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**IN THE HIGH COURT OF BOMBAY AT GOA**

**WRIT PETITION NO. 636 OF 2023**

**KIMIYA ENGINEERS PRIVATE LIMITED**

a Company registered under the Companies Act,  
1956 with its registered office at  
A-Wing, fourth floor, 32,  
Corporate Avenue, off Mahakali Caves  
Road, Andheri (East), Mumbai, 400093  
Represented by its Authorized Representatives  
Mr. Thomas Zachariah, Aged 62 years,  
Resident of Chandivali,  
Andheri (East), Mumbai-400072.

..Petitioner/  
Original Plaintiff

***Versus***

**1. GOA STATE INFRASTRUCTURE  
DEVELOPMENT CORPORATION LTD.**

A Company registered under the Companies Act, 1956  
with registered office at 7<sup>th</sup> Floor,  
EDC House, Dr. Atmaram Borkar Road,  
Panaji-Goa.

**2. ORIENTAL Bank OF COMMERCE**

Office at Plot No.5, Sector 32,  
Institutional Area, Gurgaon (Haryana),  
with its branch at Ground Floor,  
Mahatma Gandhi Seva Mandir Trust Bldg.,  
Opp. Bandra Talao, S V Road  
Bandra (West), Bandra Branch,  
Mumbai-400050.

..Respondents/  
Original Defendants

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Mr.Sudesh Usgaonkar with Ms.Venessa L. Barreto, Ms.Marie Rosette Pereira, Advocate for the Petitioner.

Mr. A. D. Bhobe with Ms. Shaizeen B. Shaikh, Advocate for the Respondents.

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**CORAM : PRAKASH D. NAIK, J.**

**DATE OF RESERVED : 8<sup>th</sup> NOVEMBER 2023.**  
**DATE OF PRONOUNCED : 25<sup>th</sup> APRIL 2024.**

**JUDGMENT :-**

1. The Petitioner challenges the order dated 11<sup>th</sup> August 2023 passed by District Judge-3 at Panaji in Misc. Civil Appeal No.83 of 2018 and Order dated 9<sup>th</sup> August 2018 passed by Civil Judge Junior Division, North Goa at Panaji dismissing the petitioner's application for temporary injunction in Regular Civil Suit No.22 of 2017/C.
  
2. The Petitioner instituted the Regular Civil Suit No.22 of 2017/C for declaration that the Bank guarantee was fraudulently obtained by the defendant No.1 by misrepresentation, exercising undue influence and coercing the plaintiff to issue such Bank guarantee. The petitioner also sought declaration that the Bank guarantee issued in favour of defendant No.1 by the Banker of defendant No.2 is not enforceable. It was also prayed for perpetual injunction restraining the defendant No.1 from acting in furtherance of letter dated 19<sup>th</sup> January 2017 made to the defendant No.2 for the encashment of the Bank guarantee or

taking any other measures or steps or to encash the Bank guarantee and restrain defendant No.1 from receiving any amount from defendant No.2 by way of encashment of Bank guarantee dated 31<sup>st</sup> August 2016 for Rs. 38,66,320/-.

3. The brief facts emanating from the plaint of the petitioner in Regular Civil Suit No. 22 of 2017 can be summarised as under:-

- (i) The plaintiff is a company registered under the Companies Act and engaged in the business of undertaking civil construction works and development of properties.
- (ii) The defendant No.1 is the company in which the Government of Goa holds majority of shares. The defendant No.1 is constituted by the Government of Goa to take up the development of infrastructure under the infrastructure up-gradation programme for the State of Goa.
- (iii) The defendant No.2 is nationalized Bank. Defendant No.2 is the Banker of the plaintiff.
- (iv) The plaintiff was awarded the work of construction for national institute of water sports campus at Caranzalem, Goa by the defendant No.1. Upon accepting the plaintiff's tender for

Rs.27,30,84,360/-, the plaintiff issued a letter of acceptance dated 27<sup>th</sup> December 2013 in respect of the work.

(v) An Agreement was executed between the defendant No.1 and the plaintiff dated 11<sup>th</sup> February 2014 for the execution of the aforesaid work. Tender documents in volume I, II, III and IV alongwith letter of acceptance and work order dated 22<sup>nd</sup> January 2014 were part of the said agreement. In terms of letter of acceptance, the plaintiff was required to submit performance guarantee of Rs.1,36,54,220/- being 5% of the original contract price as provided at clause 5.4 of the contract contained in volume-I of the tender document.

(vi) The plaintiff complied with requirement and irrevocable Bank guarantee was issued in favour of defendant No.1 by the plaintiff's Bankers and defendant No.2 vide instrument of Bank guarantee for performance security dated 1<sup>st</sup> January 2014 for an amount of Rs.1,36,54,220/-.

(vii) The date of completion of work as per terms and conditions of the contract was 24 months, which period was to be reckoned from 10<sup>th</sup> day after the issuance of the work order. The work order was issued on 22<sup>nd</sup> January 2014. Therefore, the period of contract

was from 2<sup>nd</sup> February 2014 to 2<sup>nd</sup> February 2016.

(viii) The work did not progress as per schedule and consequently could not be completed within the scheduled time for the various reasons including non-payment of full amount under running account bills No. 1 to 10. In the circumstances, it was not possible for plaintiff to continue the progress of the work which was intimated to defendant No.1 and also to the project consultant by various communications.

(ix) Notwithstanding the fact that the delay in progress and the completion of the work was solely attributable to the defendant No.1, show cause notice dated 24<sup>th</sup> June 2015 was issued by defendant No.1 making various false allegations attributing cause for non completion of work to the plaintiff and to show cause as to why action should not be taken for non-performance/breach of contract.

(x) The plaintiff replied to the show cause notice on 4<sup>th</sup> July 2015 denying allegations and putting on record the reasons on account of which the work did not progress as scheduled and completed within the time scheduled and bringing to the notice of defendant No.1, plaintiff's letters dated 26<sup>th</sup> May 2014, 2<sup>nd</sup> August 2014 and

1<sup>st</sup> September 2014.

