

Pinj Sons (P) Ltd. vs Hong Kong & Shanghai Banking ... on 23 November, 1990

Equivalent citations: 1991(1)ARBLR157(DELHI), I(1991)BC254, 1991(20)DRJ154

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Bench: B.N. Kirpal

JUDGMENT

Santosh Daggal, J.

(1) MESSRS. Panj Sons Pvt. Ltd. (appellant herein), filed a suit seeking issuance of permanent injunction, against Messrs. General Electric Technical Services Company Inc., (for short 'GETSCO'), restraining them through their agents, employees etc. from encashing or seeking encashment of the bank guarantee dated January, 1988 as furnished by the Hong Kong & Shanghai Banking Corporation, respondent No. 1 herein. seeking correspondingly decree again the bank restraining it from making payment under the aforesaid guarantee or the cashier order to GETSCO.

(2) Simultaneously, an application under order 39 Rule 1,2 and 3 read with Section 151 Code of Civil Procedure was filed-seeking an ad interim injunction against the respondents in the same terms, as prayer in the suit. It appears that an ex-parte interim injunction was issued in the first instance as prayed for, but on an application being made by Getsco under Order 39 Rule 4 CPC. the said order was vacated, and application of the plaintiff under Order 39 Rule 1, 2 and 3 Civil Procedure Code dismissed by an order passed on 11th July, 1989. It is this order which is assailed in the present appeal, reiterating the plea for restraining Getsco from enforcing or encashing the bank guarantee/cashier order for the amount of Rs. 1,06,52,500.00, as furnished/ issued by respondent No.1.

(3) The facts in so far as they, have a bearing on the appreciation of the contentions canvassed in the present appeal and disposal thereof, are as under.

(4) An agreement was arrived at between M/s. Punj Sons Pvt. Ltd. the appellant and respondent No. 2 (GETSCO) on 13th October, 1986 for getting fabrication and installation work done from the appellant in respect to aircraft test Center engine repair centre at the Indian Airlines Engineering Complex, Palam Airport, New Delhi which Getsco had undertaken to construct for the Indian Airlines on the basis of an agreement dated 20th November, 1985 executed between Getsco and Indian Airlines. In so far as the appellants are concerned, the total revised value of the contract was Rs. 7,07,50,000.00 and a formal contract was executed between them on August 21, 1987, although the work had already been commenced by the appellants with effect from October 13, 1986 in pursuance

to the oral agreement., In the contract M/s. Pnnj Sons were described as 'Contractor', the Getsco as 'owner' and the Indian Airlines as owner's Customer'. As rms of the contract, the work was to be completed by the appellant within 7-1/2 months from the date of supply of certain material to it by GETSCO. It is stated that this material was finally supplied on January 3, 1988. As a result, the dale of completion as per terms of the contract came to be 18th August, 1988.

(5) An advance payment equal to 25% of the contract price was agreed to be paid to the Contractor. Such advance was to be liquidated prorata, and deducted . from subsequent payments to be made for material and work executed until the total amount of advance payment had been recovered by GETSCO. It was further stipulated in clause 5.1 of the contract that , Contractor shall secure at no cost to theOwncr.abank guarantee for the full amount of the advance payment. Pursuant to this terms of the Contract, a bank guarantee wherein mobilisation advance was quantified to be Rs.1,86,0,00.00 was furnished by the Bank, respondent No.1, obviously at the instance of the appellants and this bank guarantee is No. 86 Ndh 918, dated 28th October 1986.

(6) In addition, the appellants had undertaken vide Clause 8 of the contract to furnish performance bonds equal to 30% of the total value of the Contract, which, was to be split up into two performance bonds partly to be released on completion of the Project, and the balance upon the expiration of the Warranty.

(7) The appellants allege to have undertaken the work and continued with execution of the same as per terms of the Contract and intimated completion of the Project to the respondents by letter dated 8thAugust. 1988. Running bills were submitted by the appellants, and payments made by Getsco in account, after making deductions prorata towards recovery of mobilisation advance.

(8) In between, the appellants, in awareness of the liability to furnish performance bonds in terms of Clause 8 of the Contract, and after the bank guarantee towards mobilisation advance had been furnished on 28th October, 1986, approached Getsco by letter dated 3rd September, 1987 proposing submission of a composite bank guarantee where amount vacated by mobilisation advance was to be utilised by performance guarantee amount and it was stipulated that this guarantee shall at any time be valid for equivalent of 30% of the contract value to cover unrecovered mobilisation advance and performance guarantee amount of the work. It appears that this proposal was accepted by Getsco as a result, a fresh bank guarantee designated as Composite Bank Guarantee' was furnished by the bank on 25th January, 1988, superseding in effect the original bank guarantee, incorporating however terms and conditions thereof insofar as these were not expressly stated in the fresh guarantee or inconsistent therewith.

