would be done. The first respondent has also made the payment of Rs.5.23 Crores out of the remaining amount of Rs.6 Crores starting from 28.05.2009 to 19.07.2010 on various dates.

8.In the meanwhile, the Tamil Nadu Pollution Control Board by the order dated 14.07.2010 has ordered closure since the first respondent has not achieved the zero discharge as stipulated by it. It also found that during inspection held on 29.06.2010 there are very many deficiencies in the common effluent treatment plant. The first respondent, by the letter dated 14.10.2010 addressed to the second respondent, sought for invocation of the bank guarantee by stating that the appellant has failed to perform its part of the agreement inspite of the fact the first respondent has complied its part. The second respondent addressed a letter to the appellant on 18.10.2010 asking the appellant to pay the balance of amount in its account or to make arrangements for withdrawal of the invocation of the bank guarantee from the first respondent. A reply was sent by the appellant on 20.10.2010 to the second respondent. Thereafter, the appellant has filed two applications one for seeking an order of interim injunction restraining the first respondent from invoking the performance bank guarantee issued by the second respondent pending adjudication of the dispute raised and another seeking an order of interim injunction restraining the second respondent from making any payment under the performance bank guarantee in favour of the first respondent pending adjudication of the dispute before the Arbitrator.

9.The learned single Judge after initially granting interim injunction in favour of the appellant was pleased to dismiss both the applications on the ground that in view of the settled position of law that the bank guarantee cannot be injected except on the ground of fraud or irreparable loss. Challenging the common order passed in both the applications, the appellant has come forward to file these two appeals.

10.At the outset, we make it clear that we are not inclined to dwell into the entire dispute between the parties considering the fact that the appellant has raised the dispute before the Arbitrator and what is to be seen is a prima facie case for granting

an order of interim injunction under Section 9(d) of the Arbitration and Conciliation Act, 1996. Therefore, findings are rendered in these appeals only for the purpose of deciding the applications filed under Section 9(d) of the Arbitration and Conciliation Act, 1996 and they will not have any barring on the proceedings before the Arbitrator.

11.Heard Mr.Umasudhan, learned counsel appearing for the appellant and Mr.Guberan, learned counsel appearing for the first respondent as well as Mr.Mr.R.Sureshkumar, learned counsel appearing for the second respondent.

Submissions of the learned counsel for the appellant:

12.Mr.Umasudhan, learned counsel appearing for the appellant submitted that what has been given by the second respondent by way of a performance guarantee is a conditional guarantee and therefore, the legal position applicable to a letter of credit or a bank guarantee cannot be made applicable to the present case on hand. The first respondent cannot invoke the conditional performance guarantee without satisfying the conditions provided therein. The issue as to whether the guarantee is a conditional one or not and if so, the said conditions have been complied with or not can only be decided through the Arbitrator and thereforen inasmuch as the appellant having approach the Arbitrator the bank guarantee cannot be invoked.

13.A claim has been made for a sum of Rs.8 Crores by way of Arbitration and when such a claim is pending, the invocation of bank guarantee by the first respondent will cause substantial prejudice and injury to the appellant. The members of the first respondent constituting 24 independent Units have admittedly closed their Units in pursuant to the closure order dated 21.05.2010 passed by the Tamil Nadu Pollution Control Board and therefore, it is impossible to recover the amount mentioned in the bank guarantee in the event of the Arbitrator upholding the claim of the appellant. The guarantor cannot be made liable beyond the terms of the guarantee and inasmuch the terms of the guarantee having not been complied with by the first respondent, the injunction sought for will have to be granted. In support of his submissions, the learned counsel apart from his written arguments has relied upon the following judgments:

"i.M/S.HINDUSTAN CONSTRUCTION COMPANY LTD. AND OTHERS vs. STATE OF BIHAR AND OTHERS [1999 (III) CTC 618] ii.LARSEN and TOUBRO LTD. vs. MAHARASHTRA STATE ELECTRICITY BOARD AND OTHERS [(1995) 6 SCC 68] iii.STATE OF MAHARASHTRA vs. DR.M.N.KAUL AND ANOTHER [AIR 1967 SC 1634] iv.PREMIUM INDUSTRIES INDIA LTD., CALCUTTA vs. QUALITY FABRICATORS [1998 (II) CTC 492] v.IOCEE EXPORTS LTD. vs. KALYANEE MARINE AND OTHERS [2006 (4) CTC 552] vi.VINDHYA TELELINKS LTD. vs. MAHANAGAR TELEPHONES NIGAM LIMITED AND ANOTHER [AIR 2003 NOC 1 (DELHI)] vii.G.S.ATWAL & CO. ENGINEERS (PVT.) LTD. vs. HINDUSTAN STEEL WORKS CONSTRUCTION LTD. [1991 COMPANY CASES VOL.71, 280]