(xi) The defendant No.1 never controverted the causes stated in the reply to the allegations in the show cause notice. The defendant No.1 however addressed communications in September, November and December 2015 making false allegations about delay at various stages of the work namely RCC works, Water Proofing etc. The defendant No.1 was aware of the actual position as stated in the reply and show cause notice was issued for creating record.

(xii) As the period for completion was on 2<sup>nd</sup> February 2016, the plaintiff applied for extension of time vide notice dated 29<sup>th</sup> January 2016 in terms of clause 49(C). The defendant No.1 did not communicate the extention of time.

(xiii) The defendant No.1 was fully aware that the causes of the delay in completion of work was attributable to them. The defendant No.1 issued another show cause notice on 26<sup>th</sup> April 2016 with identical allegations. There was no reference to the previous show cause notice and reply by the plaintiff. The second show cause notice was replied by the plaintiff vide letter dated 9<sup>th</sup> May 2016.

(xiv) In the reply it was stated that, the attempt of defendant No.1 to make out the case of breach of contract is nothing but abuse of dominant position held by them. There are various letters on record which indicate that there has not been any breach on the part of plaintiff and they have always performed their part of contract but they have not made the decision on time which was needed to be taken. They did not resolve issues that were raised, did not finalize and made payments of bills on time. The plaintiff have incurred heavy losses due to lack of timely decisions clear drawings, delayed payments and lack of approvals that combined with acrimonious atmosphere created by PMC sight staff which makes difficult to proceed with the work.

(xv) The issuance of second show cause notice was periodic exercise for the purpose of record. The defendant No.1 did not respond to the reply of the plaintiff.

(xvi) The plaintiff received letter from the project consultant intimating that the term for completion of the contract work has been extended till 31<sup>st</sup> May 2016. The letter dated 8<sup>th</sup> February 2016 was issued by defendant No.1 to its consultant stating that it has been decided to grant provisional extention of time for

completion of contract work upto 31<sup>st</sup> May 2016. The project consultant was required to notify the plaintiff accordingly. The plaintiff responded to defendant No.1 by letter dated 16<sup>th</sup> May 2016. Thus, almost entire period from 2<sup>nd</sup> February 2016 to 30<sup>th</sup> May 2016 had expired when such extention was communicated to the plaintiff.

(xvii) It was apparent that the defendant No.1 and its consultant were not interested in completion of the project by plaintiff.

(xviii) For the various reasons attributable to defendant No.1 and their project consultant the work remained standstill. The defendant No.1 called the officers of plaintiff for meeting on 21<sup>st</sup> July 2016 and 19<sup>th</sup> August 2016 requesting to continue with the work for the time being.

(xix) The plaintiff insisted that unless outstanding payment is cleared, it will not be possible to continue with the work. The managing director of defendant No.1 agreed to make part payment of pending outstanding amount towards running account bills of Rs.90,00,000/-.

(xx) The defendant No.1 through its managing director and the

person from finance department assured that if the work is continued, even the balance payments due will be released and also pending issues regarding contract work will be resolved.

(xxi) The defendant No.1 represented to the plaintiff that the plaintiff would have to fulfill one condition for all that the plaintiff should give irrevocable Bank guarantee to the payment released. There was no pre-condition in the contract clauses for the payment of outstanding dues.

(xxii) When the plaintiff did not agree to the issuance of Bank guarantee contrary to the contract clauses, the defendant No.1 threatened the plaintiff that action will be taken against the plaintiff for terminating the contract on the ground of abandonment of the work and appropriation of all the retention money and securities. In such compelling circumstances, the plaintiff agreed to the terms dictated by defendant No.1 as the defendant No.1 was in dominant position and the plaintiff did not want to face further losses in the project work.

(xxiii) In view of the compelling circumstances narrated above, the plaintiff agreed to the proposal of defendant No.1 as there was no alternative. The plaintiff was under compulsion. The defendant

No.1 released an amount of Rs.38,66,320/- on 29<sup>th</sup> August 2016 as against total outstanding of Rs.90,00,000/-. Acting on the representation of the defendant No.1 and out of compulsion, the plaintiff through its Banker, issued Bank guarantee on 31<sup>st</sup> August 2016 for an amount of Rs.38,66,320/- which is valid till 26<sup>th</sup> February 2017.

(xxiv) The defendant No.1 did not honor its commitment in removing hindrances pointed out and also did not make outstanding payments resulting in non-completion of the work. The plaintiff was left with no other option but to stop the work again. The defendant No.1 being unable to find ways of foreclosing work under the contract terms issued third show cause notice dated 25<sup>th</sup> November 2016 alleging that the plaintiff sought an opportunity to complete the work and assured to achieve the target within stipulated date. There was no reference to reply dated 4<sup>th</sup> July 2016 to the previous show cause notice. It was an attempt to cover up its gross mishandling of the contract and its consultant.

(xxv) The plaintiff replied to the show cause notice stating that it did not want to continue with project and putting on record what was already communicated to defendant No.1 in the previous reply.

(xxvi) In the reply it was stated that, the delay had resulted in heavy losses to plaintiff for no fault of their and it is not viable to continue with the project. The defendant No.1 was requested to settle the accounts and claim set off against any balance of money.

(xxvii) The defendant No.1 issued notice of termination of contract dated 24<sup>th</sup> December 2016. The termination was based on non-existent ground. The plaintiff was asked to submit final bill. The defendant No.1 sent letter to defendant No.2 for encashing Bank guarantee on 19<sup>th</sup> January 2017.

(xxviii) By letter dated 30<sup>th</sup> January 2017, the defendant No.2 addressed the communication to the defendant No.1 stating that it requires the original Bank guarantee. By letter dated 31<sup>st</sup> January 2017, the defendant No.2 addressed letter to the plaintiff informing that the Bank is in receipt of letter from defendant No.1 for encashment of Bank guarantee dated 31<sup>st</sup> August 2016 for Rs.38,66,320/- and that the plaintiff shall deposit money and give reasons for termination of the contract.