(9) It is considered expedient to extract the terms both of the original guarantee dated 28th October 1986 as also of the second guarantee dated 25th January 1988. The first Guarantee reads as under :-
"1.INconsideration of General Electric Technical Services Company, Inc., Cincinnati Ohio, U.S.A. c/o M/s PL. Jaitly & Co., IE/12, Jhandewalan Extn, New Delhi (hereinafter called the owner) having agreed to grant mobilisation advance of Rs. 18,600,000 (Rupees Eighteen million six hundred thousand only) to M/s. Punj Sons Pvt. Ltd., Industrial Area, Kalkaji, New Delhi-110019 (hereinafter called Contractor) under the-terms and conditions of Tender No. NH-040-1 made by and between

owner and Contractor for Indian Airlines Jet Engine Repair and Test Facilities. Phase I Construction being undertaken at Indira Gandhi International Airport, New Delhi (herein called the Agreement) on the production of Bank Guarantee for Rs 18,600.080 (Rupees- Eighteen million six hundred thousand only), we Hongkong & Shanghai Banking Corporation, Kasturba Gandhi Marg, New Delhi-110001 (hereinafter called Bank) do hereby undertake to pay to the owner an amount not exceeding Rs. 18,600.000 (Rupees Eighteen million six hundred thousand only), against any loss or damage caused to or suffered or would be caused to or suffered by the owner by reason of any breach by the Contractor of the terms and conditions contained in the Agreement. 2. We, the Bank do hereby undertake to pay the amount due and payable under this Guarantee without any demur, merely on demand from the owner stating that the amount claimed is due by way of loss or damage caused to or would be caused to or suffered by the owner by reason of any breach by the Contractor of any of the terms or conditions contained in the Agreement or by reason of the Contractor's failure to perform the Agreement. Any such demand made on the Bank, shall be conclusive, as regards the amount due and payable by the Bank under this Guarantee. However, our liability under this Guarantee shall be restricted to an amount not exceeding Rs. 18,600,000 (Rupees Eighteen million six hundred thousand only). 3. We, the Bank further agree that the Guarantee herein contained shall remain in force and effect during the period that would be taken for the performance of the Agreement and that it shall continue to be enforceable till all the dues of the owner under or by virtue of the Agreement have been fully paid and its claims satisfied or discharged or till the owner certifies that the terms and conditions of the Agreement have been fully and properly carried out by the Contractor and accordingly discharges and Guarantee. Unless a demand or claim under this Guarantee is made on us in writing on Or before the (date named in the Agreement as the end of the warrant/maintenance period), we shall be discharged from all liability under this Guarantee thereafter. 4. We, the Bank further agree with the owner shall have the fullest liberty without our consent and without affecting in any manner our obligations hereunder to vary any of the terms and conditions of the Agreement or to extend time of performance by the Contractor from time to time or to postpone for any time or from time to time any of the powers exercisable by the owner against the Contractor and to for bear or enforce any of the terms and conditions relating to the Agreement and we shall not be relieved from our liability by reason of any such variation, or extension being granted by the owner or any indulgence by the owner to the Contractor or by any such matter or thing whatsoever which under the law relating to sureties would but for this provision have effect of so relieving us. 5. We, the Bank lastly undertake not to revoke this Guarantee during its currency except with the previous consent of the owner in writing. Notwithstanding anything stated above, our liability under this Guarantee is restricted to a sum of Rs. 18,600,000 (Rupees Eighteen million six hundred thousand only). Our Guarantee shall remain in force until the (date named in the Agreement as the end of the warrant/maintenance period) Unless a demand is lodged with us on or before that dated 13th day of February, 1988, all your rights under the said guarantee shall be forfeited and we shall be relieved and discharged from all liabilities thereafter. Dated this 28th day of October, 1986."

