HIGH COURT OF DELHI

Date of Decision: 01 February, 2024

Bench: Acting Chief Justice Manmohan And Justice Mini Pushkarna

FAO(OS) (COMM) 296/2022, CM APPL. 45945-45946/2022 & CM APPL. 55791/2022

OFB TECH PRIVATE LIMITED …APPELLANT

VERSUS

M/S KKSPUN INDIA LTD AND ORS. …RESPONDENTS

Legislation:

Order XXXIX Rules 1, 2, and 4 of the Code of Civil Procedure, 1908

Subject: Appeal against the judgment of a Single Judge in a commercial suit involving the invocation and encashment of bank guarantees.

Headnotes:

Contractual Dispute – Bank Guarantees – Challenging of Single Judge's Judgment on Bank Guarantees – Appellant challenges the judgment of the learned Single Judge regarding the stay of invocation of advance and performance bank guarantees. Dispute involves supply contracts and bank guarantees provided by respondent no.1 to the appellant. Single Judge restrained invocation/encashment of bank guarantees, which was contested by the appellant. [Para 1, 2]

Invocation of Bank Guarantees – Criteria and Jurisprudence – Indian law recognizes only two grounds for restraining encashment of bank guarantees: fraud and special equities in the form of preventing irretrievable injustice. Unconscionability, as argued by respondent, not a recognized ground in Indian jurisprudence for staying bank guarantees. [Para 10, 11]

Bank Guarantee – Autonomous Nature and Non-interference by Courts – A bank guarantee is an independent contract and is to be honored irrespective of disputes in the underlying contract between the parties. Courts should not

interfere with the autonomy of bank guarantees except in cases of fraud or irretrievable injustice. [Para 13, 14, 17]

Respondent's Performance and Breach – Examination of Contractual Obligations – Respondent no.1's failure to fulfill contractual obligations highlighted. Against a contract value of approximately Rs. 310 crores, only goods worth Rs. 81 crores supplied, showing a clear breach by the respondent. [Para 13, 26]

Bank Guarantees – Interpretation and Obligations – Bank guarantees, both advance and performance, found to be unconditional, unqualified, and unequivocal. The assertion of loss by the appellant is conclusive upon the bank under these guarantees. The contention of respondent no.1 regarding absence of loss to the appellant rejected. [Para 19, 22, 23]

Judgment – Overruling of Single Judge's Findings and Allowing Appeal – Findings of the learned Single Judge in the impugned judgment not sustainable. If invocation of bank guarantees by the appellant is in terms of the said bank guarantees, banks are bound to honor them. Appeal allowed, clarifying that judgment does not express an opinion on the merits of the underlying dispute. [Para 26, 27]

Referred Cases:

- General Electric Technical Services Company Inc. Versus Punj Sons (P) Ltd. and Another, (1991) 4 SCC 230
- U.P. Cooperative Federation Ltd Versus Singh Consultants and Engineers (P) Ltd., (1988) 1 SCC 174
- U.P. State Sugar Corporation Versus Sumac International Ltd., (1997) 1 SCC 568
- Dwarikesh Sugar Industries Ltd. Versus Prem Heavy Engineering Works (P) Ltd. And Another, (1997) 6 SCC 450
- Skyline Air Conditioning Engineers Private Limited Versus Public Works Department, 2023 SCC OnLine Del 1135

Representing Advocates:

For Appellant: Mr. Tanmaya Mehta and Mr. Sanyam Khetarpal

For Respondents: Mr. Jatin Mongia, Mr. Ankit Rajgarhia, Mr. Tarun Mehta, Mr. Rohit Kumar, and Mr. Lalit Maheshwari

J U D G M E N T MINI PUSHKARNA, J:

1. The present appeal has been filed challenging the Judgment dated 19th September, 2022 passed by the learned Single Judge in *CS (COMM) No. 323/2022.* By the impugned Judgment, the learned Single Judge has allowed *I.A. No. 7704/2022* filed under Order XXXIX Rule 1 and 2 of Code of Civil Procedure, 1908 ("CPC") by respondent no.1/plaintiff and has dismissed *I.A. No. 9797/2022* filed under Order XXXIX Rule 4 CPC by the appellant/defendant no.1, thereby making absolute the interim injunction granted by him vide order dated 13th May, 2022. The instant appeal has been preferred by the appellant being aggrieved by the impugned Judgment of the learned Single Judge whereby the invocation of the advance bank guarantees and performance bank guarantees have been stayed.