(xxix) The letter of invocation dated 19<sup>th</sup> January 2017 is not in compliance with the conditions or requirement for making demand under the Bank guarantee dated 31<sup>st</sup> August 2016 for

Rs.38,66,320/-.

(xxx) The defendant No.1 suppressed from defendant No.2 the fact that the period for completion of contract was not extended and on the contrary fraudulently misrepresented that the period of contract was in force and purportedly terminated for reasons of non-performance, unsatisfactory services and failure to complete the work within stipulated time.

(xxxi) The invocation of the Bank guarantee by defendant No.1 on 19<sup>th</sup> January 2017 was fraudulent on account of suppression and misrepresentation.

(xxxii) The defendant No.1 is holding substantial amount payable to the plaintiff in comparison to the amount under the Bank guarantee.

(xxxiii) The action of defendant No.1 in proceeding to encash the Bank guarantee is fraudulent. It was taken on the representation that the entire outstanding amount of plaintiff would be released and the issues relating to the stoppage of the contract work would be resolved. The Bank guarantee was executed on representation that the contract period would be extended which never happened

and which turned out to be the misrepresentation.

4. The defendant No.1 filed written statement in the suit on 11<sup>th</sup> May 2017. The additional written statement was filed by the defendant No.1 on 24<sup>th</sup> July 2017.

5. The plaintiff filed an application on 7<sup>th</sup> February 2017 for temporary injunction restraining the defendant No.1 from acting in furtherance of letter dated 19<sup>th</sup> January 2017 made to defendant No.2 for the encashment of Bank guarantee or taking any other measures or steps to encash the Bank guarantee.

6. The defendant No.1 filed interim reply to the application dated 7<sup>th</sup> February 2017. The plaintiff filed rejoinder to the reply dated 10<sup>th</sup> February 2017 on defendant No.1.

7. Vide order dated 9<sup>th</sup> February 2017, the learned Civil Judge Junior Division C. Court Panaji directed the defendant No.1 to maintain status quo and not to encash the Bank guarantee till the disposal of the application for temporary injunction.

8. The application for temporary injunction was dismissed vide order dated 9<sup>th</sup> August 2018. The said order was challenged by preferring Appeal No.83 of 2018 before the Court of learned

District Judge. Vide order dated 11<sup>th</sup> August 2023, the Appeal was dismissed.

9. Learned Advocate for the petitioner submitted that, the impugned orders are vitiated for non-consideration of relevant pleadings and material available on record. The Courts failed to examine the basic principles to determine prima facie case for grant of temporary injunction. The Appellate Court has glossed over the pleadings and the documents to hold that, the petitioner has not made out a prima facie case at the stage of grant of temporary injunction. The impugned order is flawed by applying the general principles that encashment of Bank guarantee cannot be stopped by order of the Court when it was not universal principle of law. The appellate Court erred in observing that, there was no coercion or fraud on either side which compelled the petitioner to execute Bank guarantee. The Appellate Court had erroneously observed that, nothing prevented the petitioner not to consent for the execution of Bank guarantee. The finding of the Court that the petitioner's case lacks clear elements of fraud misrepresentation or deliberate suppression of material fact which entitles petitioner to specific equality. However, the Court has not

given any reasons as to how the elements of fraud and misrepresentation are lacking. The Court ignored the pleadings in paragraph Nos. 15, 16, 17, 25, 26, 27 and 31 of plaint supported by documentary evidence showing the circumstances and the reasons why the Bank guarantee was given. A bare reading of clause 5.4.1 of the contract dated 11<sup>th</sup> February 2014 indicate that the performance guarantee contemplated under the contract was for amount equal to 5% of the original contract price. The performance guarantee was issued on 1<sup>st</sup> January 2014 validity of the Bank guarantee has to be extended only in case in time for completion was extended by respondent No.1. It was valid till 27<sup>th</sup> February 2016 and has expired thereafter for want of extension of validity. There was no obligations on petitioner to renew the same because respondent No.1 failed to extend the time fixed for the completion of contract. The letter dated 8<sup>th</sup> February 2016 issued by respondent No.1 was received by petitioner on 13<sup>th</sup> May 2016 as an attachment to the letter dated 11<sup>th</sup> May 2016 from the project management consultant, 15 days before its expiry date. This fact was brought on record by the petitioner vide reply dated 16<sup>th</sup> May 2016 to the respondent No.1. The respondent No.1 had back dated

extention letter. The second extention letter dated 19<sup>th</sup> July 2016 was produced in the Court for the first time. It was not received by petitioner. There is no statement of such letter having been received by the petitioner either in the previous correspondence prior to the Regular Civil Suit or in original written statement. It was creation after institution of suit for the purpose of supporting defence. It is incomprehensible that the petitioner whose dues are to be settled, will unnecessarily agree to issue Bank guarantee in favour of respondent No.1 for an amount of such dues thereby nullifying the effect of settlement of dues. There is no such requirement in the contract. The purpose of guarantee was related to settlement of petitioner's due is clear from the letter dated 6<sup>th</sup> September 2016 from the petitioner to respondent No.1 wherein the petitioner had submitted the guarantee and requested respondent No.1 to realise all pending payments. Thus, there was connection between issuance of such guarantee to all pending payments. This letter was not refuted by respondent No.1 nor the Bank guarantee was returned back. Letter dated 6<sup>th</sup> September 2016 exhibits nature of understanding for the issuance of subject Bank guarantee. The Bank guarantee was executed on the

representation that the contract period would be extended which never happened and it was turned out to be misrepresentation. The Bank guarantee contained statements which were contrary to the documentary evidence that the respondent No.1 had misrepresented the facts about the pendency of the contract when the same was not extended, false statement were made in the letter of invocation that the guarantee is required to be invoked as some dues are likely to arise and recoveries is to be made. The first letter of invocation dated 19<sup>th</sup> January 2017 was sought to be improvised by second letter for invocation during the pendency of suit by incorporating false statements and misquoting the contents of the previous letter of invocation.