The composite Bank Guarantee dated 25th January 1988 is in following terms : "BANKGUARANTEE No : 86 Ndh 918 Dated 38-10-1996 For RS. 1,86,00,000.00 favoring M/S. General Electric & Technical services CO.INC. Under the instructions from our elements M/s Punj Sons Private Limited, M-13, Connaught Place, New Delhi-110001, we here enhance the value of the above Bank

Guarantee up to Rs. 21,225,000.00 (Rupees Twenty one Million Two Hundred Twenty five Thousand only) being 30% of the revised lumpsum Contract Value of Rs. 70,750,000.00 (Rupees seventy million Two hundred fifty thousand only). This Bank Guarantee shall act 'Composite Bank Guarantee' for Mobilisation Advance and Performance Bond where in Bank Guarantee, to the extent, of amounts of Mobilisation Advance so recovered, shall be utilised towards Two Performance Bonds of 15% of the Contract Value each valid up to 30th June, 1988 and 30th June, 1989 respectively. All the other terms & conditions of the Original Guarantee will remain unchanged. We, the Hongkong & Shanghai Banking Corporation, 28-Kasturba Gandhi Marg, New Delhi-110001, hereby undertake not to revoke the Guarantee during the currency except with the previous consent of the General Electric & Technical Services Company Inc. Notwithstanding anything contained herein before, our liability under this Guarantee is restricted to Rs. 21,225,000.00 (Rupees Twenty One Million Two Hundred Twenty Five Thousand only) and the recovery of Mobilisation advance from Running Bills Account will be in accordance with the Contract, the Guarantee against such amounts of Mobilisation Advance as so recovered shall be treated towards performance Guarantee with the intent that after recovery of Mobilisation Advance in full, the Guarantee shall operate against the full value of Performance Bond Out of the said Guarantee amount. Bank Guarantee amount of Rs. 10,612,500.00 (Rupees ten million six hundred twelve thousand & five hundred only) being the 15% of lumpsum value of the contract shall remain in force till the completion of the Project i.e. up to 30th June, 1988 and the Bank Guarantee For the balance amount i.e., Rs 10,612,500.00 (Rupees ten million six hundred twelve thousand five hundred only) being 15% amount shall remain in force till final acceptance certificate i.e. till 30th June, 1989. Notwithstanding anything contained hereinbefore our liability under this Guarantee will be restricted to Rs. 21,225,000.00 (Rupees twenty one million two hundred twenty five thousands only) until 30th June, 1988 without further reference to you. Our liability will continue only to the extent of the balance amount of Rs. 10,612,500.00 (Rupees ten million six hundred twelve thousand & five hundred only) after 30th June, 1988 and will be conditional upon a claim being filed with us in writing on or before 30th June, 1989. Thereafter our liability under this Guarantee shall stand extinguished and we shall be relieved and discharged from all liabilities there under."

(10) It appears, the mobilisation advance was being recovered by deduction from the running bills and as such no dispute seems to have arisen pertaining to recovery of the said advance. In so far as performance bond part of the composite bank guarantee was concerned, the stipulation was that to the extent of recovery of amount of mobilisation advance, the same was to be utilised, towards two performance bonds of 15% of the contract value each valid up to 30th June 1988 and 30th June 1989 respectively, the total value of the guarantor being 30% of the revised lumpsum value, qualified at Rs. 70,750,000.00 the total value of the guarantee thus was Rs. 21,225,000.00 .

(11) As already noticed, the work went on and the parties are in direct touch with each other. No stop was taken at any time by Getsco towards enforcement of the bank guarantee, till a letter was written for the first time on 31st October, 1988 calling upon the appellants to extend the performance bond of Rs. 10,612,500.00 to the probable date of completion and the performance bond of the like amount to be extended for further period of 12 months from the aforesaid date. Although in this letter no dates were specifically mentioned but it appears that the reference was to the performance bond to the extent of 15% of the Contract Value which was enforceable up to 30th

June 1988, and which had obviously not been invoked by that date, and for consequential extension of the remaining 15% of the contract value which was originally valid up to 30th June, 1989, in terms of the Composite Bank Guarantee.

(12) The appellants reacted to this request from Getsco by letter 'dated 31st January 1989 contending that their position had been explained to Getsco number of, times and so far as they were concerned the work was competed as conveyed by their letter dated 8th August 1988 and that first 15% part of the performance bond stood discharged and there was no question of any retrospective extension particularly when the remaining 15% performance bond was still valid and with GETSCO. A reference was also made to several requests pending for consideration of Getsco which the appellants had made in respect to the completion of the contract such as invocation of the excusable delay clause of the contract. It was also stated by the appellants in this letter that pending resolution of issues, payment of their bills be made.