viii.BHUSHAN INDUSTRIAL CO. PVT. LTD. vs. CIMMCO INTERNATIONAL AND ANOTHER [1983 COMPANY CASES VOL.54, 157] ix.JAINSONS CLOTHING CORPORATION vs. STATE TRADING CORPORATION OF INDIA LTD. AND ANOTHER [1990 COMPANY CASES VOL.68, 526] x.TAJ TRADE AND TRANSPORT CO. LTD. vs. OIL AND NATURAL GAS COMMISSION AND ANOTHER [1994 COMPANY CASES VOL.80, 740] xi.FEDERAL BANK LTD. vs. V.M.JOG ENGINEERING LTD. AND OTHERS [(2001) 1 SCC 663]"

Submissions of the learned counsel for the first respondent:

14.Mr.Guberan, learned counsel appearing for the first respondent submitted that the substantial amount of moneys have been provided by the first respondent in favour of the appellant inspite of its failure to perform its part of the contract. In pursuant to the meeting held on 09.07.2008, a sum of Rs.10 Crores was granted by RTGS transferred on 24.12.2008. Even though the remaining amount has to be paid only on the completion of the part of the contract by the appellant a sum of Rs.5.23 Crores has been paid out of Rs.6 Crores. The performance guarantee has been executed by the appellant in view of the insistence on the behest of the banker of the first respondent, the earlier Memorandum of Understanding dated 25.07.2005 and the subsequent Memorandum of Understanding 11.01.2006 do not provide for a performance guarantee and the bank guarantee issued on 21.08.2008 is an independent agreement between the guarantor/second respondent and the first respondent. There is a non obstante clause which clearly stipulates that on the failure of the appellant to achieve the guaranteed performance the bank guarantee can be invoked. The first respondent has clearly spelt out that it has performed its part of the agreement in all its communications.

15.Nowhere in the communications between the parties it has been stated about the non performance of the first respondent after the minutes of the meeting held on 09.07.2008 by which the contract value was reduced to Rs.22.19 Crores. The appellant has specifically admitted that in the letter dated 06.09.2010. The contention of the appellant that the primary treatment Plant of the member Units of the first respondent have not been utilised and put into work properly resulting in the delay has never been putforth in any of the communications and therefore, it is nothing but an after thought. The first respondent has been put into untold hardship and misery due to the failure of the appellant to complete the project within the time.

16.The Tamil Nadu Pollution Control Board has passed an order of closure due to the failure of the appellant to perform its part of the agreement. The bank guarantee issued is an unequivocal bank guarantee. There is no fraud committed by the first respondent. Merely because the Units have been closed it cannot be stated that an order of injunction will have to be given, since the member Units of the first respondent have been doing business by erecting permanent Units. The order of closure has been passed due to the failure on the part of the appellant and therefore,

it cannot be put that as a reason while seeking injunction against invocation of the bank guarantee. The learned counsel in support of his contention has made reliance upon the judgments of the Honourable Apex Court in ANSAL ENGINEERING PROJECTS LTD. vs. TEHRI HYDRO DEVELOPMENT CORPORATION LTD. AND ANOTHER [(1996) 5 SCC 450] and VINITEC ELECTRONICS PRIVATE LTD. vs. HCL INFOSYSTEMS LTD. [(2008) 1 SCC 544] and submitted that these appeals are devoid of merit and therefore, liable to be dismissed with costs.

Submissions of the learned counsel for the second respondent:

17.Mr.R.Sureshkumar, learned counsel appearing for the second respondent submitted that in pursuant to the directions issued by this Court, the bank guarantee has not been released and whatever the direction to be issued by this Court would be complied with in letter and spirit.

Discussions:-

18.Admittedly, two Memorandum of Understandings were entered into between the appellant and the first respondent. The Memorandum of Understanding was entered into on 25.07.2005 was modified by a subsequent Memorandum of Understanding dated 11.01.2006. It is also not in dispute that the execution of the performance guarantee by the appellant has not been stipulated in the above said two agreements which was executed only when the bankers of the first respondent insisted for the same. A perusal of the bank guarantee issued on 21.08.2008 by the second respondent on behalf of the appellant clearly stipulates that it is an unequivocal bank guarantee.