10. Mr.Usgaonkar further submitted that, the incorporation of some new words in the second letter of invocation dated 9<sup>th</sup> February 2017 was to overcome the petitioner's case that the pre-conditions of the encashing Bank guarantee are not met and do not exist. The petitioner had challenged the basis of the amount of Rs.3,02,03,760/- referred to in the termination notice. The respondent No.1 is not entitled to encash the Bank guarantee as the respondent No.1 is holding substantial amount payable to the

petitioner in comparison to the amount under the Bank guarantee. The amount held by respondent No.1 is towards earnest money deposit being Rs.3,897,600.00/- to the security deposit deducted from R.A. Bill No. 11 being Rs.380,500.00/- final bill amount to be re-submitted to the respondent No.1 being Rs.10,000,000.00/- and secured advance paid towards the items and materials procured by the petitioner for which only 90% was paid advance by respondent No.1 being Rs.698,519.00/-.

11. Mr. Usgaonkar has relied upon the following decisions:-

- (i) Union of India Vs. Raman Iron Foundry<sup>1</sup>;
- (ii) Gangotri Enterprises Limited Vs. Union of India and Ors.<sup>2</sup>;
- (iii) ABG Shipyard Ltd. Vs. Shipping Corporation of India Ltd and Anr.<sup>3</sup>
- (iv) ITD Cementation India Ltd. Vs. Reliance Infrastructure Limited and Ors.<sup>4</sup>;
- (v) Karan Chand Thapar and Bros. (Coal Sales) Ltd. Vs. Hindustan Construction Company Ltd.<sup>5</sup>;
- (vi) Kamal Virdichandji Garg Vs. Flat India Pvt. Ltd. and Anr.<sup>6</sup>;
- (vii) Himadri Chemicals Industries Ltd. Vs. Coal Tar

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<sup>1</sup> (1974) 2 SCC 231

<sup>2</sup> (2016) 11 SCC 720

<sup>3</sup> (2014 (3) Mh.L.J.)

<sup>4</sup> (2014) 2 Bom CR 1

<sup>5</sup> 2012 SCC OnLine Bom 683

<sup>6</sup> 2004 (4) Mh.L.J.

Refining Co.<sup>7</sup>;

(viii) Banerjee and Banerjee Vs. Hindusthan Steel Works Construction Ltd and Ors.<sup>8</sup>;

(ix) Hindustan Construction Co. Ltd. Vs. State of Bihar and Ors.<sup>9</sup>.

12. Learned Advocate Mr. Bhobe for Respondent No.1 submitted that, there is no infirmity in the impugned orders. The concurrent findings does not require any interference. The petitioner is not entitled for any order of injunction. The petitioner is bound by the terms and conditions of the tender documents, the work order dated 22<sup>nd</sup> January 2014 and agreement dated 11<sup>th</sup> February 2014. The petitioner/plaintiff failed to make out case of fraud for issuing Bank guarantee. There is no evidence to establish that the Bank guarantee was executed by the plaintiff under coercion or misrepresentation. In terms of the tender, the plaintiff/petitioner was required to furnish performance guarantee, security deposit and renew the same in terms of tender document. The Bank guarantee dated 31<sup>st</sup> August 2016 was unconditional and the same was en-cashable at the instance and on a mere demand by respondent No.1. The contract of the plaintiff was terminated vide

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<sup>7</sup> (2007) 8 SCC 110

<sup>8</sup> AIR 1986 Cal 374

<sup>9</sup> (1999) 8 SCC 436

order dated 24<sup>th</sup> December 2016 which termination is not questioned by the plaintiff as on date, to the knowledge of respondent No.1. On account of default and breach of contract committed by plaintiff, the respondent No.1 was compelled to terminate the contract. The termination order dated 24<sup>th</sup> December 2016 was issued after following due process of law. The petitioner is liable to pay various amount to respondent No.1 which fact is referred to in the termination order dated 24<sup>th</sup> December 2016 and/or the amount covered by Bank guarantee dated 31<sup>st</sup> August 2016 are required to meet the recoveries dues. The respondent No.1 made the demand for encashment of Bank guarantee dated 31<sup>st</sup> August 2016 on the respondent No.2. The Bank guarantee stands forfeited. The respondent No.2 was under obligation to release Bank guarantee. The performance guarantee of Rs.1,36,54,220/- was required to be kept valid till the completion of the work and/or extended period/enlarge time for completion of the work. The plaintiff failed and neglected to abide by the said condition and failed to renew Bank guarantee after 27<sup>th</sup> February 2016. Non-renewal and not validating the performance guarantee during subsistence of the contract was breach of the

contract and the same was liable to be terminated. The courts below has assigned reasons for refusing the prayer for temporary injunction. The petitioner has not produced any document indicating that the plaintiff had raised issue prior to 24<sup>th</sup> February 2016 with regard to the contract period not being extended and/or the contract having come to an end in the month of May 2016. The contention of the petitioner in paragraph 15 of the plaint that for various reasons attributed to the respondent No.1 and the project consultant work remained standstill, is devoid of merits. The progress of the work and the work coming to standstill was attributable to the petitioner. The petitioner in terms of clause 5.4.1 of tender document was required to deposit and grant equal to 5% of the contract price as performance guarantee. The said guarantee kept valid up to stipulated date of completion plus 60 days beyond that and in case the time of completion of the work gets enlarged the petitioner was under obligation to get the validity of the performance guarantee extended to cover such enlarged time for completion of work. The initial time period for completion of work was 31<sup>st</sup> January 2016, which was extended by respondent No.1 vide letter dated 8<sup>th</sup> February 2016 to 31<sup>st</sup> May 2016 and

thereafter vide letter dated 19<sup>th</sup> July 2016 to 31<sup>st</sup> December 2016. The petitioner was liable and under obligation to keep performance guarantee after 27<sup>th</sup> February 2016 which is breach of the terms of the contract. To ensure progress of work, the respondent No.1 released the amount of Rs.38,66,320/- on 29<sup>th</sup> August 2016 subject to the plaintiff furnishing performance guarantee to that effect. In view of the fact that, the petitioner having not renewed the Bank guarantee on account of financial constraint, in order to secure public funds and to ensure performance of the work, the petitioner had agreed and undertaken to submit the performance of Bank guarantee in respect of the amount that the respondent No.1 would feel appropriate to release to the petitioner in terms of the contract.