2. Facts in brief are as under:

2.1 The appellant/defendant no.1 placed six purchase orders upon the respondent no.1/plaintiff from 14th October, 2020 to 13th December, 2021 for manufacture and supply of MH Covers and Frame, Manholes, IC Chambers, RCC Pipes, HSC Chambers, Precast Boxes, Culvert Boxes, etc. for a total amount of Rs. 248,26,68,539/-. The said work orders were to be completed within 12 months.

2.2 The appellant provided to the respondent no.1 mobilization advance, in lieu whereof, the respondent no.1 furnished to the appellant advance bank guarantees and performance bank guarantees. In total 24 bank guarantees were furnished by the respondent no.1 to the appellant in the aggregate sum of Rs. 41,21,57,263/-.

2.3 It is the case of the appellant that the respondent no.1 was unable to complete the contracts in the first year and had a shortfall in excess of Rs. 170 Crores of supplies. Thus, appellant renegotiated the initial contract for 12 months for an addendum for increase in the supplies and at the same time for renewal of the bank guarantees. Accordingly, the purchase orders were amended on 18th December, 2021. The revised amount of the purchase orders was to the tune of Rs. 310 Crores.

2.4 The respondent no.1 supplied goods/materials to the appellant from 03rd November, 2020 to 28th January, 2022. As per the appellant, a number of supplied goods/materials were defective. Therefore, the appellant issued

debit notes of approximately Rs. 3 Crores to the respondent no.1. It is the case of the appellant that the respondent no.1 has not supplied any product to the appellant since January, 2021. The respondent no.1 has supplied materials/goods to the appellant worth only of Rs. 81,86,32,711/- as against approximately Rs. 310 Crores worth of purchase orders. Therefore, it is the case of the appellant that the respondent no.1 has supplied only 25-30% of the entire ordered materials/goods. It is further the case of the appellant that the respondent no.1 has supplied Rs. 81 Crores worth of materials/goods against a total payment of approximately Rs. 94 Crores by the appellant. Therefore, the respondent no.1 has an excess of approximately Rs. 13 Crores currently lying with it.

2.5 The appellant invoked the bank guarantees on 09th May, 2022, vide separate notices of invocations. Thus, the respondent no.1 filed suit bearing *CS (COMM) No. 323/2022* inter-alia seeking an injunction to restrain the invocation and encashment of 24 bank guarantees submitted by respondent no.1 to the appellant for a total sum of Rs. 41,21,57,263/- against the six purchase orders.

2.6 By an *ex parte ad interim* order dated 13th May, 2022, in *I.A. No. 7704/2022* under Order XXXIX Rule 1 and 2 CPC filed by respondent no.1/plaintiff herein, the learned Single Judge restrained the respondent banks viz. respondent nos. 2, 3, 4 and 6 from releasing any amounts against the bank guarantees furnished by the respondent no.1. Since bank guarantee of Rs. 18.27 Crores out of total bank guarantees for Rs. 41,21,57,263/- were encashed by the appellant before passing of the order dated 13th May, 2022 passed by the learned Single Judge, therefore, restraint order issued by the learned Single Judge vide order dated 13th May, 2022 pertained to the bank guarantees for balance amount of Rs. 22,92,57,263/-.

2.7 Thus, appellant herein filed an application before the learned Single Judge being *I.A. No. 9797/2022* under Order XXXIX Rule 4 CPC seeking vacation of the *ex parte ad interim* order dated 13th May, 2022.

2.8 The learned Single Judge decided both the applications viz. *I.A. No. 7704/2022* filed by respondent no.1/plaintiff herein under Order XXXIX Rule 1 and 2 CPC seeking stay of the operation and effect of demand letters dated 09th May, 2022 issued by appellant to the banks for invocation of bank guarantees as well as *I.A. No. 9797/2022* filed by appellant herein under Order XXXIX Rule 4 CPC seeking vacation of the *ex parte ad interim* order dated 13th May, 2022, by the impugned Judgment dated 19th September, 2022. The learned Single Judge allowed the application bearing *I.A. No.*

7704/2022 filed by respondent no.1 herein and dismissed *I.A. No. 9797/2022* filed by appellant herein, thereby confirming the order dated 13th May, 2022 restraining the respondent banks viz. respondent nos. 2, 3, 4 and 6 from releasing any amount against the bank guarantees furnished by respondent no.1 herein to the appellant. Thus, the present appeal has been filed.

3. On behalf of the appellant, the following submissions have been made:

3.1 The appellant in terms of the advance bank guarantees, had the power to invoke the same for future anticipated losses as well. Due to non supply of material by the respondent no.1 despite expiry of the delivery period, the appellant has been suffering huge losses for the third party contracts, which were to be performed on the basis of the supply by the appellant.