(13) There is no correspondence thereafter between the parties in respect to the performance bonds until 17th April, 1989, when Getsco by their letter addressed to the bank sought encashment of the bank guarantee for the balance amount of Rs. 1,06,12,500.00 in terms of the bank guarantee dated 25th January 1988, alleging that they had become entitled to this amount on account of various breaches of the contract committed by the appellants under the contract executed between the parties on 21st August 1987 and that remaining part of the bank guarantee was valid till acceptance certificate was issued by them, and in any case up to 30th June 1989 as stated specifically, and that since the Contractor had failed to perform the contract and had not complied with their demand to remove the defects and deviations and to complete the building and building related equipments and also to fully install and commission the equipment in accordance with the Specification of the contract, as a result of which the Project had been unreasonably delayed and that on that account the Project was not complete as per the contract and Getsco had not issued the certificate of completion as contemplated under Article 27 of the Contract and had become entitled to invoke the bank guarantee and receive the amount covered thereby.

(14) It appears that immediately on receipt of the requisition from Getsco on 17th April, 1989, the bank issued a cashier's order equivalent to the sum of the guarantee, namely, Rs. 1,06,12,500.00. It was this development which led to the institution of the suit. wherein the impugned order was passed and which has been taken up in the present appeal.

(15) Mr A S. Chandhiok appearing for the appellants contended in the first instance that the composite guarantee consisted of three parts and whereas the first could be termed strictly speaking as guarantee towards the liquidation of the mobilization advance; the remaining two were in the nature of performance bonds, each of the value of 15% of the total Contract value, and one was to be for the completion of the contract, valid up to 30th June, 1988 unless extended further, and the second was towards Warranty clause after completion certificate had been issued, and was to be operative up to a period of 12 months from the date of acceptance of the works by the owner's customer, namely, Indian Airlines, but the deadline was 30th August, 1989. He argued that the mobilisation advance was recovered in stages from out of the bills of the appellants and that there was no complaint on that account although the mobilisation advance had not been fully liquidated,

which was due to the fact that some of the bills submitted by the appellants had been withheld by Getsco and the amount not cleared.

(16) In so far as the first performance bond in respect to completion of the Contract is concerned, Mr. Chandhiok contended that stage was over as not only the appellants assert that the contract stands, completed and handed over, otherwise also, the deadline set for enforcement of the performance bond being 30th June 1988 having expired, since long before the letter of invocation was sent on 17th April 1989, there was no right left for encashment of the guarantee on that account. In so far as the Warranty aspect is concerned ; according to the learned counsel since the Indian Airlines has not issued any acceptance letter so far, the stage for enforcement of the Warranty clause has not yet arisen.

(17) The contention is that after 30th June 1988, the bond cannot be invoked on grounds, other than breach of Warranty. Reliance is on Article 9.3 of the Contract which reads as under: "9.3.All workmanship and material at the Project site shall be guaranteed by Contractor against defects for a period of twelve (12) months after formal acceptance by owner's Customer."

(18) Mr. Chandhiok further contended that even otherwise completion was not in question because all that is stated by Getsco, in reply to appellant's letter of 8th August 1988, informing about completion of the contract, vide letter dated 19th August 1988, is that the work was full of deficiencies and deviations and completion cannot be accepted for that reason. According to Mr. Chaodhiok, till completion certificate is issued by the appellants and works handed over to the Indian Airlines, the stage of enforcement of Warranty clause would not arise, and as such the invocation of the bank guarantee for the residue amounts as on 17th April 1989 was premature.

(19) The counsel further raised a related argument as to the true nature and import of the Bank Guarantee in respect to performance bonds contending that a performance guarantee was in the nature of Contract of security as envisaged by Section 126 of the Indian Contract Act, for the reason that it was not a bipartite agreement as in the case of a contract of indemnity, but a tripartite one, in the sense that it always involved three parties, namely, the principal debtor at whose instance the security is furnished or guarantee given, the guarantor and the beneficiary. Accordingly, he argued, the bank guarantee in the present case in so far as it covered the performance bonds was essentially in the nature of a contract of security, and that it was incumbent for the beneficiary to have satisfied the guarantor the Bank in this case, while seeking encashment of the bank guarantee that there had been in fact breach in performance of the contract, and this in turn would have obliged the Bank to make enquiries from the appellants as to the veracity of the allegations made regarding breach of contract or failure to perform the same, in terms stipulated in the said Contract.