In the month of August 2016, the respondent No.1 after considering the approvals of the project consultant and after deducting retention amount, secured advance, mobilization advance, statutory deductions, taxes, in terms of contract, found that the amount of Rs.38,66,320/- could be released to the petitioner and it was released on 30<sup>th</sup> August 2016. There was no intimidation upon the petitioner. The respondent No.1 is Government company and to secure the funds released to the

petitioner as also to guarantee performance of the contract, the petitioner had to furnish the performance Bank guarantee. Furnishing performance Bank guarantee was voluntary and without compulsion for the first time in the suit. The petitioner had contended that, there was force or compulsion upon the petitioner for furnishing performance Bank guarantee. The petitioner was under obligation to furnish the performance guarantee of Rs.1,36,54,220/-. The said arrangement cannot be said to be outside the stipulation of the contract. The amount was released on 30<sup>th</sup> August 2016 and the performance Bank guarantee dated 31<sup>st</sup> August 2016 was submitted to the respondent No.1 by petitioner on 7<sup>th</sup> September 2016. Thus, the claim of compelling circumstances cannot be countenanced. The petitioner received the amount of Rs.38,66,320/- in the month of August 2016 without any protest. The petitioner has misinterpreted contract agreement. The amount of Rs.38,66,320/- was released on request of the petitioner and the assurance of the petitioner to commence the work which the petitioner failed to despite receipt of the amount. The petitioner is due and liable to pay amount to Respondent No.1. Vide termination of contract dated 24<sup>th</sup> December 2016, the

petitioner was notified that the amount of Rs.3,02,03,760/- being due and payable by the petitioner and further amounts being due in terms of agreement. The demand for encashment of the Bank guarantee by respondent No.1 is in accordance with law and performance Bank guarantee dated 31<sup>st</sup> August 2016. The petition is devoid of merits and deserves to be dismissed.

13. Mr. Bhobe learned Advocate for Respondent No.1 has relied upon the following decisions:-

- (i) State of Maharashtra and Anr. Vs. National construction Company, Bombay and Anr.<sup>10</sup>;
- (ii) Ansal Engineering Project Ltd. Vs. Tehri Hydro Development Corporation Ltd. and Anr.<sup>11</sup>;
- (iii) Hindustan Construction Co. Ltd. Vs. State of Bihar and Ors.<sup>12</sup>;
- (iv) Kamal Virdichandji Garg Vs. Fiat India Pvt. Ltd. and Anr.<sup>13</sup>;
- (v) Himadri Chemical Industries Ltd. Vs. Coal Tar Refining Co.<sup>14</sup>;
- (vi) Karam Chand Thapar and Bros. (Coal Sales) Ltd. Vs. Hindustan Construction Company Ltd.<sup>15</sup>
- (vii) The ABG Shipyard Ltd. Vs. The Shipping Corporation

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10 (1996) 1 SCC 735

11 (1996) 5 SCC 450

12 (1999) 8 SCC 436

13 2004 (3) ALL MR 360

14 (2007) 8 SCC 110

15 2013(2) ALL MR 344

of India Ltd. and Anr.<sup>16</sup>

- (viii) Gujarat Maritime Board Vs. Larsen and Toubro Infrastructure Development Projects Limited and Anr.<sup>17</sup>;
- (ix) Andhra Pradesh Pollution Control Board Vs. CCL Products (India) Limited<sup>18</sup>;
- (x) Transrail Lighting Limited Vs. Public Electricity Corporation Republic of Yemen and Anr. delivered by this Court on 11<sup>th</sup> March 2023 in Commercial Suit (L) No. 185 of 2020;
- (xi) Standard Chartered Bank Vs. Heavy Engineering Corporation Limited and Anr.<sup>19</sup>.

14. Learned Civil Judge vide order dated 9<sup>th</sup> August 2018 rejected the application for temporary injunction. While rejecting the said application it was observed that, the plaintiff through material on record have to *prima facie* establish that the Bank guarantee is obtained fraudulently. From the tenor of the contents of the plaint and paragraph 15 of the plaint so also documents relied upon by plaintiff, it is *prima facie* not established by the plaintiff that the Bank guarantee is obtained under coercion or fraudulently by the defendants. The plaintiff has not shown other than filing reply to the show cause notices that it had taken any

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<sup>16</sup> 204(3) MR 131

<sup>17</sup> (2016) 10 SCC 46

<sup>18</sup> (2019) 20 SCC 669

<sup>19</sup> (2020) 13 SCC 574

measures to enforce terms of the agreement. The plaintiff has failed to prima facie prove that there was fraud committed by defendants. If the Bank guarantee is invoked and plaintiff can establish that invocation was wrongful then the plaintiff can get an award for refund of amount with interest. The plaintiff failed to make out the prima facie case in its favour. There is not evidence to prima facie established that the alleged Bank guarantee dated 31<sup>st</sup> August 2016 for Rs.38,66,320/- is executed fraudulently. No case of special equity is made out by plaintiff. The Court has to issue an injunction whether the balance of convenience is in favour of plaintiff and not that the balance of convenience is in favour of opposite party. The construction activity as undertaken under the contract dated 11<sup>th</sup> February 2014 executed between the plaintiff and defendant No.1 is not completed. It is also to be kept in mind that the defendant No.1 is Infrastructure Development Corporation of State of Goa and is undertaking many contracts of such nature. No serious inconvenience would be caused to the plaintiff than that which would be caused to the defendants if the injunction is not granted. The plaintiff failed to show that, the comparative mischief from the inconvenience which is likely to arise from withholding

the injunction will be greater than which is likely to arise from granting it. It was further observed that, for grant of interim injunction, the applicant has to *prima facie* prove that irreparable loss and injury will be caused to the plaintiff if the temporary injunction application filed is not allowed. Irreparable damage does not mean that damage that can never be repaired. It only means that the damage caused cannot be adequately compensated by money. Sometimes, compensation may be available, but in a given case it may be difficult or impossible to recover such damage then such cases may be considered as cases of irreparable damage.