3.2 The grounds which find mention in the suit of the respondent no.1 and upon which the interim injunction was awarded was „irretrievable injury" or „fraud", whereas the learned Single Judge has injuncted the invocation of the advance bank guarantees on the ground of „special equities", which was not a pleaded ground. Further, no special equities existed in favour of respondent no.1.

3.3 Any reference to a dispute between the parties relating to the performance of the contracts is irrelevant to the invocation of a bank guarantee. However, the learned Single Judge has ventured into the merits of the dispute to restrain invocation of the bank guarantees.

3.4 Despite holding that the invocation of the performance bank guarantees was consistent with the language of the contract, the learned Single Judge conducted a fishing and roving inquiry into the merits of the underlying dispute, which was impermissible under the law.

3.5 The respondent no.1 has admittedly supplied Rs. 81 Crores worth of materials/goods against a total payment of approximately Rs. 94 Crores (including the mobilization advance and payment for supply of goods and market place payments to suppliers). Therefore, the respondent no.1 has an excess of approximately Rs. 13 Crores currently lying with it. The claim of the respondent to be an unpaid seller is, therefore, factually wrong.

3.6 The contracted time for supply even as per respondent"s best case ended in December, 2022. Against a contract value of Rs. 320 crores, the respondent had only supplied goods worth Rs. 81 crores. Breach by respondent is therefore *ex facie* apparent.

3.7 Since the learned Single Judge found a deficiency in the invocation qua advance bank guarantees, the appellant by way of abundant caution has already issued a fresh invocation letter dated 06th October, 2022. Existence

of loss has been specifically stated in the invocation letter dated 06th October, 2022.

3.8 The advance bank guarantees are not only towards mobilization advance, but also for existing and future losses.

4. On behalf of respondent no.1 the following submissions have been made:

4.1 Encashment of bank guarantee can be restrained on four grounds, viz. fraud, special equities, irretrievable injustice and unconscionability. Special equities is a distinct ground and is not the same as irretrievable harm. Unconscionability is a distinct and separate ground from fraud and includes unfair and reprehensible conduct, as detailed in the judgment dated 9th May, 2012, *Civil Appeal No. 143/2011* passed by Court of Appeal, Singapore in the case of ***BS Mount Sophia Pte Ltd. Versus Join-Aim Pte Ltd***.

4.2 In the present admitted facts, wherein respondent no. 1 had already supplied goods worth Rs. 81.86 Crores and appellant had paid only Rs. 54.31 Crores, there is no question/possibility of any loss or damage being caused to appellant at all.

4.3 Advance guarantee was only for mobilization, which stands adjusted.

4.4 Invocation is unfair and unconscionable and gives double benefit to appellant. Since the appellant had already admittedly adjusted the mobilization advance given to respondent no.1 against the goods supplied, permitting the invocation of the advance bank guarantees would amount to a double benefit, which cannot be countenanced by law. On these admitted facts, the court found special equities had arisen in favour of respondent no.1 and against the appellant.

4.5 The acts of appellant by first adjusting the complete amount of mobilization advance against the goods supplied, and thereafter trying to encash the advance bank guarantees provided against the advance receipt, amounts to egregious fraud and gives rise to special equities. The appellant‟s contention that special equities were not pleaded by respondent no.1 in the suit is to no avail.

4.6 Clause 2.6 and 2.7 of the purchase orders make it clear that the advance bank guarantees were provided to secure the mobilization advance to be given by the appellants to respondent no.1, as distinct from the performance bank guarantees which were to secure performance by respondent no.1. The appellant cannot now seek to alter the very nature and purpose of the advance bank guarantees to suit its mala fide interests.

4.7 The invocation of the performance guarantees by the appellant is bad in law, as no case has been made out by the appellant about there being any non-performance on the part of respondent no.1.

4.8 Appellant has itself in the pleadings admitted the fact that the respondent no.1 has till date supplied goods/materials worth Rs. 81,86,32,711/- to the appellant under the purchase orders. However, the appellant has admittedly made payment of only Rs. 54.31 Crores. The appellant has not produced any document/proof to show any payments beyond Rs. 54.31 Crores identified by respondent no.1 in its ledger filed with the suit.

4.9 Addendums dated 18th December, 2021 were issued in relation to three purchase orders wherein the scope of work was increased, thereby meaning that the time to complete the scope of work under the said purchase orders was mutually extended by necessary implication. The appellant was satisfied with the materials/goods being supplied by the respondent no.1, in view of which, the addendums were issued.