(20) The learned counsel placed reliance in support of this contention on a Single Bench judgment of this Court, reported as 1990(2) Delhi Lawyer 403, Nangia Construction (India) Pvt. Ltd. v. National Building Construction Corporation Ltd. where taking note of a Supreme Court decision reported as, Punjab National Bank Ltd. v. Sri Bikram Cotton Mills Ltd. and another, it was held that a bank guarantee did not constitute an independent contract but was in nature of a tripartite agreement, covered by Section 126 of the Contract Act, and that the obligation of the guarantor

depends substantially on the principal debtor's default. Mr. Chandhiok argued that in this view of the matter, a guarantee bond becomes enforceable upon default, and to that extent it cannot be independent of the principal contract. Reliance is further placed on a judgment of the Andhra Pradesh High Court to develop the same arguments. reported as . NagpurNagri Sahakari Bank Ltd and another v. Union of India and another.

(21) We are, however, of the view that nothing turns on this argument, as this is not the point in issue. Mr Shanti Bhushan, learned counsel for respondent No. 2, made it clear that he was not disputing the locus stands of the principal, and pointed out that respondent No. 2, at no stage, raised objections to the light of the appellants to come before the Court. He added that a contract of bank guarantee is a distinct and special type of agreement creating obligations directly between the Bank and the beneficiary.

(22) He argued that the law in this respect is well settled, and the consensus of judicial authorities, is to the effect that a contract of bank guarantee stands on a footing different than other contracts, and that commitments of bankers by way of bank guarantees must be honoured, and when there was a confirmed bank guarantee, there should be no interference by the Court in the way of their enforcement. He, however, conceded that there were certain areas where the Court could intervene, such as existence of fraud on the part of the beneficiary, in either securing the bank guarantee or in the manner of enforcing it, or existence of special equities in favor of the party which comes before the Court to interdict encashment of the bank guarantee in the form of preventing irretrievable injustice to the party concerned.

(23) The learned counsel placed reliance in support of this contention of the Supreme Court judgment reported as (1988) 1 Supreme Court Cases 174. U.P. Cooperative Federation Ltd v. Singh Consultants and Engineers (P) Ltd and two judgments of this Court one reported as (1989) 66 Company Cases 621 Escorts Limited v. Modern Insulators Pvt. Ltd and another and the other reported as 1990(3) Delhi Lawyer \\\o, Mls. Mahalingam Shetty & Co. Ltd v. National Projects Construction Corporation Limited, and summed up his arguments in this respect by contending that in the present case none of these situations exist and that the bank guarantee was very explicit to the effect that there was an undertaking on the part of the Bank to pay to the beneficiary on demand, without demur, and on mere statement that the amount claimed had become due, on account of fact of breach of contract or failure to complete the Project or unsatisfactory completion thereof, and the resultant damage suffered by the beneficiary.

(24) He argued that on a cumulative reading of the two bank guarantees, inasmuch as the first stood merged in the second, it became clear that the bank guarantee took within its purview the recovery of the mobilisation advance in terms of Article 5 of the Contract, and also provision for the performance bond, as required by Article 8 thereof. The learned counsel repudiated contentions of the appellants that the two performance bonds were to operate in separate areas and that one was exclusively for performance of the contract, and the second towards satisfaction of the Warranty clause. According to him, the entire amount of the performance bond was available to the respondents for encashment in the event of breach of Contract in any manner, as stipulated in the bank guarantee, and that the only consequence of splitting up the amount or providing two terminal

points for their operation was for the purpose of fixing points of time for enforcement. The purpose, according to him, for providing the performance bonds was manifest from Article 8 of the Contract, namely, to secure due performance of the Contract by Punjsons. He contended, therefore, that the argument of the appellants that the two performance bonds operated separately and that one was operative allegedly till the completion of the Project, and the other only against Warranty, and could become operative only after the issuance of the Acceptance Certificate by the Indian Airlines, was wholly fallacious. He pointed out by referring to Article 27 of the Contract that the completion certificate, as envisaged in the bank guarantee, was the one that was to be issued by the owner, namely, GETSCO. and that it has been wrongly urged by the appellants that the Warranty clause did not mature for enforcement until Acceptance Certificate had been issued by the Indian Airlines.

(25) Before considering respective contentions of the parties, we would like to record that the basic principles that emerge on a resume of the case law on the subject are : firstly, that in any given case, what is of relevance is terms of the bank guarantee, and that in fact constitutes the only guiding factor; and secondly, the next determining point would be the manner in which the bank guarantee had been invoked by the beneficiary, and in that. context the terms of the demand letter assume great importance as well as significance.