In the case in hand, the plaintiff has on the face of record has not established that the serious damage would be caused to him if the injunction is not granted. Mere financial hardship is not irretrievable harm or injury. In the present case, the situation is not such that the remedy by damages would be inadequate if the compensation ultimately payable to the plaintiff in case of success in the suit would not place him in the position in which he was before injunction was refused.

15. The appeal preferred by petitioner was dismissed vide judgment and order dated 11<sup>th</sup> August 2023 passed by District

Judge and thereby the order passed by Civil Court refusing injunction was confirmed. While dismissing the Appeal, the appellate Court has observed that, the case in hand lacks clear element of fraud, misrepresentation or deliberate suppression of material facts which makes plaintiff entitled for special equity. It cannot be held that, the plaintiff has strong *prima facie* case for grant of special equity. It is not safe to conclude that the plaintiff could prove a *prima facie* case in his favour for the grant of equitable relief. The plaintiff could not prove *prima facie* case in his favour for grant of equitable relief and that balance of convenience is in favour of plaintiff. It is not the case for injunction can be granted by the Court. The plea of fraud is without any substance. No particulars of the alleged fraud have been given. The fraud has to be to the knowledge of the Bank giving Bank guarantee and mere bald allegation of fraud was not sufficient to grant an injunction. The trial Court while passing order dated 9<sup>th</sup> August 2018 has taken into account all the material pleadings and documents relied upon by the parties. The impugned order was passed appreciating all the material on record in right perspective, keeping in view the relevant ingredients and passed reasoned order

which does not call for any interference.

16. It is settled law that for granting temporary injunction, the party claiming injunction has to establish that it has strong *prima facie* case, the balance of convenience is in favour of the said party and in the event, injunction is not granted, the party would suffer an irreparable loss. The Court is not required to examine merits of the case rather only the basic facts on which it is established that the applicant has *prima facie* case to contest. The Court has to examine the balance of convenience i.e. the comparative loss cause to the applicant and respondent.

17. The suit was filed by petitioner/plaintiff for temporary injunction restraining defendant No.1 from acting in furtherance of letter dated 19<sup>th</sup> January 2017 made to defendant No.2 for the encashment of the Bank guarantee or taking any other measures or steps or to encash the Bank guarantee and to restrain the defendant No.1 by order of temporary injunction from receiving any amount from defendant No.2 by encashing Bank guarantee dated 31<sup>st</sup> August 2016 for Rs.38,66,320/-.

18. Vide letter dated 27<sup>th</sup> December 2013, the tender of the petitioner in respect of construction of “National Institute of Water

Sports Campus" was accepted by respondent No.1. The agreement dated 11<sup>th</sup> February 2014 was executed between the parties. Bank guarantee dated 31<sup>st</sup> August 2016 was executed in connection to the agreement dated 11<sup>th</sup> February 2014. The work was to be completed within 24 month which would reckon from the tenth day after the issuance of work order. The work order was issued on 22<sup>nd</sup> January 2014. Period of contract was from 2<sup>nd</sup> February 2014 to 2<sup>nd</sup> February 2016. The release of amount was stage wise. The construction of "National Institute of Water Sport Campus" was not completed. Show cause notice dated 24<sup>th</sup> June 2018, 26<sup>th</sup> April 2018 and 25<sup>th</sup> November 2016 were issued. The tenor of the said notices indicate that, the respondent No.1 had sought explanation from the plaintiff for not completing the work as per the agreement. The petitioner had forwarded the reply to the notices.

19. The contention of the petitioner is that, the Bank guarantee dated 31<sup>st</sup> August 2016 is not in terms of agreement dated 11<sup>th</sup> February 2014. The contract was not extended and that the Bank guarantee was obtained fraudulently and hence, it is not enforceable.

20. It is not in dispute that, the Bank guarantee was executed by parties. There is no material on record to establish that the Bank guarantee was objected by the petitioner for not having being executed according to the terms of agreement dated 11<sup>th</sup> February 2014. The petitioner/plaintiff received an amount of Rs.38,66,320/- towards the contract from respondent No.1 before the execution of the Bank guarantee. The petitioner contends that, balance amount for carrying out further work as per terms of contract was not released by respondent No.1 and hence, work could not be completed. The petitioner/plaintiff has relied upon several documents which has referred to by the trial Court in its order dated 9<sup>th</sup> August 2018. The trial Court after analyzing the said document had observed that, the none of the documents prima facie revealed that, the efforts were put up by the plaintiff for the execution of terms of contract in order to complete the work as per contract. The trial Court has also observed that the work in terms of contract is not completed by the plaintiff. It is claimed by the plaintiff that the contract stands terminated and therefore, the Bank guarantee cannot be executed but the question which arises for consideration is if the contract is terminated, why the Bank

guarantee was executed by the plaintiff, the plaintiff had not shown that the execution of the Bank guarantee was resisted by the plaintiff.

21. The contention of defendant No.1/respondent No.1 that the petitioner/plaintiff is seeking relief on the basis of pleadings in paragraph No.15 of the plaint. The plaintiff had not proved that Bank guarantee was obtained fraudulently.