4.10 The alleged defective goods supplied by respondent no.1 to appellant, have in turn been supplied by the appellant to its customers without any complaints as to quality. The fact that appellant has not on a single occasion ever complained about the quality of material being supplied by the respondent no.1 speaks for itself.

4.11 In the present admitted facts where the appellant has not made complete payment towards the goods/materials supplied and instead sought to adjust the complete amount of the mobilization advance, the respondent no.1 could not have supplied any further goods/materials until complete payment was made by the appellant for the goods/materials already supplied. By continually not making the payments for the goods supplied, the appellant clearly materially breached the contract and repudiated the same.

5. We have heard learned counsel for the parties and have perused the record.

6. The facts on record show that the respondent no.1 had furnished advance bank guarantees and performance bank guarantees, totaling 24 in number aggregating to Rs. 41,21,57,263/- to the appellant under six purchase orders. The impugned Judgment passed by the learned Single Judge injuncts the invocation/encashment of advance bank guarantees and performance bank guarantees aggregating to Rs. 22,92,57,263/- furnished by respondent no.1 to the appellant. It is to be noted that bank guarantees of the amount of Rs. 18,27,00,000/- had already been encashed by the appellant before passing of the impugned Judgment.

7. The advance bank guarantees have been injuncted on the grounds that the invocation was not in terms of the contract and that permitting the appellant to invoke the advance bank guarantees in its entirety would imply permitting it to obtain adjustment of mobilization advance against value of goods and to also claim encashment of security against mobilization advance, which amounts to claiming „double benefit‟ in the same transaction. Further, the impugned Judgment also observed that „special equities‟ also existed in favour of respondent no.1.

8. As regards performance bank guarantee, the learned Single Judge has held that though the invocation was in terms of the contract, there was no material which was brought forth by the appellant to show that the respondent no.1 had failed to fulfill its commitments under the purchase orders.

9. In order to assess as to whether the aforesaid findings by the learned Single Judge are justified in law, it would be relevant to note the law relating to bank guarantees.

10. At the outset, it is to be noted that the submission made by respondents that invocation of bank guarantee can be restrained on four grounds, cannot be accepted. Unconscionability and unfairness, pleaded by the respondents as grounds for restraining encashment of bank guarantee, on the basis of judgment of Court of Appeal, Singapore, is not part of Indian Jurisprudence on stay of bank guarantees. In India, only two grounds have been recognized for restraining encashment of bank guarantees, viz. fraud and special equities in the form of preventing irretrievable injustice between the parties (See: ***General Electric Technical Services Company Inc. Versus Punj Sons (P) Ltd. and Another, (1991) 4 SCC 230***- Paras 9 & 10).

11. It is a settled principle of law that a bank guarantee is an independent contract in itself and the disputes concerning the main agreement between the appellant and the respondent no.1 does not affect the invocation of the bank guarantee. Thus, holding that bank guarantee is to be honored according to the terms of the guarantee and should not be concerned with the underlying contract between the parties, Supreme Court in the case of ***U.P. Cooperative Federation Ltd Versus Singh Consultants and Engineers (P) Ltd., (1988) 1 SCC 174*** has held as follows:

> *"**24.** I may notice that in India, the trend of law is on the same line. In the case of Texmaco Ltd. v. State Bank of India [AIR 1979 Cal 44] one of us (Sabyasachi Mukharji, J.) held that **in the absence of special equities arising from a particular situation which might entitle the party on whose behalf guarantee is given to an injunction restraining the bank in performance of bank guarantee and in the absence of any clear fraud, the bank must***

***pay to the party in whose favour guarantee is given on demand**, if so stipulated, and whether the terms are such have to be found out from the performance guarantee as such. There the court held that where though the guarantee was given for the performance by the party on whose behalf guarantee was given, in an orderly manner its contractual obligation, **the obligation was undertaken by the bank to repay the amount on "first demand" and "without contestation, demur or protest and without reference to such party and without questioning the legal relationship subsisting between the party in whose favour guarantee was given and the party on whose behalf guarantee was given", and the guarantee also stipulated that the bank should forthwith pay the amount due "notwithstanding any dispute between the parties", it must be deemed that the moment a demand was made without protest and contestation, the bank had obliged itself to pay irrespective of any dispute as to whether there had been performance in an orderly manner of the contractual obligation by the party**. Consequently, in such a case, the party on whose behalf guarantee was given was not entitled to an injunction restraining the bank in performance of its guarantee. It appears that special equities mentioned therein may be a situation where the injunction was sought for to prevent injustice which was irretrievable in the words of Lord Justice Danckwerts [Vide Corrigendum No. F.3/Ed BJ/43 dated 8-988] in Elian and Rabbath v. Matsas and Matsas [[1966] 2 Lloyd's Rep. 495 (CA)].*