19.The said bank guarantee executed further stipulates that apart from being unequivocal the same can be invoked on receipt of a written demand from the first respondent stating that the system put in place by the appellant has failed to meet the requirements of achievement 500mg (TDS) without colourless and the first respondent has performed its contractual obligation regarding technical specification under the contract. It also states that such a demand shall be accepted by the second respondent as a conclusive evidence that such sum is due to the first respondent. It is important to note that the non obstante clause provided under the performance guarantee stipulates in clear terms that the said guarantee is issued for assuring the performance of M.B.R. and Reverse Osmosis System. Therefore, a conjoint reading of the entire guarantee would make it clear that it has been issued for the purpose of assuring the performance of M.B.R. and Reverse Osmosis System. The said position is clarified by subsequent sentence which states that in the event of the failure on the part of the contractor to achieve the guarantor performance the amount is liable to be claimed by the first respondent. Therefore, a reading of the above said performance bank guarantee gives no doubt in our mind that it pertains only to the performance of M.B.R. and Reverse Osmosis System. It is not in dispute that the Tamil Nadu

Pollution Control Board has ordered closure the Units of the first respondent on its failure to achieve the M.B.R. and Reverse Osmosis System. In other words, on the failure of the first respondent to achieve zero discharge and produced 500mg of Total Dissolved Solids (TDS) and without colour, the order of closure has been passed. Only for this purpose, the Memorandum of Understanding has entered into between the parties and the bank guarantee has been given for the very same purpose. Therefore, the bank guarantee being an independent agreement between the respondents 1 and 2, we are of the considered view that the appellant cannot seek to inject the invocation of the bank guarantee.

20.It is seen from the documents filed by the parties that the contention of the appellant regarding the failure of the first respondent in operating the primary treatment Plant has never been raised in any other document. On the contrary, the appellant has specifically admitted in and by its letter dated 06.09.2010 that it agreed that there were certain issues relating to maintenance. This letter was given as a reply to the letter dated 23.08.2010 sent by the first respondent wherein it was pointed out that the appellant has committed several mistakes in the erection of the Plant and the achievement towards the establishment of the Reverse Osmosis System. It is also seen that in pursuance to the minutes of the meeting held on 09.07.2008, the first respondent made substantial payment. A sum of Rs.10 Crores was paid by RTGS transfer on 24.12.2008. Thereafter, a further sum of Rs.5.23 Crores have been paid even though Clause No.5(c) of the minutes of the meeting held on 09.07.2008 says that the balance of 20% will be paid at the time of system achieving the required data less than 500mg/1 and colour less.

21.The contention regarding fraud, dispute having raised before the Arbitrator and possibility of inability to recover the amount awarded by the Arbitrator in view of the closure also cannot be countenanced. As submitted by the learned counsel for the first respondent, fraud on the part of the first respondent has not been proved from the documents filed. The action from the Tamil Nadu Pollution Control Board was warranted due to the failure on the part of the appellant to fulfill its part of the obligations under the Memorandum of Understanding. Moreover, the members of the first respondent have been doing business for quite a number of years at Tirupur having their Industries located permanently. The closure order passed by the Tamil Nadu Pollution Control Board can at best be temporary till the first respondent achieves the parameters stipulated. Merely because an arbitration clause has been invoked by the appellant it by itself cannot be a ground to grant orders of injunctions.

22.The question as to whether a bank guarantee is unequivocal one without condition or a conditional one has to be seen from the document of guarantee itself. As discussed above, the bank guarantee dated 21.08.2008 merely provides for a demand from the first respondent stating that it has been perform its part of the contract. It has been issued to ensure the performance on the part of the appellant. Therefore, it being an independent agreement between the respondents 1 and 2. It is always open

to the first respondent to invoke the same on the ground that the appellant has not performed its part of the contract. Further a document has to be read as a whole and in view of the non obstante clause contained therein, we have no hesitation in holding that the guarantee which is the subject matter of these appeals is not a conditional guarantee.

23.The judgment relied upon by the learned counsel for the appellant in M/S.HINDUSTAN CONSTRUCTION COMPANY LTD. AND OTHERS vs. STATE OF BIHAR AND OTHERS [1999 (III) CTC 618] is distinguishable on facts. In the said judgment, a specific clause has been provided that the bank guarantee could be invoked only if the obligations are not fulfilled or there is misappropriation. Therefore, until and unless the obligations are not fulfilled or there is a misappropriation, the question of invoking the bank guarantee would not arise. Hence the facts involved in the judgment relied upon by the learned counsel for the appellant are totally to the facts on the present case on hand. There is no clause in the present case in the bank guarantee stating that the bank guarantee can be involved only when the obligations are not fulfilled or there is misappropriation. Clause 9 which was subjected to interpretation before the Honourable Apex Court specifically puts the onus on the party which seeks to invoke the bank guarantee which is not the position in the present case.