22. The construction activity as undertaken under the contract dated 11<sup>th</sup> February 2014 is not completed. The respondent No.1 is Infrastructure Development Corporation of State of Goa and his undertaking contracts of such nature. The trial Court has rightly observed that, no serious inconvenience is caused to the plaintiff than that which would be caused to defendant if an injunction is granted and that the plaintiff had not established that serious damage would be caused if injunction is not granted.

23. The contention of respondent No.1 is that Bank guarantee dated 31<sup>st</sup> August 2016 was unconditional and en-cashable on demand made by respondent No.1. The contract of the plaintiff was terminated vide termination order dated 24<sup>th</sup> December 2016 and that the said termination is not questioned by the plaintiff. On

account of breach of contract by plaintiff, the respondent No.1 was compelled to terminate the contract. According to defendant/Respondent No.1, the plaintiff is due and liable to pay various amount to defendant No.1 which is referred to in the termination order dated 24<sup>th</sup> December 2016 and the amount covered by Bank guarantee dated 31<sup>st</sup> August 2016 are required to meet recoveries due or likely to be due for the plaintiff. The respondent No.1 made demand on defendant No.2 on 19<sup>th</sup> January 2017 for encashment of Bank guarantee dated 31<sup>st</sup> August 2016. There was delay by defendant No.2 to release the amount covered by the Bank guarantee.

24. The defendant No.1 had denied that, the project was stalled due to reason attributable to defendant No.1 and the plaintiff is responsible for the work in standstill. Opportunity was given to the plaintiff by calling meetings dated 21<sup>st</sup> July 2016 and 19<sup>th</sup> August 2016 thereby opportunity was given to the plaintiff to explain the slow progress of the work. There was no outstanding payment to claim to the plaintiff. The plaintiff was required to deposit amount equal by 5% of the contract price as performance guarantee in terms of clause 5.4.1. the performance guarantee was required to

be kept valid up to stipulated date of completion plus sixty days beyond that and in case of completion of work get enlarged the plaintiff was under obligation to get the validity of the performance guarantee extended to cover such enlarged time for completion of work. The time was extended vide letter dated 8<sup>th</sup> February 2016 to 31<sup>st</sup> May 2016 and thereafter, till 31<sup>st</sup> December 2016 vide letter dated 19<sup>th</sup> July 2016. The plaintiff was liable under obligation to keep the performance guarantee of Rs.1,36,54,220/- till 31<sup>st</sup> December 2016 and thereafter for a period of 60 days. The plaintiff has not renewed the performance guarantee after 27<sup>th</sup> February 2016. To ensure progress of work, the defendant No.1 and released amount of Rs.38,66,320/- on 29<sup>th</sup> August 2016 subject to plaintiff furnishing performance guarantee to that effect. The plaintiff did not renew performance guarantee on the ground of financial constrained and therefore, plaintiff had agreed and undertaken to submit performance Bank guarantee in respect of the amount that the defendant No.1 would fill appropriate relief to the plaintiff in terms of contract. In August 2016, the defendant No.1 found that, the amount of Rs.38,66,320/- could be released to the plaintiff. No conditions were imposed nor there was

intimidation by defendant No.1. The defendant No.1 is the Government Company and to secure the funds released to the plaintiff, the performance Bank guarantee was furnished which was voluntary and without force that the defendant No.1 had denied the contention of the plaintiff reflected in paragraphs 15, 16 and 17 of the plaint. According to defendant No.1, the plaintiff was bound and under an obligation to furnish performance guarantee of Rs.1,36,54,220/- and the said arrangement cannot be outside the stipulation of the contract and more particularly when the plaintiff has taken benefit and advantage of the situation. The defendant No.1 had denied that, the amount of Rs.38,66,320/- was released against total outstanding of Rs.90 lakhs. The amount was released on 30<sup>th</sup> August 2016 and the performance Bank guarantee dated 31<sup>st</sup> August 2016 was submitted to defendant No.1 by plaintiff on 7<sup>th</sup> September 2016 and therefore, the plaintiff cannot claim that, there was compelled to do so. The plaintiff has received an amount of Rs.38,66,320/- in August 2016 without protest.

25. The trial Court considered the application for injunction, the reply of defendants, pleading of both the parties, documents relied upon by parties and extensively heard both the sides and passed

impugned order.

26. There is nothing on record to infer that the guarantee though not stipulated in the contract as claimed by plaintiff is obtained by committing fraud. The pleadings in the plaint indicate that, the Bank guarantee was obtained in compelling circumstance thereby the defendant No.1 was in dominant position threatened the plaintiff by terminating the contract on the ground of abandonment of work and appropriation of retention of money. When this guarantee was executed, the work was not completed. The Bank guarantee was executed with understanding that the respondent No.1 would release the payment and the plaintiff would complete the project within time limit. There is no evidence of coercion or fraud upon the plaintiff.

27. The Bank guarantee was furnished by the petitioner/plaintiff in favour of respondent No.1/defendant No.1 for consideration of defendant No.1 accepting the terms and conditions of proposed agreement between them as the security are guarantee from plaintiff for compliance of his obligation in accordance with terms and condition in the agreement. Clause (ii) of the Bank guarantee stipulates that, the respondent No.2 was bound to pay the amount

due and payable under the said guarantee. It was an unconditional Bank guarantee. There is no element of fraud, misrepresentation or intimidation by defendant No.1. In termination notice, the defendant No.1 had stated that, it reserves its right to claim the amount of Rs.3,02,03,760/- or any other amount due to them. The Appellate Court has observed that, the plaintiff has failed to establish that, the balance of convenience and irreparable loss to grant of equity in his favour.

28. In the light of material on record and the impugned judgment passed by the trial Court and the Appellate Court, I do not find any reason to deviate from the view adopted by the Courts below.