(26) Examining the subject bank guarantee in this light, we are clearly of the view that (the contentions of the appellants are wholly untenable when they contend that the Composite Bank Guarantee operated in water tight compartments, and that on the expiry of the first terminal date, namely, 30th June 1988, the performance bond as incorporated in the bank guarantee for . the completion of the contract or satisfactory performance thereof, stood extinguished and that the second performance bond had not matured turn enforcement at the time of invocation i.e. on 17th April 1989 for the reason that the starting period for the Warranty has not arisen, by virtue of the fact that Indian Airlines had not issued the formal acceptance as contemplated by Article 93 of the Contract, and as a matter of fact, even the completion certificate in terms of Article 27 had not been issued.

(27) We say so because on a reading of the Composite Bank Guarantee, vis-a-vis the first one, the terms whereof stood incorporated in the second one, read with Article 8 of the Contract, it is clear that the appellants were obliged to furnish performance bond for due performance of the Contract and it , for this reason that the bank guarantee stipulated that the Bank would pay the amount due and payable as stated by the owner (GETSCO) without any demur or merely on demand, claimed by way of loss or damage caused to or would be caused to or suffered by the owner by reason of any breach by the Contractor of any of the terms or conditions contained in the agreement or by reason of the Contractor's failure to perform the agreement, and that this demand shall be conclusive, as regards the amount due and. payable by the Bank under this guarantee. The only limitation was the ceiling of the amount covered by the Bank Guarantee, and the date by which it had to be enforced unseal further extended.

(28) It is therefore not open to the appellants to argue that the performance Guarantee consisted of two separate parts, which operated in different areas, and that once the first date expired, no claim could be raised thereafter on account of breach of contract or unsatisfactory performance or. failure

to complete the Project or any other related reason ; for to our mind. the performance of the Contract, as contemplated by Article 8, in relation to which performance bonds were to be given, and which are now represented by the bank guarantee under reference, encompassed every facet of the Contract, including satisfactory execution of the Project, including satisfactory execution of the Project, and undertaking not to commit any breach of terms. of the Agreement at any stage, and to Warranty satisfactory performance after the work were taken over by Getsco or their Customer. We also find ourselves in agreement with Mr. Shanti Bhushan's argument that the only implication of providing two dates was to fix points of time for enforcement of the bank guarantee and in case there had been saturator completion of the contract, then one part of the performance guarantee would have stood discharged and only warranty clause would have remained operative. But it is wrong for the appellants to urge that after the expiry of 30th June 1988 the performance bond, in so far as it related to completion of the Contract or satisfactory performance thereof, stood discharged and that the bank guarantee did not remain enforceable on this account after that date. We say go. because terms of the bank guarantee do not want any such inference or interpretation.

(29) Nevertheless we cannot loose sight of another important requirement set aside down by judicial decisions, which we have already noted, i.e. that the bank guarantee has to be enforced strictly in terms thereof. We consider the appellants entitled to succeed on this count, because we find that the letter sent by Getsco on 17th April, 1989 demanding encashment of the bank guarantee is lull of infirmities, and wanting inessential particulars. It would be expedient to extract here (he aforesaid letter of 17th April, 1989 for proper appreciation of this aspect of the matter. The letter reads as under: APRIL 17, 1989 The Hongkong & Shanghai Banking Corporation, 2, Kasturba Gandhi Marg, New Delhi-110 061. Re : Encashment of Bank Gnaraatee No. 86-1918 bearing the date of 25th January, 1988, on the right-hand side of the first page. Dear Sirs, We are hereby filing a Claim with you in terms of the aforesaid Bank Guarantee given by you and in operation for the amount of Rs. 1,06,12,500.00 and cali upon you to pay to us forthwith the sum of Rs. 1,06,12,500.00 in terms of the said Bank Guarantee. We are entitled to payment of the aforesaid amount forthwith under the laid Bank Guarantee furnished by you on account of the various breaches to the contract committed by M/s. Punjsons Private Limited. Industrial Area, Kalkaji, New Delhi under the contract which was executed between us and M/s. Punj Sons Private Limited on 21-5-1987 and in relation to which you gave the Raid Guarantee under which you continue to be liable to pay the si of Rs. 1,06.12,500/ "till final acceptance certificate is issued by Uk i.e. till 30-6-1989", as stated specifically by you in the laid Guarantee and further by reason of the contractor (M/s. Punj Sons Pvt, Ltd.) having failed to perform the contract. The Contractors have not complied with our repeated demands to remove the defects and deviations in the building and building related equipment which arc nut in accordance with the drawings and specifications provided in the contract. The contractors have also failed to complete the building and building related equipment and/or fully install and commission the equipment in accordance with the specifications of the contract and accordingly the Project has been unreasonably delayed on account of the various defects and deviations in the building and building related equipment and the Project not being complete as per the contract, we have not issued the certificate of completion or final acceptance. Under Article 27 of the Contract executed between us and the contractors (M/s. Punj Sons Pvt. Ltd.), it is specifically provided as follows: "The Project shall be considered as completed and accepted when owner (General Electric Technical Services Inc.) has issued the certificate of completion and title shall pass to the owner concurrent with