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28. *I am, however, of the opinion that these observations must be strictly considered in the light of the principle enunciated. It is not the decision that there should be a prima facie case. **In order to restrain the operation either of irrevocable letter of credit or of confirmed letter of credit or of bank guarantee, there should be serious dispute and there should be good prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Otherwise the very purpose of bank guarantees would be negatived and the fabric of trading operation will get jeopardised**.*

29. *In Tarapore & Co. V. M/s V/O Tractors Export [(1969) 1 SCC 233 : AIR 1970 SC 891 : (1969) 2 SCR 920] this Court observed that irrevocable letter of credit had a definite implication. It was independent of and unqualified by the contract of sale or other underlying transactions. It was a mechanism of great importance in international trade and any interference with that mechanism was bound to have serious repercussions on the international trade of this country. The court reiterated that the autonomy of an irrevocable letter of credit was entitled to protection and except in very exceptional circumstances courts should not interfere with that autonomy.*

30. *These observations a fortiori apply to a bank guarantee because upon bank guarantee revolves many of the internal trade and transactions in a country. In United Commercial Bank v. Bank of India [(1981) 2 SCC 766 : AIR 1981 SC 1426 : (1981) 3 SCR 300]*

this Court was dealing with injunction restraining the bank in respect of letter of credit. This Court observed that the High Court was wrong in granting the temporary injunction restraining the appellant bank from recalling the amount paid to the respondent bank. The Court reiterated that courts usually refrain from granting injunction to restrain the performance of the contractual obligations arising out of a letter of credit, or a bank guarantee between one bank and another. If such temporary injunction were to be granted in a transaction between a banker and a banker, restraining a bank from recalling the amount due when payment was made under reserve to another bank or in terms of the letter of guarantee or credit executed by it, the whole banking system in the country would fail.

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***34.** On the basis of these principles I reiterate that commitments of banks must be honoured free from interference by the courts. Otherwise, trust in commerce internal and international would be irreparably damaged. It is only in exceptional cases that is to say in case of fraud or in case of irretrievable injustice be done, the court should interfere.*

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*53. Whether it is a traditional letter of credit or a new device like performance bond or performance guarantee, the obligation of banks appears to be the same. If the documentary credits are irrevocable and independent, the banks must pay when demand is made. Since the bank pledges its own credit involving its reputation, it has no defence except in the case of fraud. The bank's obligations of course should not be extended to protect the unscrupulous seller, that is, the seller who is responsible for the fraud. But, the banker must be sure of his ground before declining to pay. **The nature of the fraud that the courts talk about is fraud of an "egregious nature as to vitiate the entire underlying transaction"**. It is fraud of the beneficiary, not the fraud of somebody else. If the bank detects with a minimal investigation the fraudulent action of the seller, the payment could be refused. The bank cannot be compelled to honour the credit in such cases. But it may be very difficult for the bank to take a decision on the alleged fraudulent action. In such cases, it would be proper for the bank to ask the buyer to approach the court for an injunction.*

54. The court, however, should not lightly interfere with the operation of irrevocable documentary credit. I agree with my learned brother that in order to restrain the operation of the irrevocable letter of credit, performance bond or guarantee, there should be serious dispute to be tried and there should be a good prima facie acts of fraud. As Sir John Donaldson, M.R. said in Bolivinter Oil SA v. Chase Manhattan Bank [(1984) 1 All ER 351, 352] :

"The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly

be fraudulent. But the evidence must be clear, both as to the fact of fraud and as to the bank's knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it discharged.""
(Emphasis Supplied)

12. Similarly in the case of ***U.P. State Sugar Corporation Versus Sumac International Ltd., (1997) 1 SCC 568***, Supreme Court has held in categorical terms that a beneficiary of a bank guarantee is entitled to realize such a bank guarantee in terms thereof, irrespective of any pending disputes.