29. In the case of **Union of India Vs. Raman Iron Foundry** (*supra*) the Court was considering the interpretation of one of the clause of contract. The clause related to 'Recovery of Sum Due'. In the facts of the case it was observed that the heading "Recovery of Sums Due" cannot control the interpretation of a clause if its meaning is otherwise plain and unambiguous, but it can be referred to as indicating the general drift of the clause and affording a key to a better understanding of the meaning. The language of clause indicate that it is with recovery of sums

presently due and payable by contractor to purchaser. It does not lay down substantive rights and obligations of parties. It is intended to provide mode of recovery of claim. It does not create a lien on other sums due to the contractor or give a right to purchaser to retain such sums until claim against the contractor is satisfied.

30. In the case of **Gangotri Enterprises Ltd. Vs. Union of India and Ors.** (supra) it was held that, the Bank guarantee in an unrelated contract between the some parties issued as performance guarantee in that contract, cannot be encashed based on clause therein. A claim for damages for breach of contract is not a claim for a sum presently due and payable and the purchaser is not entitled in exercise of right upon it to recover the amount of such claim by appropriating other sums due to the contractor.

31. In the case of **ABG Shipyard Ltd. Vs. Shipping Corporation of India Ltd. and Anr.** (supra), it was held that injunction can be granted in respect to encashment of Bank guarantee if there is fraud or irretrievable harm and injury likely to be caused to the applicant, and where special equities can be said to arise. Mere financial hardship is not irretrievable harm or injury. Injunction not

to be granted in absence to the harm and injury to the applicant.

32. In the case of **ITD Cementation India Ltd. Vs. Reliance Infrastructure Ltd. and Ors.** (*supra*), this Court had observed that defendant No.1 was not entitled to invoke the Bank guarantee on the ground that the defendant No.1 has not made certain payments on the due dates and not performed their obligations under the principal agreement and that in view thereof, the special equities are in their favour.

33. In the case of **Karam Chand Thapar and Bros (Coal Sales) Ltd. Vs. Hindustan Construction Company Ltd.** (*supra*) it is observed that, the law in relation to the grant of injunction against invocation of Bank Guarantee is thus well settled. There are only 2 exceptions, namely, fraud and irretrievable damage. The fraud has to be to the knowledge of the concerned Bank. Even if the Bank Guarantee is invoked and the amounts are recovered by the Respondent, the Petitioner can always establish in the arbitration proceedings between the parties that the invocation was wrongful and in such a case, the Petitioner will be entitled to get an award for refund of the amount together with interest.

34. In the case of **Kamal Virdichandji Garg Vs. Fiat India Pvt. Ltd. and Anr.** (supra) Court did not grant injunction from encashing Bank guarantee on the ground of fraud or special equity in the light of facts of the case.

35. In the case of **Banerjee and Banerjee Vs. Hindusthan Steel Works Construction Ltd and Ors.** (supra), the Calcutta High Court had observed that, the Court has to find out from the facts of each case: (i) Whether demands for enforcing the Bank guarantees has been made strictly in accordance with the terms of the document concerned; or (ii) whether there is any allegation of fraud against the beneficiary of which the Bank has notice; or (iii) whether there is any special equity arising out of the particular situation of the case giving rise to a strong *prima facie* arguable case against enforcement of the Bank guarantee or not. Whether the enforcement of the Bank guarantee should be allowed or not will depend on the facts and circumstances of each case and the finding of the court on the said point.

36. In the case of **Hindustan Construction Co. Ltd. Vs. State of Bihar and Ors.** (supra), the Hon'ble Supreme Court has dealt with the issue when can court grant injunction against invocation of

Bank guarantee. It was held that the grant of injunction would depend upon terms of the Bank guarantee. The Bank guarantee is in unequivocal and unconditional terms undertakes to pay the amount without any demur or objection and irrespective of any dispute, Court would refrain from issuing the injunction. If the Bank guarantee is conditional, the beneficiary cannot have unfettered right to invoke the guarantee and Court can issue injunction against invocation of the guarantee in view of the facts of the case. Having regard to the terms of the Bank guarantee against mobilization advance, it was held that the guarantee was not unequivocal or unconditional and hence, trial Court was justified in granting the injunction.

37. In the case of **Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Co.** (supra) it was held that, injunction restraining encashment of Bank guarantee can be granted in exceptional cases of fraud and retrievable harm or injury.

38. In the case of **State of Maharashtra Vs. National construction company, Bombay and Anr.** (supra), it was observed that, the Bank must honor the guarantee and court would not interfere in the absence of allegation of fraud. Ordinarily,

unless there is an allegation of fraud or the like, the Courts will not interfere, directly or indirectly, to withhold payment, otherwise trust in commerce, internal and international, would be irreparably damaged. The legal position is that a Bank guarantee is ordinarily a contract quite distinct and independent of the underlying contract, the performance of which it seeks to secure.

39. In the case of **Ansal Engineering Projects Ltd. Vs. Tehri Hydro Development Corporation Ltd. and Anr.** (supra), it is observed that, 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 prime 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, It is 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 prime 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.

40. In the case of **Andhra Pradesh Pollution Control Board Vs. CCL Products (India) Ltd.** (supra), it was held that, Bank guarantee is an independent contract and in the absence of fraud irretrievable injustice and special equities, the encashment cannot be restrained.

41. In the light of law laid down in several decisions, the material on record, I do not find any reason to distrub the findings of the Courts below. The Courts have taken into consideration relevant aspects of the matter while refusing the injunction to the petitioner. The petitioner has not made out the case for grant of injunction. Hence, petition is required to be dismissed.

**ORDER**

(i) Writ Petition No. 636 of 2023 is dismissed and stands disposed off.

**[PRAKASH D. NAIK, J.]**

42. At this stage, the learned Advocate for petitioner requested for extention of interim relief for a period of eight weeks. The prayer is opposed for learned Advocate for Respondents.

43. Considering the request of learned Advocate for the Petitioner, interim relief granted earlier is extended for a period of eight weeks.

**[PRAKASH D. NAIK, J.]**