insurance of such certificate." As a result of the breaches of the contract by the Contractors, a sum of Rs. 2,50,00,000.00 is due to us from the Contractors on account of loss or damages caused to us by reason of the breaches of the contract by the Contractor. Under the terms of the Bank Guarantee, which bears the date of 25th January, 1988 on the top incorporating therein the terms and conditions contained in your earlier Bank Guarantee of 28th October, 1986, you are liable to pay the said amount of Rs. 1,06,12,500.00 upon Acclaim being filed with you on or before 30-6-1989, without any demur and merely on our demand slating that the amount claimed is due to us by way of loss or damage roused or which would be caused or suffered by us by reason of breaches by the contractor of the terms and conditions contained in the Agreement and by reason of the Contractor's failure to perform the agreement. We, therefore, are filing the present claim with you in terms of the aforesaid Bank Guarantee and further call upon you to pay to us forthwith the sum of Rs.],06,12,000.00 immediately on receipt of the present claim in writing. Yours faithfully. (P. Mathur) Programme Manager."

(30) Getsco by means of this letter has straightway sought enforcement of the bank guarantee by treating it as if the bank guarantee was in the nature of performance bond simpliciter, and had no other terms or conditions attached thereto. However, a reading of para 5 of the Composite Bank Guarantee makes it clear that first of all the bank guarantee was to provide a cover for recovery or liquidation of the mobilisation advance, which was to be adjusted from the running bill accounts and it was only that to the extent the recovery of the mobilisation advance had been effected, that it was to be treated towards performance guarantee. The manifest intention was that after recovery of mobilisation advance in full, the guarantee shall operate against the full value of the performance bond. On & bare reading of these terms, it is obvious that the bank guarantee was not a self-contained performance guarantee for the amount covered thereby, but was conditional on the fact that first of all it has to be utilised for the recovery of the mobilisation advance wholly or partly, to the extent it was not or could not be recovered from the Contractor, and that depending upon the fact that the mobilisation advance stood recovered in full, then whole of the amount was to be treated as cover for performance guarantee, but in case any part of the mobilisation advance remained un-recovered, then to that, extent the amount of bank guarantee was to remain in reserve for the mobilisation advance and only balance was to operate as performance guarantee.

(31) That being so, it was obligatory on the part of GETSCO-while trying to encash the bank guarantee on account of alleged breach of Contract or other refuted allegations, to state as to whether the mobilisation advance had been recovered ? If so, to what extent, because on this vital information depended the obligation of the Bank to pay the amount claimed by GETSCO. For it is not a case where Getsco could straightway demand payment of the full amount of the Guarantee as alive at the time, by merely alleging breach or non-performance or unsatisfactory performance of the Contract. Before it could do so. it had to mention the fact of mobilisation advance or the position as to its recovery and whether it stood fully liquidated or whether any part was still lying unrecovered, because right of recovery of the full amount of the Guarantee, as then available, was dependent on this disclosure.

(32) This becomes significant on account of the fact that whole of the mobilisation advance had not been recovered at the time the letter seeking encashment of the bank guarantee was sent. There is

nothing on record to indicate as to what was the exact amount due This is for the reason that Getsco had, at no stage, revealed this fact, while enforcing the bank guarantee or demanding payment there under. During hearing, however, in response to the Court query, it was at one stage stated on behalf of respondent No. 2 that some amount of approximately rupees twenty lacs was due towards the mobilisation advance but later information given was that it may be about rupees eight lacs or so. Be that as it may, the fact remains that so long any part of the mobilisation advance remained to be recovered, Getsco was not entitled to claim full amount of the bank guarantee on account of non-completion or unsatisfactory completion of the Project or other alleged breaches of the terms of the agreement on the part of the Contractor. This would be so, even if the amount claimed is 50% of the total amount because that is not for reasons related to mobilisation advance but because half of the amount of bank guarantee stands released by efflux of time, namely, by expiry of the stipulated date, which was 30th June, 1988.