Thus, it has been held as follows:

*"**12.** The law relating to invocation of such bank guarantees is by now well settled. **When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated.** The courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. **The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned.** Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country. The two grounds are not necessarily connected, though both may coexist in some cases. In the case of U.P. Coop. Federation Ltd. v. Singh Consultants and Engineers (P) Ltd. [(1988) 1 SCC 174] which was the case of a works contract where the performance guarantee given under the contract was sought to be invoked, this Court, after referring extensively to English and Indian cases on the subject, said that the guarantee must be honoured in accordance with its terms. **The bank which gives the guarantee is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contractual obligation or not, nor with the question whether the supplier is in default or not. The bank must pay according to the tenor of its guarantee on demand without proof or condition**. There are only two exceptions to this rule. The first exception is a case when there is a clear fraud of which the bank has notice. The fraud must be of an egregious nature such as to vitiate the entire underlying*

transaction. Explaining the kind of fraud that may absolve a bank from honouring its guarantee, this Court in the above case quoted with approval the observations of Sir John Donaldson, M.R. in Bolivinter Oil SA v. Chase Manhattan Bank [(1984) 1 All ER 351] (All ER at p. 352): (at SCC p. 197)

"The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear both as to the fact of fraud and as to the bank's knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it charged." This Court set aside an injunction granted by the High Court to restrain the realisation of the bank guarantee."

(Emphasis Supplied) 13. Considering the aforesaid parameters of law, it is clear that in the present case no *prima facie* case has been established by the respondent no.1 with respect to any fraud or irretrievable injustice being committed upon it or any special equities in its favour. The facts on record manifest that out of total value of purchase orders of approximately Rs. 310 crores, respondent no.1 has supplied goods/materials worth only Rs. 81,86,32,711/- to the appellant. This Court notes that the time for performance of the contract has already expired. Therefore, there is no basis whatsoever for injuncting the invocation of the bank guarantees.

14. It is settled law that the concept of special equity and irretrievable injustice as a ground for restraining encashment of bank guarantee, implies a situation where payments, if made under a guarantee, would not be capable of being recovered. Thus, in the case of ***Dwarikesh Sugar Industries Ltd. Versus Prem Heavy Engineering Works (P) Ltd. And Another, (1997) 6 SCC 450***, Supreme Court has held as follows:

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

15. Similarly, on the aspect of fraud as a ground for stay of encashment of bank guarantee, a Co-ordinate Bench of this Court in the case of ***Skyline Air Conditioning Engineers Private Limited Versus Public Works Department***, ***2023 SCC OnLine Del 1135***, in which one of us (Manmohan, J) was a member, has held as follows:

*"**7.** Consequently, the nature of fraud on the basis of which an encashment of bank guarantee can be stayed is fraud of an egregious nature. It should be a fraud which the bank can detect with minimal investigation. Such is not the case in the present proceedings."*

16. In the present case the respondent no.1 has not been able to set up any case of fraud or irretrievable injustice or special equity in its favour. Moreover, special equities, though argued orally, were not even pleaded by the respondent no.1 in its plaint. Besides, law is very clear in this regard that a bank guarantee being an independent contract, any dispute between the parties cannot affect the invocation of the bank guarantee.

17. Delving on the aspect that bank must honour the bank guarantees and that the bank is not concerned with the disputes between the parties, Supreme Court in the case of ***General Electric Technical Services Company Inc. (Supra)***, has held as follows:

*"**9.** The question is whether the court was justified in restraining the Bank from paying to GETSCO under the bank guarantee at the instance of respondent 1. The law as to the contractual obligations under the bank guarantee has been well settled in a catena of cases. Almost all such cases have been considered in a recent judgment of this Court in U.P. Cooperative Federation Ltd. v. Singh Consultants and Engineers (P) Ltd. [(1988) 1 SCC 174] wherein Sabyasachi Mukharji, J., as he then was, observed (SCC p. 189, para 28) that "[I]n order to restrain the operation either of irrevocable letter of credit or of confirmed letter of credit or of bank guarantee, there should be serious dispute and there should be good prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Otherwise, the very purpose of bank guarantees would be negatived and the fabric of trading operations will get jeopardised". **It was further observed that the Bank must honour the bank guarantee free from interference by the courts. Otherwise, trust in commerce internal and international would be irreparably damaged.** It is only in exceptional cases that is to say in case of fraud or in case of irretrievable injustice, the court should interfere. In the concurring opinion one of us (K. Jagannatha Shetty, J.) has observed that whether it is a traditional bond or performance guarantee, the obligation of the Bank appears to be the same. If the documentary credits are irrevocable and independent, the Bank must pay when demand is made. Since the Bank pledges its own credit involving its reputation, it has no defence except in the case of fraud. The Bank's obligations of course should not be extended to protect the unscrupulous party, that is, the party who is responsible for the fraud. But the banker must be sure of his ground before declining to pay. The nature of the fraud that the courts talk about is fraud of an "egregious nature as to vitiate the entire underlying transaction". It is fraud of the beneficiary, not the fraud of somebody else.*