24.The learned counsel for the appellant has also relied upon the judgment in FEDERAL BANK LTD. vs. V.M.JOG ENGINEERING LTD. AND OTHERS [(2001) 1 SCC 663]. In our considered view the said judgment lays down the ratio which is totally against the appellant. The Honourable Apex Court in the said judgment was pleased to hold that the contract of bank guarantee being distinct and independent from the main contract a bank cannot refuse encashment except when there is a fraud committed by the seller or where there is encashment resulting in irretrievable damage. It was further held that an act of fraud has to be proved. Applying the ratio laid down by the Honourable Apex Court to the facts on hand, we are of the view that neither a fraud nor a irretrievable loss is involved. The reliance made by the learned counsel for the appellant to the judgment rendered in LARSEN and TOUBRO LTD. vs. MAHARASHTRA STATE ELECTRICITY BOARD AND OTHERS [(1995) 6 SCC 68] would also will have to be held against it. In the said case while dealing with a conditional guarantee, the Honourable Apex Court was pleased to hold that in a case of a conditional guarantee for a partial release of retention money which was to enure only till the successful completion of the trial operation and that event having enured, the guarantee shall not be encashed. In the present case on hand, such a situation has not arisen because the appellant has prima facie failed to enure and comply with the agreement between the parties entered through the Memorandum of Understanding by completing the project to the satisfaction of the Tamil Nadu Pollution Control Board. In fact, in the said judgment, the Honourable Apex Court was pleased to hold that a mere irretrievable injury without a prima facie case of establishing fraud is of no consequence.

25.Therefore, in the absence of any proof that would result in establishing the factum of fraud committed by the first respondent, even assuming that there is some injury, the same cannot be a sole basis for granting an order of injunction. The Honourable Apex Court was also pleased to observe that in view of the claim raised before the Arbitrator the grant of injunction is not warranted. Therefore, a perusal of the said judgment would indicate that the contention of the appellant has no legal basis.

26.The learned counsel further made reliance upon the judgment of the Honourable Apex Court in STATE OF MAHARASHTRA vs. DR.M.N.KAUL AND ANOTHER [AIR 1967 SC 1634] and submitted that a guarantor cannot be made liable beyond the terms of his engagement. As discussed above, we are of the view that the terms of the agreement entered into between the respondents 1 and 2 do not bar the enforcement of bank guarantee by the first respondent and on the other hand it paves way for it. It is pertinent to note that the Honourable Apex Court in the very same judgment was pleased to hold that in case of ambiguity, the Courts will have to interpret the guarantee against the guarantor and use the recitals to control the meaning of operative part when that is possible. Hence by applying the ratio laid down by the Honourable Apex Court, we hold on a construction of the agreement entered into between the respondents 1 and 2, the first respondent is entitled to invoke the bank guarantee.

27.Merely because an Arbitrator has been appointed or a party has invoked the Arbitration clause, the beneficiaries of a bank guarantee cannot be restrained by an order of injunction from encashing the amount payable till the decision of the Arbitrator is made final. Considering the said issue, the Honourable Apex Court in ANSAL ENGINEERING PROJECTS LTD. vs. TEHRI HYDRO DEVELOPMENT CORPORATION LTD. AND ANOTHER [(1996) 5 SCC 450] has held as follows:

"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 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], it was contended that a contractor had a counter-claim against the appellant; that disputes had been referred to the arbitrator and no amount 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."

28.Therefore, in view of the said legal position enunciated by the judgment of the Honourable Apex Court referred supra, we hold that an invocation of a arbitration clause or a pendency of arbitration would not be a ground to prevent the beneficiary to get the benefits of a bank guarantee.

29.In a recent judgment rendered in VINITEC ELECTRONICS PRIVATE LTD. vs. HCL INFOSYSTEMS LTD. [(2008) 1 SCC 544], the Honourable Apex Court has considered as to whether the deed of guarantee is conditional or not. It was held therein that until and unless any particular clause of the agreement has been found incorporated in the deed of guarantee, it has to be considered as an unconditional guarantee. It was further held that considering the fact the arbitral proceedings are pending, it is always open to the parties to work out their remedies before the arbitrator.

30.Therefore, in the light of the discussion made above, on facts and also on the questions of law, we do not find any merit in these appeals warranting interference with the orders passed by the learned single Judge. Accordingly, these two appeals are dismissed. No order as to costs. However, once again we make it clear that the orders passed in these appeals will not have any bearing on the merits on the respective case of the parties before the Arbitrator.

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