(33) In so far as the recovery of the mobilisation advance was concerned, to the extent it remained unpaid, the banks liability under the bank guarantee was intact, even on the date the letter of demand was issued.

(34) As a result, we would hold that the Bank was not right in honouring this demand, with the promptitude it was done, as on a bare reference to the terms of the bank guarantee, it ought to have become clear to them that the letter of demand does not reveal all, and they were obliged to raise query from Getsco as to what was the position about mobilisation advance and only after being satisfied about recovery of mobilisation advance, that they were obliged to pay the full amount claimed under the performance bond.

(35) It is here that the observations of a Division Bench of this Court, become very aptly and pertinently applicable. Our reference is to the judgment in the case of M/s Harpras had & Co. Ltd. v. Sudarshan Steel Mills and others, , where the bank concerned was reprimanded for not performing its duty of satisfying itself that the demand by the beneficiary was made in accordance with the terms of the bank guarantee. It was held that mere parrot like reproduction in the letter of demand, of recitals in the bank guarantee, was not sufficient and that the beneficiary was in same position as plaintiff while filing a suit. namely, to disclose full cause of action for the claim, and conversely it became incumbent upon the Bank, to see whether the demand made reveals a cause of action, and further that it was in terms of the bank guarantee. This proposition is reiterated in the recent judgment in the case of Mahalingam Shetty (supra).

(36) We also cannot avoid the observation that this failure on the part of Getsco to make a reference to mobilisation advance, would be tantamount to suppression of material facts, in the sense that the mobilisation advance was, under the Contract to be recovered from the running bills. It is contention of the appellants, which is not denied by the respondents, that a number of bills submitted by them are pending with Getsco, with the obvious implication that as and when those bills are cleared, the remaining amount of mobilisation advance would stand recovered. Getsco completely omitted to mention these facts, the disclosure of which would have put the bank to further enquiry as to what was the amount covered by these bills, which admittedly were withheld, and what was the corresponding amount of the mobilisation advance, and to what extent the

amount covered by the bank guarantee remained payable. In any case, it was not a case, on facts, where Getsco could demand full amount of the bank guarantee at the time the encashment was sought, namely, on 17th April, 1989, nor the bank respondent No. 1 could straightway, without further enquiry from Getsco, in regard to the mobilisation advance, make the payment, as it did by issuing cashier's cheques on the same day for the full amount, namely, Rs. 1,06,12,500.00 .

(37) We are, therefore, of our firm view that the appellants can seek to injunct payment for this reason, namely, that the letter seeking encashment of the bank guarantee was not in terms of the bank guarantee, and did not disclose full and relevant facts, We find that the learned Single Judge did go into this aspect of the matter, and to that extent the order suffers from an infirmity, calling for interference by this Court.

(38) In view of thi(r), and the fact that the parties are in serious controversy on number of issues, inasmuch as another suit has been filed by Punjsons for the recovery of rupees twenty four lacs and odd against the respondents, and parties are contemplating arbitration also. we feel that equities of the case also demanded the payment under this bank guarantee should be injuncted at this stage.

(39) We accordingly allow the appeal and while setting aside the order of the learned Single Judge dated 11th July, 1989, order that till the disposal of the plaintiff's suit, the encashment of the the bank guarantee dated 25th January 1988 pursuant to the impugned demand shall remain stayed While doing so, the appellants are put on conditions, so as to safeguard the rights of the opposite party. We, therefore, as a condition for allowing the prayer for stay of encashment of the bank guarantee, direct that the appellant shall keep the bank guarantee alive for the entire amount of Rs. 1.06.12.500.00 initially for a period of one year, and renew thereafter from year to year, in case exigency of the situation so requires, till dispute between the parties are finally disposed of During the course of hearing in this appeal, it was directed that the bank guarantee be extended till 31st December 1990 and respondent No. 1 was also directed to extend the validity of the cashier's cheque. No direction to the Bank is called for in view of our order that the encashment of the bank guarantee is to be stayed during the pendency of the suit It is understood that the Bank Guarantee stands renewed up to 31st December, 1990, pursuant to the Court direction. The appellants shall renew or keep alive the Bank Guarantee for a year. effective from 1st January, 1991. and then renew it from year to year, as order hereihabove. Steps for renewal of the Bank Guarantee, with the same Bank, be taken at least two weeks before the date of expiry, failing which the stay shall stand vacated.

(40) No order as to costs.