10. *The High Court has observed that failure on the part of GETSCO to make a reference to mobilisation advance in the letter seeking encashment of the bank guarantee would 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 was further observed that disclosure of such facts would have put the bank to further inquiry as to what was the amount covered by those bills 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 event, the High Court said, that GETSCO could not demand full amount of the bank guarantee on April 17, 1989. It seems to us that the High Court has misconstrued the terms of the bank guarantee and the nature of the inter-se rights of the parties under the contract. The mobilisation advance is required to be recovered by GETSCO from the running bills submitted by the respondent. If the full mobilisation advance has not been recovered, it would be to the advantage of the respondent.* ***Secondly, the Bank is not concerned with the outstanding amount payable by GETSCO under the running bills. The right to recover the amount under the running bills has no relevance to the liability of the Bank under the guarantee. The liability of the Bank remained intact irrespective of the recovery of mobilisation advance or the non-payment under the running bills.*** *The failure on the part of GETSCO to specify the remaining mobilisation advance in the letter for encashment of bank guarantee is of little consequence to the liability of the Bank under the guarantee. The demand by GETSCO is under the bank guarantee and as per the terms thereof. The Bank has to pay and the Bank was willing to pay as per the undertaking.* ***The Bank cannot be interdicted by the court at the instance of respondent 1 in the absence of fraud or special equities in the form of preventing irretrievable injustice between the parties.*** *The High Court in the absence of prima facie case on such matters has committed an error in restraining the Bank from honouring its commitment under the bank guarantee."*

(Emphasis Supplied)

18. At this stage it would be fruitful to refer to the bank guarantee for advance payment between the parties. One such advance bank guarantee reads as under:

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To,
OFB Tech Private Limited
Shop No. G-22 C (UGF) D-1(K-84)
Green Park Main, South Delhi,
New Delhi -110016
(hereinafter referred to as "Beneficiary")

Dear Sir

xxx xxx xxx

We, IndusInd Bank Limited (the Bank), do hereby undertake to pay the amounts due and payable under this guarantee without any demur merely on a demand *from OFB Tech Private Limited stating that* ***the amount claimed is due by way of loss or damage caused to or would be caused to or suffered by OFB Tech Private Limited by reason of any breach by the said contractor of any of the terms and conditions contained in the said Purchase order or any other connected agreement executed between the parties or by reasons of the contractor's failure to perform the said contract. Any such demand made on the Bank shall be conclusive as regards the amount due and payable by the Bank under this guarantee*** *and shall be restricted to an amount not exceeding* ***Rs. 1,00,00,000/- (Rupees One Crore Only)****.*

We hereby irrevocably agree and undertake to forthwith, on your first written demand*, credit the full amount(s) demanded from us however not exceeding* ***Rs. 1,00,00,000/- (Rupees One Crore Only)***
*(the "****Demand Amount****") to your* ***Account Number: 002105023612****,* ***Bank Name : ICICI Bank Ltd., Branch Address: SCO 18 & 19, HUDA Shopping Centre, Market Complex, Sector-14, Gurugram, Haryana-122001, Bank IFSC Code: ICIC0000021, Account Name : OFB Tech Private Limited*** *or any other account as specified in your demand Letter.* ***Such payment will be made by us to you, irrevocably and unconditionally, without any contestation, protest or delay on our part and without any demur, set off, counter-claims, deductions*** *or withholding charges or taxes of any kind now or hereafter imposed, levied, collected, withheld or addressed by any governmental and/or any other authority whatsoever. However not exceeding the Guaranteed Amount.*

xxx xxx xxx"

(Emphasis Supplied)

19. Perusal of the aforesaid advance bank guarantee clearly shows that the same is unconditional, unqualified and unequivocal. Further, the terms of the advance bank guarantee are clear that it is not only towards mobilization advance, but for existing and future losses. Therefore, the finding of the learned Single Judge that since the appellant has already adjusted the mobilization advance given to respondent no.1 against the goods supplied, permitting the invocation of advance bank guarantees would amount to a double benefit, cannot be sustained.

20. Reference may also be made to the terms of the performance bank guarantee furnished by respondent no.1 to the appellant, one of which reads as under:

"xxx xxx xxx

To,
OFB TECH PRIVATE LIMITED,

SHOP NO. G-22 C (UGF) D-1 (K-84), GREEN PARK MAIN NEW DELHI SOUTH, DELHI - 110016.
(HEREINAFTER REFERRED TO AS "BENEFICIARY")

xxx xxx xxx

We, the Yes Bank, do hereby guarantee the amount recoverable by the Beneficiary in accordance with the said work order and other connected agreement(s) executed between the parties and/or any interest thereon, if applicable. In case Customer fails to fulfill its commitments in accordance with the said work order and other connected agreements, we the said bank, hereby unconditionally and irrevocably undertake to pay to the Beneficiary on demand and without demur *to the extent of* ***INR 60,63,902.00 (Indian Rupees Sixty Lakh Sixty Three Thousand Nine Hundred Two Only)*** *hereinafter referred to as "****Guaranteed Amount****").*

We hereby irrevocably agree and undertake to immediately, on your first written demand, credit the full amount(s) demanded from us *(the "****Demand Amount****") to your* ***Account Number: 002105023612****,* ***Bank Name : ICICI Bank Ltd., Branch Address: SCO 18 & 19, HUDA Shopping Centre, Market Complex, Sector-14, Gurugram, Haryana-122001, Bank IFSC Code: ICIC0000021, Account Name: OFB Tech Private Limited*** *or any other account as specified in your demand Letter.* ***Such payment will be made by us to you, irrevocably and unconditionally, without any contestation, protest or delay on our part and without any demur, set off, counter-claims****, deductions or withholding charges or taxes of any kind now or hereafter imposed, levied, collected, withheld or addressed by any governmental and/or any other authority whatsoever. In the event of any tax/other deductions being mandatory under law, the amounts being paid by us shall be grossed up/increased by us to ensure that you receive an amount equivalent to the Demand Amount, net of any such deductions. However, our liability under this Bank Guarantee shall be restricted to the Guaranteed Amount.*

xxx xxx xxx"

(Emphasis Supplied)

21. Reading of the performance bank guarantee also demonstrates that the same is unconditional, unqualified and unequivocal.

22. Perusal of the bank guarantees, as aforesaid, manifests that there is a conclusive evidence clause in the bank guarantees in so far as the assertion of loss is concerned. Thus, bank is liable to pay, as any assertion of loss suffered by the appellant, would be conclusive upon the bank. Therefore, the contention made by respondent no.1 that there is no question/possibility of

any loss or damage being caused to appellant, is totally misplaced and liable to be rejected.

23. Thus, in the case of ***Skyline Air Conditioning Engineers Private Limited (Supra),*** Division Bench of this Court has held as follows:

"xxx xxx xxx

> *12. From the aforesaid, it is apparent that the bank guarantee in question is unconditional, unqualified and unequivocal because* ***it incorporates a conclusive evidence clause inasmuch as the bank is liable to pay, without any demur, merely on a demand from the Government stating that the amount claimed is due by way of loss or damage caused by the contractor i.e. appellant and such a demand „shall be" conclusive on the bank****.*
>
> *13. This Court is of the view that the manifest object of conclusive evidence clauses is to provide a ready means of establishing the existence and amount of the guaranteed debt and avoiding an enquiry upon legal evidence into the debits going to make up the indebtedness.*

xxx xxx xxx"
(Emphasis Supplied)

24. When the advance bank guarantees as well as the performance bank guarantees furnished by respondent no.1 to the appellant are categorical to the effect that the banks in question have unconditionally, irrevocably, without any protest and without any demur have undertaken to make payment to the beneficiary upon demand being raised in that regard, such bank guarantees are bound to be honoured by the bank. The circumstances under which the bank guarantee can be restrained from being encashed have been discussed in the preceding paragraphs. However, there is nothing on record to show that the present case falls within the specified grounds in order to justify stay of the encashment of the bank guarantees. The judgments relied upon by the respondent no.1 do not assist its case, since in the present case there is nothing on record to establish any *prima facie* case of fraud or irretrievable injury or special equities in its favour.

25. Since the learned Single Judge had found deficiency in invocation qua the advance bank guarantee, the appellant has already issued a fresh invocation letter dated 06th October, 2022.

26. In view of the aforesaid detailed discussion, this Court is unable to sustain the findings of the learned Single Judge in the impugned Judgment. Accordingly, it is held that if the invocation of bank guarantees by the appellant

is in terms of the said bank guarantees, the banks are bound to honour the same since the said bank guarantees are unconditional and unequivocal.

27. Consequently, the present appeal is allowed in the aforesaid terms. However, it is clarified that nothing contained in this Judgment shall be construed as an expression on the merits of the dispute between the parties.